



Third, to the extent Respondent is complaining that Complaint Counsel did not disclose oral communications with Mr. Hamilton or Walgreens' counsel, there is no discovery mechanism that would require such production. Respondent never served a discovery request seeking this information, and if they had, such a request would be improper. Complaint Counsel's communications with potential third party witnesses are protected by the work-product doctrine. *Hickman v. Taylor* 329 U.S. 495 (1947).

Hickman is controlling here. In that case, the U.S. Supreme Court rejected a party's efforts to obtain factual information from opposing counsel's interviews with potential witnesses. *Hickman*, 329 U.S. at 498-99. The information was protected work product, and that protection could not be overcome by the party's need for discovery; indeed, the party's counsel could simply go out and seek the same factual information from the witnesses himself. *Id.* at 511-13. The same is true here. Respondent's counsel was free to seek additional discovery from Walgreens after they obtained Mr. Hamilton's declarations disclosing the use of the Google Adwords Keyword Planner. They could have asked Walgreens for Mr. Hamilton's printed results after they learned of them at Mr. Hamilton's deposition in January. But they did none of those things. Respondent's counsel appears to place remarkable importance on the information in this document, *see* Resp's Trial Br. at 4, yet they have never even bothered to try to get it.²

² On this score, we respectfully note the Court's March 30, 2017, ruling denying our motion in limine to exclude the testimony of one of Respondent's fact witnesses, Dr. Neil Wieloch. There, the Court reasoned:

Complaint Counsel does not persuasively explain why, in the two months since the deposition, Complaint Counsel did not seek an extension or reopening of discovery to request a further search and production.

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CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2017, I filed the foregoing documents electronically using the FTC's E-Filing System, which will send notification of such filing to:

CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

May 1, 2017

By: /s/ Daniel J. Matheson
Attorney