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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 662.

standard) *Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1328-29 (8th Cir. 1986) (attorneys' 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) (attorneys' personal recollections pertaining to witness interviews "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 03-6 (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 written communications with third-party declarants and did not object when Respondent 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. 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. 2007) (“[w]ork-product waiver is not a blanket waiver of all work product”).

1294, 1302 (Fed. Cir. 2007) (“[w]ork-product waiver is not a blanket waiver of all work product”).

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 should have had no basis to object to questioning of third-party declarants about their own recollections⁴ 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 their 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 in 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 IX-3-RX15.

⁴ Respondent's argument would undermine the purposes of discovery and encourage 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").

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- x Richard Prince testified that, while Ms. Brannon-Quale did the physical act of writing Mr. Prince's statement into the declaration based on their conference, she described 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.
- x 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.
- x 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 deponents' credibility—and they found nothing.

Respondent also argues it learned in some of the declarations and depositions that some sought to revise statements in their executed declarations. Motion at 8. In one example, in preparation for her deposition, a witness 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 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 "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); *Peek 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[.]"

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

<p>In the Matter of</p> <p>HOMEADVISOR, INC., a corporation, d/b/a ANGI LEADS, d/b/a HOMEADVISOR POWERED BY ANGI.</p>	<p>DOCKET NO. 9407</p>
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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 ~~pf815 8Siif1 (om)ee-pf815 -5 (TI)6i3p2-1 hroii (i)- 8f61 (2 (d t)Be)1 (c)4 (a)4~~

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UNITED STATES OF AMERICA
Federal Trade Commission
Seattle, Washington 98174

Sophie Calderón
Attorney
Northwest Region
(206) 220-4486

April 25, 2022

VIA EMAIL

HomeAdvisor, Inc.
c/o Quinn Emanuel Urquhart & Sullivan, LLP
Attn: William A. Burck

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

Sincerely,

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

Sophie Calderón

Cc:

Colin D. A. MacDonald (by email)
Breena 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:

April Tabor
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Federal Trade Commission
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The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

I further certify that on August 9, 2022, I caused the foregoing document to be served via email to:

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Counsel for Respondent HomeAdvisor, Inc.

Dated: August 9, 2022

By: s/ Sophia H. Calderón
Sophia H. Calderón

Counsel Supporting the Complaint