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FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INTRODUCTION AND SUMMARY

plenty of work for the *respondent* to do to achieve compliance, but they leave nothing more for the *court* to do, unless the respondent fails to comply. It is of no import that the district court might be called upon to rule on disputes arising from Boehringer's efforts to comply. As in any other subpoena enforcement case, even if the district court may need to rule on additional issues in the future, "[t]he district court's retention of jurisdiction for possible further relief after the documents [are] produced does not defeat finality." *FTC v. Texaco, Inc.*, 555 F.2d at 873 n.21.

There is also no merit to Boehringer's co0ityTc-.s421Tnng fn adn erroneous

BACKGROUND

The Commission issued the subpoena *duces tecum* at issue here on February 5, 2009, as part of an investigation into whether Boehringer conspired with another firm to restrain competition, in violation of Section 5 of the FTC Act, 15 U.S.C. § 45.[2] In response to the subpoena, Boehringer conducted an unduly limited search for documents; failed to meet the subpoena's deadline for producing documents; and refused to produce (or severely redacted) numerous responsive documents that it claimed were protected under the work product and attorney-client privileges. The Commission filed its petition for enforcement of the subpoena – initiating this case – on October 23, 2009.

After extended efforts by the parties to narrow the scope of the issues in dispute, ultimately only "two issues remain[ed] [to be decided by the district court]: (1) whether the documents claimed by [Boehringer] to be protected under a privilege are, in fact, privileged; and (2) whether the scope and adequacy of [Boehringer's] search is sufficient." *Privilege Op.* at 4. *See also Search Op.* at 1

[2] The investigation concerns Boehringer's agreement to settle patent litigation against Barr Laboratories, Inc. ("Barr"), and the two companies' simultaneous entry into a purportedly separate joint marketing agreement. Under the litigation settlement, Boehringer dropped its claims that Barr's generic equivalents to two of Boehringer's brand-name drugs had infringed its patents; and Barr agreed to delay introducing its generics for several more years. The Commission is investigating, among other things, whether Boehringer's payments to Barr under the joint marketing agreement were actually unlawful inducements to postpone competition.

(characterizing inadequacy of document search as “the remaining issue” in the case after having “resolved the privilege issue” in its September 27 opinion).

The district court conclusively disposed of both issues. In its Privilege Opinion and accompanying order issued on September 27, 2012, it sustained most of Boehringer’s privilege claims. And in its Search Opinion and accompanying final order issued on October 16, 2012, the court found that Boehringer’s search for electronically stored documents had been inadequate. The district court ordered Boehringer to prs searccot.Opinionfinal order is962 -BoehAnd in men.3002(]TJ08 Tc-.0

unnecessary back-and-forth" going forward, and warned that any spurious motions practice could result in sanctions. *Privilege Op.* at 17.

To date, neither party has had any need to raise any disputes with the district court for further adjudication.[3] The district court directed Boehringer and the FTC to "meet and confer to determine the appropriate method of searching the relevant backup tapes to render the process as efficient as possible." *Search Op.* at 6. They did so, and, on December 4, 2012, reached agreement on the specific scope of Boehringer's supplemental search. *See* Mo. to Dismiss at 5; *id.*, Exh. E.

ARGUMENT

I. THE FINALITY OF THE DISTRICT COURT'S DECISIONS FOR APPEAL IS NOT AFFECTED BY THE MERE POSSIBILITY THAT THE DISTRICT COURT COULD BE ASKED TO ADDRESS ANCILLARY DISPUTES IN THE FUTURE.

The district court's October 16, 2012, *Search Opinion* and *Order* constituted the district court's "final decision," triggering this Court's appellate jurisdiction under 28 U.S.C. § 1291. That decision, together with the September 27 *Privilege Opinion* and *Order*, constituted the court's complete response to the Commission's request for relief – denying the subpoena enforcement petition in part and granting it in part – and conclusively resolved all disputed issues in the case.

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"Since the late nineteenth century, the Supreme Court has repeatedly found reviewable appeals from orders upholding [or rejecting] administrative subpoenas," Kemp v. Gay, 947 F.2d 1493, 1496 (D.C. Cir. 1991) (citing cases), and it is now "settled that an order of a district court granting or denying an agency's petition for enforcement of a subpoena is final and appealable." FTC v. Texaco, Inc., 555 F.2d at 873 n.21. Indeed, almost 120 years ago, the Supreme Court concluded that, when a defendant fails "to produce the books, papers, documents, etc. called for" pursuant to an agency's lawful process," a court's decision "that the defendants are, in law, obliged to do what they have refused to do" is "a final and indisputable basis of action as between the commission and the defendants." ICC v. Brimson, 154 U.S. 447, 487-88 (1894); see also Ellis v. ICC, 237 U.S. 434, 442 (1915) (Holmes, J.). Once the court has directed a party to comply with an administrative subpoena – i.e., "ordered a recusant witness to testify before the Commission" – the court's work is done, and "there remains nothing for it to do." Cobbledick v. United States, 309 U.S. 323, 330 (1940).

Here, the district court resolved the scope of Boehringer's obligations under the subpoena and ordered it to comply to the extent it had not already done so. "It is well established that a decree is final, for the purposes of an appeal," where, as here, it disposes of all disputed issues in "litigation between the parties on the merits of the case, and leaves nothing to be done" except – in the event the

respondent's compliance falls short in the future – "to enforce… what has been determined" by the court. *United States v. Philip Morris USA, Inc.*, 686 F.3d 839, 846 (D.C. Cir. 2012) (quoting *St. Louis, Iron Mtn. & Southern Ry. Co. v. Southern Express Co.*, 108 U.S. 24, 28-29 (1883)); *see also Catlin v. United States*, 324 U.S. 229, 233 (1945).

Boehringer argues that the district court's companion orders adjudicating the Commission's claims are not final because "there remain proceedings or issues for the district court to resolve." Mo. to Dismiss at 8. But the mere possibility of a future proceeding to address an ancillary, post-judgment dispute does not mean that the district court's companion subpoena enforcement rulings do not constitute a "final" decree. "The considerations we employ to evaluate finality… do not require that the order appealed be the last order possible in the matter." *United States v. Legal Services for New York City*, 249 F.3d 1077, 1081 (D.C. Cir. 2001). Thus, for example, in *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), the Supreme Court held that a district court's antitrust divestiture order was final and reviewable, even though the district court would certainly need to issue "[f]urther rulings… in administering its decree," since the "details of the divestiture which the District Court will approve cannot affect the outcome of the basic litigation in this case." *Id.*

The speculative prospect that some ancillary dispute "could well arise," Mo. to Dismiss at 10, and Boehringer's pessimistic prediction that "further potential disputes are looming," *id.* at 11, have no bearing on the finality of orders that conclusively adjudicated the Commission's petition and resolved all *existing* disputes. Future disputes "may not even occur and, if they do, will provide their own opportunity for review."[4] *Office of Thrift Supervision v. Dobbs*, 931 F.3d 956, 958 (D.C. Cir. 1991). For this reason, this Court has made clear that, in the administrative subpoena enforcement contex

not alter the existing decision governing how privilege disputes are to be resolved. The district court already has made clear that any future privilege disputes emerging from the ongoing document search "will be subject to the same principles and holdings laid out in [the *Privilege Opinion*] in this case," and that the court would interpret privilege issues in the same manner "as I have interpreted them in that opinion." *Search Op.* at 6. These are precisely the principles, holdings, and interpretations that the Commission seeks to challenge in this appeal. Any future district court proceeding involving Boehringer's claimed "looming" disputes over whether particular documents are privileged "will not alter the [*Privilege Opinion*] or moot or revise decisions embodied in the order." *Budinich*, 486 U.S. at 199.

The posture of the instant case is strikingly similar to *United States v. Legal Services for New York City*, in which this Court found that a district court order rejecting a blanket claim of attorney-client privilege was final and appealable, even though "the district court [had] indicated its willingness to entertain particularized claims of privilege" going forward. 249 F.3d at 1081. This Court reasoned that those individualized decisions would be governed by the same "view on the scope of the privilege" as the order that the appellant sought to challenge. *Id.* As in that case, the district court's *Privilege Opinion* here established principles that govern how any future "particularized" privilege disputes would be resolved. Thus,

despite the theoretical possibility of a further ancillary proceeding, the district court's orders collectively constitute a final decision that is ripe for appellate review.

Boehringer has not adduced any support for its contrary argument. It cites several appellate cases that held district court orders to be non-final and non-appealable, supposedly because they left some privilege issues to be resolved in future proceedings. Mo. to Dismiss at 8-10. But each of these cases is inapposite.

For example, Boehringer relies heavily on Citizens for Responsibility and Ethics in Washington v. Dept. of Homeland Security,

court has ordered Boehringer to produce specific documents sought by the

be required to comply with the subpoena. *Id.* at 1180. By contrast, here the district court has ordered Boehringer to comply with the subpoena (in part). No question has been left open.[6]

There is thus no merit to Boehringer's challenge to the finality of the district court's orders, or to this Court's

the corresponding memorandum opinions containing the district court's factual findings and legal reasoning.

Second, for each of these one-page orders, "[t]he fact that the page is labeled 'Order' rather than 'Judgment' is not relevant." *United States v. Johnson*, 254 F.3d 279, 285 n.7 (D.C. Cir. 2001). "The label used by the District Court of course cannot control the order's appealability," and therefore the fact "that the District Court did not caption its order as a 'judgment' [or] a 'final judgment'" is insignificant for purposes of finality under 28 U.S.C. § 1291. *Sullivan v. Finkelstein*, 496 U.S. at 628 n.7. *See also Spann v. Colonial Village, Inc.*, 899 F.2d 24, 32 n.4 (D.C. Cir. 1990) (R.B. Ginsburg, J.) (a "document labeled 'Order' rather than 'Judgment' may satisfy Rule 58"); *Kidd v. District of Columbia*, 206 F.3d 35, 41 n.2 (D.C. Cir. 2000) (same).

Third, even if the district court had not issued its judgment in a separate document, the finality of a district court's decision for purposes of appeal under 28 U.S.C. § 1291 is determined by the substance of the decision, not by such technicalities as whether the district court issued a Rule 58 "separate document." The Supreme Court has made clear that a "separate document of judgment is not needed for an order of a district court to become appealable." *Shalala v. Schaefer*, 509 U.S. 292, 302 (1993). This is because the Rule 58 separate-judgment requirement was intended "to clarify when the time for appeal… begins to run,"

and "should be interpreted to prevent loss of the right of appeal, not to facilitate loss." *Bankers Trust Co. v. Mallis*, 435 U.S. at 385 (citation omitted). *Accord*, *Outlaw v. Airtech Air Conditioning and Heating, Inc.*, 412 F.3d 156, 162 (D.C. Cir. 2005) (Roberts, J.) (order in which "all pending claims against all parties was resolved… constitutes a judgment… from which an appeal lies," despite the absence of a Rule 58 "separate document"); *United States v. Johnson*, 254 F.3d at 287 & n.10 ("this court has jurisdiction to decide an appeal filed before entry of a [judgment] conforming" with Rule 58).[7]

Fourth, the relief Boehringer seeks is pointless. In effect, Boehringer asks that the Commission be compelled to go back to the district court and ask it to "file and enter the separate judgment, from which a timely appeal would then be taken." *Bankers Trust*, 435 U.S. at 385.[8] The relief Boehringer seeks would cause

[7] Boehringer misreads *United States v. Johnson* as ruling that the district court's decision was "not unambiguously… a final judgment" and therefore unappealable. Mo. to Dismiss at 14. To the contrary, the Court recognized that, notwithstanding "confusion as to whether a judgment [had] properly been entered" by the district court in conformance with Rule 58, "entry of a conforming order is not necessary for the district court's decision to become appealable." 254 F.3d at 286-87.

[8] Although Rule 58(d) provides that an appellant "*may* request that judgment be set out in a separate document," Fed. R. Civ. P. 58(d) (emphasis added), nothing in the Rule *requires* a party to do so. Boehringer's contrary suggestion, Mo. to Dismiss at 14, is baseless. Indeed, in one of the cases Boehringer cites – *American Int'l Specialty Lines Ins. Co. v. Electronic Data Sys. Corp.*, 347 F.3d 665 (7th Cir. 2003) (Posner, J.), the court confirmed that the district court's order was "final… and immediately appealable," even though the parties had specifically moved for issuance of a separate "Rule 58 judgment" and the district court had not acted on the motion. *Id.*

"[w]heels [to] spin for no practical purpose." *Id.* The Supreme Court has recognized that "nothing but delay would flow from requiring the court of appeals to dismiss the appeal" on the grounds urged here by Boehringer. *Id.* To dismiss an appeal "on the basis of such mere technicalities" would be "entirely contrary to the spirit of the Federal Rules of Civil Procedure," which are supposed to be "construed to secure the just, speedy, and inexpensive determination of every action." *Id.* at 386-87 (quoting *Foman v. Davis*, 371 U.S. 178, 181 (1962)). As the district court acknowledged, "the debate about these documents has gone on too long."[9] *Privilege Op.* at 17. Further delay might serve Boehringer's interests, but would not serve the interest of justice.

CONCLUSION

For the foregoing reasons, Boehringer's Motion to Dismiss should be denied.

[9] This subpoena enforcement action was pending in the district court for almost exactly three years from the filing of the petition to enforce (October 23, 2009) to the court's final order (October 16, 2012).

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