W

On August 11, 2008, the two companies settled their dispute on the following terms: Barr would refrain from marketing its generic versions of Aggrenox and Mirapex in the immediate future, but Boehringer would permit Barr to enter the market several months ahead of the expiration of Boehringer's patents. *Boehringer*, 286 F.R.D at 105; *see also* Aggrenox Settlement Agreement, J.A. 871-83; Press Release, J.A. 886-88. In the meantime, under a related co-promotion agreement,

challenged Boehringer's refusal to produce documents containing financial analyses of the Aggrenox co-promotion agreement, forecasting analyses of alternative time lines for generic entry into the market, and financial analyses of the business terms of the settlement agreement. *Id*. at 108. The FTC also challenged Boehringer's withholding of several other categories of documents not at issue in this appeal. *See id*. at 112 (discussing emails, notes, and reports on strategic decisions and other issues; emails containing legal advice or requests for legal advice; transmittal emails; and duplicate documents); Appellant's Br. 12-16 (limiting challenge on appeal to financial documents analyzing litigation settlement

The District Court next considered whether the materials sought were fact work product, which may be discovered under certain circumstances, or opinion work product, which is subject to strict protection. *Id*. at 109-10. It found that although the materials resembled financial reports that might be prepared in the standard course of business, the specific reports were prepared using "information and frameworks" provided by Boehringer counsel and reflected, at minimum, counsel's opinions as to what data were important in determining an acceptable settlement. *Id*. at 109. On these grounds, the District Court concluded that the materials constituted opinion work product, deserving of the utmost protection. *Id*. at 110. The District Court further found that the FTC had not demonstrated the sort of "overriding and compelling" need required to pierce opinion work product protection. *Id*. at 109-10. Because the District Court found that the documents were wholly protected under the work product doctrine, it did not reach Boehringer's attorney-client privilege claims with respect to any of these financial documents. *See id.*

The FTC contends that the District Court erred in two ways. It first argues that the District Court failed to properly consider whether many of these materials – particularly, the financial analyses of the Aggrenox co-promotion agreement and materials produced after the settlement agreement was executed – actually were prepared "in anticipation of litigation." It next asserts that even if all of the contested documents are work product, then they are, at most, *fact* work product and therefore may be discovered by the FTC upon a showing of substantial need and undue hardship.

II.

We review a district court's decision to enforce an administrative subpoena for abuse of discretion. *See U.S. Int'l Trade Comm'n v. ASAT, Inc.*, 411 F.3d 245, 253 (D.C. Cir. 2005). A district court necessarily abuses its discretion if it applies the incorrect legal standard, a question that is reviewed *de novo*. *See Conservation Force v. Salazar*, 699 F.3d 538, 542 (D.C. Cir. 2012); *FTC v. Church & Dwight Co.*, 665 F.3d 1312, 1315 (D.C. Cir. 2011).

A district court's factual findings are reviewed for clear error.

as attorney notes from witness interviews, created by his

prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means," so long as counsel's "impressions, conclusions, opinions, or legal theories" are not disclosed. FED. R. CIV. P. 26(b)(3)(A)-(B); *see* FED. R. C

610 F.3d 129, 137 (D.C. Cir. 2010) (internal quotation marks omitted); *accord* 8 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 2024, at 502 (3d ed. 2010). Where a document would have been created "in substantially similar form" regardless of the litigation, work product protection is not available. *Deloitte*, 610 F.3d at 138 (quoting *United States v. Adlman*, 134 F.3d 1194, 1195 (2d Cir. 1998)).

The FTC does not challenge the District Cou(ic)4chall2(50239ge)4(t)-2(h)]TJ 09itec

parties must always be treated as an ordinary (non-litigation)

underlying litigation, or where there is evidence, not present here, of gamesmanship or abuse.[1]

2.

The FTC also raises a temporal objection to many of the withheld documents. It notes that the District Court characterized the documents as having been prepared "to assess settlement option[s]." *Boehringer*, 286 F.R.D. at 109. This finding is inconsistent with the dates on many documents (including

C.

As noted, Rule 26 distinguishes between *opinion* work product, which reveals "the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation," and *fact* work product, which does not. FED. R. CIV. P. 26(b)(3)(B); *see In re Sealed Case*, 124 F.3d 230, 235-36 (D.C. Cir. 1997), *rev'd on other grounds sub nom. Swidler & Berlin v. United States*, 524 U.S. 399 (1998). The District Court, after reviewing financial analysis documents submitted *in camera*, concluded that the documents contained information that, while primarily factual in nature, gave insight into the highly protected mental impressions of counsel. *Boehring(e)mf 1h0 Tc 0-2(he)4(doc)4(um)-125*

facts. *See Dir., Office of Thrift Supervision v. Vinson & Elkins, LLP*, 124 F.3d 1304, 1308 (D.C. Cir. 1997) ("At some point . . . a lawyer's factual selection reflects his focus; in deciding what to include and what to omit, the lawyer reveals his view of the case.

already well-known. *In re San Juan Dupont Plaza Hotel Fire Litig.*

the party claiming opinion work product protection to explain specifically how disclosure would reveal the attorney's legal impressions and thought processes. The District Court failed to demand such a showing from Boehringer and instead concluded categorically that the contested documents were highly protected opinion work product. This was error.

D.

1.

The District Court's error matters because, as noted, a party's ability to discover work product often turns on whether the withheld materials are fact work product or opinion work product. A party generally must make an "extraordinary showing of necessity" to obtain opinion work product. *In re Sealed Case*, 676 F.2d at 811; *see also Dir., Office of Thrift Supervision*, 124 F.3d at 1307 (observing that opinion work product is "virtually undiscoverable"). By contrast, "[t]o the extent that work product contains relevant, nonprivileged *facts*," the work product doctrine "merely shifts the standard presumption in favor of discovery and requires the party seeking discovery to show 'adequate reasons' why the work product should be subject to discovery." *In re Sealed Case*, 676 F.2d at 809 (emphasis added) (quoting *Hickman*, 329 U.S. at 512). This "adequate reasons" test corresponds to Rule 26(b)(3)'s requirement, adopted in 1970, that a party seeking fact work product demonstrate that "it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." FED. R. CIV. P. 26(b)(3)(A)(ii); *see In re Sealed Case*, 676 F.2d at 809 n.59.

The District Court, believing that the contested documents contained only opinion work product or facts

inextricably intertwined with legal opinions, confined its inquiry to whether the FTC had demonstrated an "overriding and compelling need" for those materials and concluded that it had not. *Boehringer*, 286 F.R.D. at 109-10. Because the FTC does not claim that it is entitled to opinion work product, we have no occasion to consider whether the District Court applied the correct standard for evaluating when opinion work product immunity may be pierced.

On the other hand, the FTC does contend that it is entitled to any facts that can be reasonably excised from counsel's legal opinions and mental processes. Because it is the duty of the District Court to consider whether the FTC had met the less demanding standard for fact work product, *see* FED. R. CIV. P. 26(b)(3)(A)(ii), the customary next step would be to remand the case to allow the District Court to make this determination in the first instance.

Each party contends, however, that we have what we need to decide whether the FTC has met the Rule 26(b)(3) standard in that party's favor, based on other findings made by the District Court. Boehringer points specifically to the District Court's observation that the documents contain "no smoking guns" and are "not in any way evidence of any conspiratorial intent to violate the law." Appellee's Br. 54 (quoting *Boehringer*, 286 F.R.D. at 110). This statement, Boehringer argues, is "fatal" to the FTC's claim of need. *Id.* Boehringer's theory seems to be that a party "needs" fact work product only if the materials are critical to, or dispositive of, a key issue at trial.

We find no merit in Boehringer's argument, for two reasons. First, although some courts have demanded a heightened showing of a document's relevance or probative value for discovery of fact work product, *see Logan v.*

U.S. at 511; *see* FED. R. CIV. P. 26(b)(1) (evidence is relevant if admissible or "appears reasonably calculated to lead to the discovery of admissible evidence"). Indeed, a mere relevance requirement is consonant with *Hickman*'s statement that "[m]utual knowledge of *all* the relevant facts gathered by both parties is essential to proper litigation." 329 U.S. at 507 (emphasis added).

Of course, this interest in liberal discovery must be balanced against the key goal underlying the protection for fact work product: that each side must undertake its own investigation of the relevant facts and not simply freeload on opposing counsel. *See Guilford*, 297 F.2d at 926 (work

right to determine the facts" and to decide whether a complaint should issue. *Id.*; *see also Linde Thomson*, 5 F.3d at 1512 ("An investigation conducted by the [FTC] may conceivably neither culminate in litigation, nor be initially designed to inspire it."). If the District Court is correct that the contested materials reveal an absence of conspiratorial intent, then the materials nevertheless may be helpful to the FTC in determining whether to issue a complaint in the first place.

4.

We turn to the FTC's argument that the District Court implicitly found that the FTC had met the "substantial need" and "undue hardship" requirements. When it decided not to require Boehringer to disclose facts contained in the financial analyses and forecasts, the District Court based this decision on its misplaced belief that the information could not be disclosed without revealing protected legal opinions and attorney thought processes. The District Court never suggested that the FTC had failed to make the requisite showing for factual work product.

To the contrary, the District Court stated that it was "sympathetic to the FTC's argument that these financial analyses are the only documents that could demonstrate whether or not [Boehringer] was using the co-promotion agreement to pay Barr not to compete." *Boehringer*, 286

hardship for materials relating to financial analyses and forecasts. And although Boehringer

IV.

For the foregoing reasons, we vacate in part, affirm in part, and remand for further proceedings consistent with this opinion.

So ordered.