No. 12-5393

In the United States Court of Appeals for the District of Columbia Circuit

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FEDERAL TRADE COMMISSION,
Appellant,

v.

BOEHRINGER INGELHEIM PHARMACEUTICALS, INC.,
Appellee.

RESPONSE OF FEDERAL TRADE COMMISSION
TO PETITION FOR REHEARING EN BANC

May

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Rules

Other Authorities

GLOSSARY

Boehringer	Boehringer Ingelheim Pharmaceuticals., Inc.
Dist. Ct. Op.	*FTC v. Boehringer Ingelheim Pharms., Inc.*, 286 F.R.D. 101 (D.D.C. 2012)
FTC	

INTRODUCTION

Boehringer petitions for rehearing *en banc* of an agency subpoena enforcement case involving an unexceptional application of the work product doctrine. The petition should be denied because the unanimous panel opinion correctly applied that doctrine to the facts of this case in compliance with all relevant precedent in this and other circuits; the matter presents no "question of exceptional importance." Fed. R. App. P. 35(a). Boehringer's contrary arguments distort the panel's holding and the underlying facts, and they warrant no further review. As the FTC's investigation enters its seventh year, the agency should finally have access to the documents at the heart of this antitrust inquiry—financial spreadsheets and similar materials that were prepared by non-lawyer businesspeople and that cast no light on any lawyer's legal judgments.

BACKGROUND

1. Boehringer manufactures the highly profitable, patented brand-name drug Aggrenox. One of its competitors, Barr Pharmaceuticals, took steps to introduce a O

contemporaneous financial analyses from the businesspeople" concerning the agreements at issue here: the Aggrenox settlement agreement or the Aggrenox co-promotion agreement. *See* FTC Opening Br. 49-53. Boehringer refused to produce all such financial analyses on grounds of attorney work product.

2. The FTC sued to compel production. Boehringer argued that, because its general counsel (Marla Persky) had requested the financial and business analyses for litigation settlement negotiations, producing them would reveal "the mental thought processes of [its] attorneys," and they thus constituted virtually undiscoverable "opinion work product" rather than fact work product. *See* Dist. Ct. Op., 286 F.R.D. at 108-09 .

The district court agreed that these financial and business documents constituted opinion work product because Persky had requested them from non-lawyer business staff and because, in some vague sense, they would reveal "frameworks" she had provided for preparing them. *Id.* at 108-09. The district court also concluded that the FTC had no "overriding and compelling need" for the documents. *Id.* at 109-10. It believed that they contained "no smoking guns" providing definitive "evidence of any conspiratorial intent to violate the law," *id.* at 110, even t( )93 Td (e)12(d 8]5v4g 8T0 4(o)8(r)]TJ 0 621[TJ -0004 T Tw 8.641 pAc)1

other attorneys, and "questions about whether the agreements made business sense were a matter of business judgment, not legal counsel." *Id.* at 16 (citing Persky's testimony). Thus, "the only mental impression that can be discerned" from the documents "is counsel's general interest in the financials of the deal." *Id*. at 15. That interest "reveals nothing at all" of attorney opinions or theories because "anyone … would expect a competent negotiator to request [such] financial analyses," *id*., particularly for a $100 million deal. The panel further ruled that the district court, having incorrectly treated all the materials at issue as opinion work product, had improperly scrutinized whether the FTC had an "overriding and compelling need" for them. *Id.* at 18. Instead, the panel found, the relevant standard is the less demanding standard applicable to fact work product: whether the requesting party has a "substantial need for the materials" and "cannot, without undue hardship, obtain their substantial equivalent by other means." *Id.* at 17-18 (citing Fed. R. Civ. P. 26(b)(3)(A)(ii)).

On that issue, the panel rejected Boehringer's contention that the FTC bore the burden of showing the materials were "essential to [a] claim," "probative of a critical element," or "critical to, or dispositive of, the issues to be litigated." *Id.* at 18-19, 22-23. Instead, the FTC was required to show that the materials are "relevant to the case," that they "have a unique value apart from those already in the [FTC's] possession," and that "special circumstances" preclude the FTC from

F.3d 230, 236-37 (D.C. Cir. 1997), *rev'd on other grounds*, *Swidler & Berlin v. United States*, 524 U.S. 399 (1998); *Dir., Office of Thrift Supervision v. Vinson & Elkins, LLP*, 124 F.3d 1304, 1308 (D.C. Cir. 1997); *In re San Juan Dupont Plaza Hotel Fire Litig.*, 859 F.2d 1007, 1015 (1st Cir. 1988). The key issue is whether the lawyer's selection of or request for a document "reveals [the lawyer's] view of the case" in "a meaningful way." Panel Op. 14 (citing *Vinson & Elkins*, 124 F.3d at 1308; *San Juan Dupont*, 859 F.2d at 1015). Here, the panel reviewed documents *in camera* and held that the district court had misapplied the standard for determining whether the documents were opinion or fact work product. The panel's determination was correct and warrants no further review.

Boehringer contends that the panel improperly "narrowed the scope" of opinion work product by holding that "documents containing facts are entitled to [opinion work product] protection only if an attorney has 'sharply focused or weeded' those facts." Pet. 1 (quoting *Sealed Case*, 124 F.3d at 236). This is incorrect. The panel's opinion did not alter the scope of the work product doctrine, but simply applied the existing precedent to the facts of this dispute.

Although the panel quoted the "sharply focused or weeded" language when summarizing *Sealed Case* (*see* Panel Op. 14),[1] its analysis did not turn on

[1] Boehringer insinuates that *Sealed Case*, 124 F.3d 320, is no longer good law on any point because the Supreme Court reversed a different part of the decision. Pet. 6, 8. But the relevant holding in *Sealed Case* was unaffected by that Supreme

United States v. Adlman, 134 F.3d 1194, 1199-1200 (2d Cir. 1998)—considered whether documents were work product of *any* kind, not whether they were fact or opinion work product in particular.

Moreover, the court in *Adlman* concluded that the document was work product because it contained "detailed legal analysis of likely IRS challenges," "discussion of statutory provisions, IRS regulations, legislative history, and prior judicial and IRS rulings," and "possible legal theories or strategies … recommended preferred methods of structuring the transaction, and … predictions about the likely outcome of litigation." *Id*. at 1195. That document bears no resemblance to the non-legal business information at issue here, as the panel's *in camera* review confirmed. *See* Panel Op. 15.

II. THE PANEL PROPERLY ARTICULATED AND APPLIED THE STANDARD FOR REQUIRING DISCLOSURE OF FACT WORK PRODUCT

Boehringer challenges both the panel's articulation of the substantial need standard and its interpretation of the district court's opinion, Pet. 10-15, which the panel read as having found that the FTC had met that standard. Panel Op. 25-26. Neither claim has merit.

The Federal Rules allow discovery of fact work product when the requesting party "shows that it has a substantial need for the materials … and cannot, without undue hardship, obtain their substantial equivalent by other means." Fed. R. Civ. P.

26(b)(3)(A)(ii). Boehringer argues the panel found that the "substantial need" test was met upon a showing of "mere relevance," an "overly lax" standard that, it alleges, conflicts with decisions of this Circuit and others. Pet. 2, 11-12.[2]

Boehringer grossly mischaracterizes the panel's opinion. The panel held that substantial need requires *three* separate showings: not only (1) that "the materials are relevant to the case," but also (2) that "the materials have a unique value apart from those already in the movant's possession" and (3) that "'special circumstances' excuse the movant's failure to obtain the requested materials itself." Panel Op. 21. Those

inaccurately, that the panel adopted a lenient new standard of discoverability in this context.

Moreover, even if the documents here provided no evidence of Boehringer's intent to violate the law, "the materials nevertheless may be helpful to the FTC in determining whether to issue a complaint in the first place." *Id*. As the panel held, that is an independent basis for compelling production of these documents because, unlike private litigants, governmental agencies are broadly charged with undertaking investigations to determine whether or not the law has been violated. *Id*. at 24-25 (citing *FTC v. Texaco, Inc.*, 555 F.2d 862, 874 (D.C. Cir. 1977) (*en banc*); *Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corp.*, 5 F.3d 1508, 1512 (D.C. Cir. 1993)).

Finally, the panel properly int

CONCLUSION

The petition for rehearing and rehearing *en banc* should be denied.

Respectfully submitted,

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