

ORAL ARGUMENT NOT YET SCHEDULED

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

NO. 12-5393

**FEDERAL TRADE COMMISSION,
Petitioner-Appellant,**

v.

**BOEHRINGER INGELHEIM PHARMACEUTICALS, INC.,
Respondent-Appellee.**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA (NO. 1:09-MC-00564-JMF)**

BRIEF OF APPELLANT FEDERAL TRADE COMMISSION

Jonathan E. Nuechterlein
General Counsel

David C. Shonka
Principal Deputy General Counsel

John F. Daly
Deputy General Counsel for Litigation

Leslie Rice Melman
Assistant General Counsel for Litigation

Daniel W. Butrymowicz
Rebecca Egeland
Michael Perry
Bureau of Competition
FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue NW
Washington, DC 20580

Mark S. Hegedus, Attorney
Office of the General Counsel
FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue NW
Washington, DC 20580
(202) 326-2115
mhegedus@ftc.gov

Originally

c

2.	The record indicates that few of the withheld documents actually contain the mental impressions of counsel.....	27
B.	The District Court Committed Legal Error by Failing to Require Boehringer to Redact Any Opinion Work Product.....	31
II.	THE DISTRICT COURT COMMITTED LEGAL ERROR BY FAILING TO EVALUATE WHETHER ANY OF THE WITHHELD DOCUMENTS WOULD HAVE BEEN CREATED IRRESPECTIVE OF THE LITIGATION.....	33.....
III.	THE FTC DEMONSTRATED A SUBSTANTIAL NEED FOR FACT WORK PRODUCT AND AN UNDUE BURDEN IN OTHERWISE OBTAINING IT.....	41....
A.	To the Extent That the District Court Applied a Heightened Standard for the Discovery of Ordinary Fact Work Product, This Was Legal Error.....	43
B.	The Information in the Withheld Documents is Highly Relevant to the FTC’s Investigation and Available Only from Boehringer.....	46
IV.	THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT ACCEPTED AND RELIED ON IN CAMERA EX PARTE AFFIDAVITS	53.....
	CONCLUSION.....	58.....

TABLE OF AUTHORITIES *

CASES	PAGE
Armstrong v. Executive Office of the President, 97 F.3d 575 (D.C. Cir. 1996).....	55
B.F.G. of Illinois, Inc. v. Ameritech Corp. 2001 U.S. DistLEXIS 18930(N.D. Ill. Nov. 8, 2001).....	56
Boehringer Ingelheim Int'l GMBH v. Barr Labs., Inc. 562 F.Supp.2d 619 (D. Del. 2008), rev'd, 592 F.3d 1340 (Fed. Cir. 2010)...	10
Broad. Music, Inc. v. CBS, Inc. 441 U.S. 1 (1979).....	50
Chi. Bd. of Trade v. U.S. 246 U.S. 231 (1918).....	50
*Dir., Office of Thrift Supervision v. Vinson & Elkins, LLP, 124 F.3d 1304 (D.C. Cir. 1997).....	24-25, 25, 26, 42, 46
In re Echostar Commcns. Corp. 448 F.3d 1294 (Fed. Cir. 2010).....	35
Ellsberg v. Mitchell, 709F.2d 51 (D.C. Cir. 1983).....	55, 56
FTC v. AbbVie Prods. LLC	

Halkin v. Helms, 598 F.2d 1 (D.C. Cir. 1978).....	54, 56
Hayden v. NSA 608 F.2d 1381 (D.C. Cir. 1979).....	56
Hickman v. Taylor 329 U.S. 49 (1947).....	24
In re John Doe Corp. 675 F.2d 482 (2d Cir. 1982).....	52, 53
Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust, Corp. 5 F.3d 1508 (D.C. Cir. 1993).....	44
*Lykins v. U.S. Dep't of Justice 725 F.2d 1455 (D.C. Cir. 1984).....	54, 55
Mead DataCent, Inc. v. U.S. Dep't of Air Force 566 F.2d 242 (D.C. Cir. 1977).....	57
Polk Bros., Inc. v. Forest City Enters. 776 F.2d 185 (7th Cir. 1985).....	50-51
Recycling Solutions, Inc. v. District of Columbia 175 F.R.D. 407 (D.D.C. 1997).....	35
In re San Juan Dupont Plaza Hotel Fire 859 F.2d 1007 (1st Cir. 1988).....	25
In re Sealed Case 146 F.3d 881 (D.C. Cir. 1998).....	23, 34
In re Sealed Case 129 F.3d 637 (D.C. Cir. 1997).....	27
*In re Sealed Case 124 F.3d 230 (D.C. Cir. 1997) rev'd on other grounds, Swidler & Berlin v. United States, 524 U.S. 399 (1998).....	26, 31
Senate of the Com. of Puerto Rico on Behalf of Judiciary Committee v. U.S. Dept. of Justice 823 F.2d 574 (D.C. Cir. 1987).....	24, 31, 33
Simon v. G.D. Searle & Co. 816 F.2d 397 (8th Cir. 1987).....	25
In re Six Grand Jury Witnesses, 979 F.2d 939 (2d Cir. 1992).....	29
Smith v. Life Investors Ins. Co. of Amer. No. 2:07cv-681, 2009 WL 245197 (W.D. Pa. July 9, 2009).....	27

In re Subpoena Served upon the Comptroller of the Currency 967 F.2d 630 (D.C. Cir. 1992).....	22, 31
*U.S. v. Adlman, 134 F.3d 1194 (2d Cir. 1998).....	33, 34, 40

FEDERAL STATUTES

Federal Trade Commission Act

15 U.S.C. § 45.....	5.....
15 U.S.C. § 6	24
15 U.S.C. § 49.....	3, 24, 44
Hatch-Waxman Act, Pub. L. No. 108-173.....	8.....
21 U.S.C. §355(j)(2)(A)(vii)(IV)	8.....
28 U.S.C. § 1291.....	3.....
28 U.S.C. § 1331.....	3.....
28 U.S.C. § 1337.....	3.....
28 U.S.C. § 1345.....	3.....
35 U.S.C. § 271(e)(2).....	8.....

RULES

Fed. R. App. P. 4(a)(1)(B)(ii).....	3.....
Fed. R. Civ. P. 26(b)(3).....	24, 25
Fed. R. Civ. P. 26(b)(3)(A)(ii).....	26, 42
Fed. R. Civ. P. 26(b)(3)(B).....	25
Fed. R. Civ. P. 81(a)(5).....	45

REGULATIONS

16 C.F.R. § 2.7(a)(4).....	CE9.....
----------------------------	----------

GLOSSARY

Barr.....	Barr Pharmaceuticals, Inc. (including its wholly owned subsidiary, Duramed Pharmaceuticals) Inc.
BIPI	Boehringer Ingelheim Pharmaceuticals, Inc.
Boehringer.....	Boehringer Ingelheim Pharmaceuticals, Inc.
Commission.....	Federal Trade Commission
Dkt.	Docket entry in district court case below FTC v. Boehringer Ingelheim Pharmaceuticals, Inc. Case 1:09-mc-00564JMF (D.D.C.)
FDA.....	Food & Drug Administration
FOIA.....	Freedom of Information Act, 5 U.S.C. § 552 (2006), amended by Open Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524
FTC	Federal Trade Commission
FTC Act.....	Federal Trade Commission Act, 15 U.S.C. §§45-58

INTRODUCTION

The Supreme Court recently held that “reverse

manufacturer, and it claims the two agreements were independent. The first was a settlement of patent litigation between the two companies, in which the generic manufacturer agreed to delay competitive generic entry for a period of time. The second was a “copromotion agreement,” in which Boehringer agreed to pay the generic manufacturer to promote Boehringer’s own branded drugs. FTC’s investigation focuses on whether these two agreements are indeed independent. Are the very large sums Boehringer agreed to pay the generic manufacturer only for these promotional services? Or are they side payments for an anticompetitive agreement to delay generic entry and share the ensuing monopoly profits? Boehringer’s internal financial and business analysis of these deals is directly relevant to answering these questions.

The district court order challenged here frustrates that investigation. The court made a sweeping, categorical ruling that Boehringer could withhold as opinion work product hundreds of documents containing such financial or business analyses, including even analysis of the copromotion agreement. It reasoned that “the co-promotion agreement was an integral part of the litigation,” Dkt. 69 at 10 [JA-153], even though Boehringer has repeatedly insisted that the co-promotion agreement was a freestanding business transaction, distinct from the settlement. Moreover, the district court based its decision to a significant extent on two *ex parte* affidavits from Boehringer’s counsel, even though sworn testimony of

Boehringer executives contradicts the conclusion the court drew from these affidavits. In the course of these rulings, the district court misapplied this Circuit's precedent and reached an erroneous and overbroad conclusion on the scope of work-product protection. This Court should reverse.

JURISDICTION

The district court had subject-matter jurisdiction pursuant to 28 U.S.C. § 49 (authorizing district courts to enforce FTC subpoenas) and 28 U.S.C. §§ 1331, 1337, and 1345. On September 27 and October 16, 2012, the district court entered orders that, collectively, resolved all claims in this case, granting in part and denying in part the FTC's subpoena enforcement petitions. Dkt. 6972 [JA-144-72].

As a panel of this Court has already ruled

ISSUES PRESENTED FOR REVIEW

1. Whether the district court committed legal error when it treated business and financial analyses requested by in-house counsel as opinion work product.
2. Whether the district court committed legal error when it failed to examine whether any of the documents, including documents analyzing a “freestanding,” “fair arm’s length business arrangement,” would have been prepared in essentially similar form irrespective of litigation and thus were not work product.
3. Whether the FTC has shown substantial need for Boehringer’s factual work product and whether the district court erroneously applied a heightened standard of need.
4. Whether the district court abused its discretion when it accepted in camera affidavits, to which the FTC has still been denied access, without determining that they were “absolutely necessary” to assess Boehringer’s work-product claims and that the need for secrecy outweighed other crucial interests.

STATEMENT OF THE CASE

Pharmaceuticals, Inc. (“Barr”) and their affiliates engaged in unfair methods of competition in or affecting commerce, in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, with respect to the sale of two Boehringer drug products, Aggrenox and Mirapex. Specifically, the FTC is investigating whether Boehringer unlawfully paid Barr not to launch competing generic versions of Aggrenox and Mirapex as part of a patent litigation settlement. See *Actavis*, 133 S. Ct. at 2237. After Boehringer failed to comply with several of the subpoena’s terms, the FTC filed a petition for enforcement in the U.S. District Court for the District of Columbia on October 23, 2009. Dkt. 1 [JA-10-66].

In proceedings before the district court, the FTC challenged, *inter alia*, Boehringer’s refusal to produce hundreds of financial analyses and similar documents based on claims of attorney-client privilege and the work-product doctrine. On September 27, 2012, the district court issued an order addressing these claims. It held that all of the withheld financial analyses prepared in connection with the settlement of the Aggrenox and Mirapex patent litigation—including all analyses related to the business agreement that Boehringer entered into with Barr at the time of settlement—constituted opinion work product subject to the “virtually undiscoverable” standard, rather than the substantial-need standard generally applied to work-product claims. It did so on the grounds that the analyses (1) had been prepared at the request of Boehringer’s general counsel,

(notwithstanding sworn testimony that at least some were created by nonattorneys without input from legal personnel); and (2) were intended to “aid in the settlement process” even though some of the documents were prepared well before settlement negotiations began, or up to eight months after the settlement was executed. The court resolved the remaining claims raised in the subpoena enforcement action in a companion decision issued October 16, 2012.

This appeal followed.

B. Statement of Facts

Commission staff sought access to the documents withheld by Boehringer in order to further

When a company seeks FDA approval to market a generic version of a brand-name drug before expiration of a patent covering that drug, the generic applicant must certify that the patent in question is invalid or not infringed by the generic product (a "Paragraph IV" certification). 21 U.S.C. § 355(j)(2)(A)(vii)(IV). This system encourages challenges to patents that may be invalid. See Actavis, 133 S. Ct. at 2234. Once a generic files a Paragraph IV certification, the patent holder may bring suit immediately even before the generic applicant markets its product. 35 U.S.C. § 271(e)(2). Paragraph IV patent challenges sometimes result in reverse payment settlements, as described above.

In 2003 Congress amended the Hatch-Waxman Act, seeking, in part, to eliminate the "abuse of the Hatch-Waxman law" resulting from "pacts between big pharmaceutical firms and makers of generic versions of brand name drugs, that are intended to keep lower cost drugs off the market." S. Rep. No. 107-167, at 4 (2002). Among these changes, Congress created a mechanism for agency review and investigation of potentially anticompetitive agreements. See Medicare Amendments to Hatch-Waxman Act, Pub. L. No. 108-173, §§ 1111-1118; Actavis, 133 S. Ct. at 2234. As part of its antitrust enforcement mandate, the FTC investigates Hatch-Waxman settlement agreements to determine whether they unlawfully restrain trade.

In these investigations, the FTC often relies on companies' financial analyses and business forecasts to determine whether the branded firm has compensated the generic firm for delayed entry. Compensation takes the form of explicit cash payments; instead, the settling firms typically include the payment in a separate business deal executed simultaneously with the settlement.² In these cases, the FTC assesses whether the side deals are independent business transactions or instead an inducement offered to persuade the generic firm to delay entry. Financial forecasts and analyses of deals are often the only direct evidence of whether the branded firm believed the deal to be economically freestanding or whether it instead viewed the deal as worth entering only because of the additional profits gained through delayed generic entry. This evidence would

² Before the FTC began investigating reverse payment settlements, payments were often made part of the settlement. Since then, parties to these agreements have often conveyed payments via side deals. See, F.T.C. Bureau of Competition, Agreements Filed with the Federal Trade Commission under the Medicare Prescription Drug, Improvement, and Modernization Act of 2003: Summary of Agreements Filed in FY 2009 (2010) (cataloguing potential pay delay agreements, including nine that included a "side deal" available at <http://www.ftc.gov/reports/mmact/MMAreport2009.pdf>). See also C. Scott Hemphill, An Aggregate Approach to Antitrust: Using New Data and Rulemaking to Preserve Drug Competition

indicate the purpose and likely effect of the deal and thus help the Commission determine whether it was an anticompetitive reverse payment.

2. Mirapex and Aggrenox agreements

In this investigation, the FTC is examining whether a patent litigation settlement and a simultaneously executed co-promotion agreement between Boehringer and Barr together constitute an unlawful reverse payment agreement. The investigation involves two Boehringer branded products: Mirapex (pramipexole), which is used t

Under the settlement agreements, Barr agreed not to market generic Mirapex until January 2010 and generic Aggrenox until July 2015. Dkt. 1-1[JA-23]. At the same time, the companies entered into a promotion agreement in which Boehringer agreed to provide substantial compensation to Barr reportedly in exchange for its efforts promoting branded Aggrenox to women's health doctors. Id. [JA-23]. The FTC's investigation focuses in large part on whether Boehringer used this promotion agreement to pay Barr not to compete with Mirapex or Aggrenox.

3. FTC investigation and Boehringer privilege c

generic entry), and documents related to the Aggren promotion agreement. Dkt. 1-1 at 45 [JA-23-24]. Eight months later, Boehringer still had not certified compliance with the subpoena. ~~at 19~~ [JA-28]. Accordingly, on October 23, 2009, the FTC filed a petition in the United States District Court for the District of Columbia for an order enforcing the subpoena. Dkt. ~~JA-10-66~~ [JA-10-66]. The petition alleged that Boehringer had failed to completely produce responsive documents and used inadequate search procedures. ~~at 8-9~~ [JA-17-18].

After the FTC filed its petition for enforcement of the subpoena, the parties exchanged correspondence in an effort to settle the outstanding issues, including their disagreements about whether Boehringer had legitimately withheld or redacted a large number of documents based on attorney-client privilege and work-product assertions. See Dkt. 32, Ex. B Decl. Ex. 17 at [JA-562]. This appeal challenges the district court's ruling only as it applies to Boehringer's work-product claims.³

³ Boehringer asserted both work-product protection and attorney-client privilege for many of the challenged documents. Because the district court found that the challenged analyses and forecasts were opinion work product, it did not resolve whether any such documents were protected by the attorney-client privilege. The FTC is appealing only the court's determination that these analyses were opinion work product. The FTC is not appealing the district court's determination with regard to documents for which only attorney-client privilege was claimed. See Dkt. 69 at 15 [JA158].

Boehringer claimed attorney-client privilege or work product with regard to 3,420 documents. See Dkt. 32, Ex. B at 6 [JA-226]; Dkt. 32, Ex. B Decl. Ex. 17 at 1 [JA-562]. Based on Boehringer's description in the log and the sworn testimony of Boehringer personnel, the FTC challenged 631 of the claims, including claims of protected status for business documents "regarding" or "prepared as a result of" patent litigation or analyzing settlement options in business documents analyzing the Aggrenopromotion agreement. Dkt. 32, Ex. B Decl. Ex. 17 [JA-561-69]. A number of the documents even stated the settlement. Id. at 1-2, App. A [JA-562-63, 568-69].⁴ For purposes of this appeal, the challenged documents fall into two major categories:

(1) Non-legal business documents "regarding" or "prepared as a result of" patent litigation or analyzing settlement options. The FTC identified over 300 documents that the privilege log describes as "regarding" or "prepared as a result of" the patent litigation, which were circulated to business executives and prepared primarily by non-lawyers. Similarly, it identified 55 documents analyzing settlement options that appear to be legal business documents. Id. at 2, App. A [JA-563, 568-69]. These documents are primarily financial forecasts of generic entry or the financial impact of settlement options. See Dkt. 32, Ex. B at 67 [JA-

⁴ See supra note 1.

227-28]. For example, document no. 833a spreadsheet sent from Tom Buckley, a non-lawyer, to Paul Fonteyne, a senior business executive, copying numerous other business executives. The privilege log, however, describes the document as “Analyses of ‘577 and ‘086812 Patent Litigations prepared as a result of litigation.” Dkt. 32, Ex. B Decl. Ex. 1 at 60 [JA-347]. Document no. 92 is a PowerPoint found in the files of non-lawyer Steve Marlin (as to which Boehringer did not supply author information and which was not circulated) described in the privilege log as “Analysis of ‘577 Patent Litigations and settlement strategy prepared as a result of litigation.” at 75 [JA-362]. The FTC objected to Boehringer’s withholding these and similar documents, arguing that documents created by non-lawyers for business purposes (such as informing business decisions) are not work product.

The sworn investigational hearing testimony of Boehringer personnel confirms that many of these documents consist of legal, financial analyses. For example, Paul Fonteyne, who is listed in the privilege log as the creator or recipient of many of the disputed documents, testified that his role was to provide “commercial input” consisting of “mostly financial analyses.” Dkt. 32, Ex. B Decl. Ex. 20 at 41, 48 [JA-598-99]. Fonteyne’s testimony reinforces what the privilege log suggests: many of these documents are simply business documents created to inform business decisions.

(2) Non-legal business documents analyzing the Aggrenox copromotion agreement. The FTC also identified a number of documents, including seven submitted in camera, related solely to the Aggrenox copromotion agreement, which Boehringer maintains was an “arms-length business arrangement” separate from the patent litigation settlement. See Dkt. 32, Ex. B Decl. Ex. 18 at [JA-577]. For example, document no. 10390, sent from non-lawyer Hanbo Hu to non-lawyer Fonteyne, is a PowerPoint “Analysis regarding possible Aggrenox copromotion agreement relating to ’577 Patent Litigation settlement prepared as a result of litigation.” Dkt. 32, Ex. B Decl. Ex. 17 at 4, App. [AA-565, 56869].⁵ Despite its position that the copromotion was a separate economic transaction, Boehringer contended that these documents were work product because the copromotion agreement “relates to” the patent litigation settlement. Id. [JA-565, 56869].

Boehringer testimony again indicates that these documents were focused on the financial, not legal, implications of the copromotion agreement. Elizabeth Cochrane, a financial executive who created many of the analyses, testified that her role was to “quantify the Duramed Barr subsidiary copromotion,” which entailed evaluating “the financial impact to [Boehringer]’s P&L, profit and loss

⁵ This document was included on the list of documents that the parties agreed would be submitted to the district court in camera, but the district court did not rule on this document. See *infra* note 6.

statement. Dkt. 32, Ex. B Decl. Ex. 3 at 21:622:16 [JA-242-43]. Paul Fonteyne, who was also closely involved in creating the analyses, testified that his role was to provide “commercial input” on the deal. Dkt. 32, Ex. B Decl. Ex. 2048:79 [JA-599]. Some or all of these analyses appear to have been conducted in order to evaluate the financial (rather than legal) implications of the Aggrenox co-promotion agreement, which, again, Boehringer insists was a separate economic transaction. Dkt. 32, Ex. B Decl. Ex. 18 at 7 [JA-77].

4. District court proceedings

Ultimately, the parties failed to reach agreement as to the privilege claims or other issues in dispute. See Dkt. 32, Ex. B Decl. Ex. 9 [JA-282-83]; Id. Decl. Ex. 10 [JA-284-86]. Boehringer nonetheless certified its compliance with the subpoena on April 19, 2010. See Dkt. 15 at 2 [JA-68]; Dkt. 32, Ex. B Decl. Ex. 2 [JA-233-39]. The parties briefed the two disputed issues in 2010. After district court-supervised mediation failed to result in settlement, the district court held a status hearing on December 9, 2011. Dkt. 59-72-143. As part of the proceeding, the parties mutually agreed on 87 sample documents to submit to the district court for in camera review. See Dkt. 69 at 34 [JA-146-47].

More than a year after the parties had briefed the disputed work product issues and on the eve of the hearing, Boehringer submitted to the court affidavits from Marla Persky, Boehringer’s general counsel, and Pamela Taylor, who is outside

counsel representing Boehringer in the FTC investigation and who had no contemporaneous involvement in the settlement or co-promotion agreements. See Dkt. 69 at 10-11 [JA-153-54]. Apparently relying on these affidavits, Boehringer argued that the withheld analyses of settlement and the promotion were “specifically asked for by [Persky], either directly or indirectly.” Dkt. 59 at 19 [JA-90]. Because Boehringer did not disclose the affidavits or their content to the FTC, the FTC had an opportunity to review or respond to them and objected to their submission. Id. at 45 [JA-75-76].⁶

On September 27, 2012, almost a year after the status hearing and more than three years after the FTC filed its enforcement petition, the district court issued its opinion and order on Boehringer’s work-product claims. Dkt. 69 and 70 [JA-144-64]. It held all of the withheld financial analyses were requested by counsel to assist in settlement negotiations and so were “opinion” work product; the

⁶ The affidavits appear to have placed additional documents before the district court for in camera

disclosure of which would “necessarily reveal the attorneys’ thought processes.” Dkt. 69 at 12 [JA-155]. The district court specifically addressed the disputed documents containing analyses of the Aggrenopromotion agreement, stating that the agreement “was an integral part of the settlement.” Dkt. 69 at 10 [JA-153]. It acknowledged, but did not accord significance to, the tension between this conclusion and Boehringer’s continuing claim that the promotion agreement was “freestanding” and independent from the settlement agreement as a business matter. Id. [JA-153].

As support for its holding that these analyses reflected Persky’s mental impressions, the district court cited primarily the pair of in camera affidavits from Persky and Taylor. Id. at 11 [JA-154]. According to the court, BIPI attorneys supplied “information and frameworks” to be used in these analyses. Id. [JA-154]. Further, it held that any factual work product in those documents could not be segregated from the opinion work product because disclosing “any aspect” of the analyses would shed light on the nature of the attorney’s request. Id. [JA-155]. The court did not discuss the sworn investigational hearing testimony (which the FTC had presented in its briefs) in which Persky and other Boehringer witnesses stated that Persky did not provide input or assumptions to guide the creation of these financial analyses.

Having deemed all of the financial analyses opinion work product, the district court then ruled the FTC had not demonstrated the “overriding and compelling need” required to discover this type of work product. The 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 [Bogen] was using the co-promotion agreement to pay Barr not to compete.” 12-13 [JA156]. But in the court’s view, the documents did not provide additional useful information beyond what the Commission already knew about the settlement at 12-13 [JA-155-56]. (“No one is pretending that the FTC is not fully aware of the deal that was made or the economic benefits the deal makers were trying to achieve.”) The court declared “there are no smoking guns contained in these documents.” 12 [JA-155]. Further, it believed that “the arithmetical calculations of various potential scenarios ... are not in any way evidence of any conspiratorial intent to violate the law” and “do not cast any light on the fundamental legal issue of whether the deal was or was not anti-competitive in intent or result.” 13 [JA156]. The district court announced this conclusion without addressing issues such as the Commission might address.

Commission and its staff might consider, or what other documents and data the Commission might be able to consider in conjunction with these calculations.

SUMMARY OF ARGUMENT

The district court applied an indiscriminate, categorical approach to the work product doctrine that contradicts this Court's precedent and established work-product principles. First, the district court erroneously concluded that every financial and generic entry analysis prepared by non-lawyers at the request of Boehringer's general counsel necessarily conveyed the mental impressions of counsel and was thus subject to the heightened "opinion" work product standard rather than the normal standard for "factual" work product. That holding contradicts settled precedent: documents prepared by lawyers in response to a general request from a lawyer are opinion work product simply because they

“factual” work product that

contemporaneous analyses of the settlement and co-promotion agreement are highly relevant and otherwise available.

Finally, the district court abused its discretion by relying on in camera parte affidavits from Boehringer's general counsel and outside counsel to conclude that virtually all of the over 600 documents withheld by Boehringer were created at Persky's request for the purpose of aiding the Aggrenox and Mirapex patent litigation. Boehringer made no attempt to show that the ex parte affidavits were "absolutely necessary" to decide a dispute over work-product protection, and the district court erroneously failed to require such a showing. Moreover, the record evidence casts doubt on the reliability of these affidavits. In these circumstances, it was an abuse of discretion for the district court to rely on Boehringer's ex parte representations.

STANDARD OF REVIEW

In subpoena enforcement cases, the standard of review is de novo.

of discretion.” FTC v. GlaxoSmithKlin~~g~~ 294 F.3d 141, 146 (D.C. Cir. 2002)
(quoting In re Sealed Cas~~e~~ 46 F.3d 881, 883 (D.C. Cir. 1998))

ARGUMENT

I. THE DISTRICT COURT APPLIED AN INCORRECT LEGAL STANDARD IN RULING ON BOEHRINGER’S WORK-PRODUCT CLAIMS

A. The District Court Erroneously Deemed All Withheld Financial and Generic Entry Analyses as Opinion Work Product Because They Were Requested by Counsel

The district court made a blanket determination that virtually all of the categories of documents challenged by the FTC were opinion work product, including Excel spreadsheets and other documents calculating the financial impact of generic entry, documents analyzing the financial impact of proposed settlement terms, and documents analyzing the profitability of the Aggre~~ment~~ promotion agreement. Rather than evaluating which of the withheld documents actually contained mental impressions of counsel, the court categorically concluded that any analysis requested by counsel “necessarily” conveyed the mental impressions of counsel. Dkt. 69 at 11 [JA-154]:

[A] disclosure of any aspect of the financial analyses would necessarily reveal the attorneys’ thought processes regarding the BIPI-Barr settlement. The reports in question were prepared at the behest of BIPI attorneys, who requested that certain data be entered and manipulated to determine whether various settlement options were beneficial to BIPI. Re~~vealing~~ the data chosen for this analysis would necessarily reveal the attorneys’ mental impressions, including, at a bare minimum, that the attorneys believed such analyses of that

Supervision v. Vinson & Elkins, LLP, 124 F.3d 1304, 1308 (D.C. Cir. 1997). The general rule for discoverability does not apply to the narrower set of work product documents that disclose an attorney's "mental impressions, conclusions, opinions, or legal theories." Fed. R. Civ. P. 26(b)(3)(B), *U. v. Nobles*, 422 U.S. 225, 238 (1975). This "opinion" work product is "virtually undiscoverable." Dir., Office of Thrift Supervision, 124 F.3d at 1307.

The category of opinion work product is reserved for documents that "reveal[] the attorney's mental processes." *John Co. v. U.S.*, 449 U.S. 383, 400 (1981). All documents prepared for litigation arguably contain some clues as to an attorney's thinking, and a request from counsel does not automatically transform all resulting documents into opinion work product. Dir., Office of Thrift Supervision, 124 F.3d at 1307-08. If "every item which may reveal some inkling of a lawyer's mental impressions, conclusions, opinions, or legal theories" were to be classified as opinion work product, "the exception would hungrily swallow up the

degree of editing and selection by the lawyer. See *US v. Clemens*, 793 F. Supp. 2d 236, 252-53 (D.D.C. 2011) (discussing the degree of editing involved in Sealed Case as described in Judge Tatel's dissent from the denial of enforcement, 129 F.3d 637, 638) See also *Smith v. Life Investors Ins. Co. of America*, No. 2:07-cv-681, 2009 WL 2045197 at *3 (W.D. Pa. July 9, 2009) (an actuarial calculation created at the request of a lawyer was "at most, 'fact work product'" because "documents reflect only the financial calculations of [the actuary]" and "no impressions, opinions or thoughts of an attorney are revealed"). The district court erred in holding that an attorney's request necessarily transforms a document into "virtually undiscoverable" opinion work product.

2. The record indicates that few of the withheld documents actually contain the mental impressions of counsel

Despite the district court's blanket holding that any financial analysis requested by Boehringer attorneys is opinion work product, the record illustrates that many of the withheld documents do not reflect the mental impressions of an attorney. Boehringer witnesses testified that financial analyses take substantive contribution from in-

settlement, the Aggrenox settlement, and the Aggrenox copromotion agreement. Dkt. 32, Ex. B Decl. Ex. 19 at 113:12 [JA-592]. According to Persky, Fonteyne was the key decisionmaker regarding the terms of the Aggrenox copromotion agreement, and was responsible for evaluating whether the agreement with Barr made sense from a financial and business perspective. d. at 61:1-23, 68:19-24 [JA-589-90]. Fonteyne likewise testified his role was to provide “commercial input,” which consisted of “mostly financial analyses.” Dkt. 32, Ex. B Decl. Ex. 20 at 48:7-16 [JA-599]. With assistance from other non-lawyers, he conducted many of the withheld financial analyses.

Both Fonteyne and Persky testified that the assumptions used to construct these analyses were generated from non-

[JA

In sum, the district court's holding that an attorney's request matter how attenuated necessarily transforms a document into opinion work product would extend protection "to every written document generated by an attorney," and even beyond. *Senate of Com. of Puerto Rico*, 823 F.2d at 586. As this Court and others have recognized, that approach would be "virtually omnivorous" in the range of relevant evidence it would shield from discovery. *In re Sealed Case*, 146 F.3d at 237. This Court should thus reverse and remand for application of the appropriate standard. See *Comptroller of the Currency*, 967 F.2d at 633.

- B. The District Court Committed Legal Error by Failing to Require

analysis that [Boehringer] already provided” for agreements other than those entered into at the time of the patent settlements. Dkt. 59 at 25 [JA 101–102].¹⁰ And the district court itself found that the documents are “financial analyses” and “arithmetical calculations.” Dkt. 69 at 13 [JA 156]. Indeed, the district court ordered production with redaction for the transmittal emails and other correspondence that accompanied the financial analyses, but it failed to require the same level of scrutiny for the analyses themselves. Dkt. 69 at 17 [JA 160].

Given this record, even protected documents “likely ... include[] other information that is not work product.” *Deloitte LLP*, 610 F.3d at 139. The district court’s failure to require individual review and redaction reinforces the conclusion that the court committed legal error by assuming that any document resulting from counsel’s request necessarily merited protection as opinion work product. Accordingly, this Court should remand the case to the district court “for the purpose of independently assessing whether the document[s were] entirely [opinion] work product, or whether a partial or redacted version of the document[s] could have been disclosed.”; see also *Washington Bancorporation*, 145

¹⁰ He went on to state that the segregable portions would be meaningless out of context, but this is not *Boehringer’s* decision to make.

F.R.D.274,278 n.7 (D.D.C. 1992) (notes and commentary constituting opinion work product can be protected with redactions).

II. THE DISTRICT COURT COMMITTED LEGAL ERROR BY FAILING TO EVALUATE WHETHER ANY OF THE WITHHELD DOCUMENTS WOULD HAVE BEEN CREATED IRRESPECTIVE OF THE LITIGATION

In addition to the district court's erroneous conclusion that withheld financial analyses were opinion work product, the court erred by failing to consider whether any of the documents would have been created in essentially similar form irrespective of the litigation and are therefore not work product at all. See *Willingham v. Ashcroft*, 228 F.R.D. 1, 4 (D.D.C. 2005); also *U.S. v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998). Sworn testimony from Boehringer witnesses establishes that many of the documents in question were straightforward financial analyses—a key subset of which relate only to a business agreement that Boehringer has repeatedly claimed was *standing*. Moreover, many of the withheld documents were created well before or after settlement negotiations.

The work product doctrine protects only those documents created “because of” litigation. See *Deloitte*, 610 F.3d at 129. A document is prepared “because of” litigation if, “in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.” *Senate of the Com. of Puerto Rico*, 823 F.2d at 586 n.42 (quoting 8 C. Wright & A. Miller, *Federal Practice and Procedure* §

2024 at 198 (1970)). Thus, documents prepared in the ordinary course of business are not work product. See *Sealed Case*, 46 F.3d 881, 887 (D.C. Cir. 1998). Similarly, “if documents would have been created in essentially similar form irrespective of the litigation, it cannot fairly be said that they were created ‘because of’ actual or impending litigation.” *Willingham*, 228 F.R.D. at 4; *Adlman*, 134 F.3d at 1202 “Even if such documents might also help in preparation for litigation, they do not qualify for protection.” *Adlman*, 134 F.3d at 1202. The district court recited this standard, Dkt. 69 at 7 [JA-149-5], but then wholly failed to apply it.

The district court’s failure to consider whether any withheld documents would have been created irrespective of the litigation with respect to all categories of documents, including financial and generic entry analyses. This failure, however, was particularly indefensible with regard to those documents analyzing the financial impact of the Aggrenox promotion agreement, which Boehringer insists was a business transaction economically independent of settlement. Given Boehringer’s position, it is implausible that the conducted financial analyses of this purportedly freestanding transaction only because of the litigation settlement. Any analyses that would have been conducted to evaluate the deal regardless of a contemporaneous settlement are not work product that were produced.

In particular, if there is any truth to Boehringer's repeated assertion that this was a freestanding, arms

-pr(r)omo4(t)9(io)8((ha)1gs r)4(e)e(r)4(m)1

necessarily presupposes that the co-promotion was a vehicle to pay Barr for the delayed entry codified in the settlement. Agostino cannot logically maintain that the deal was economically freestanding while attributing the analyses of the deal to the settlement.

In any event, whatever the relationship between the patent litigation settlement and the co-promotion agreement, the district court should have considered whether any of the analyses would have been created in essentially similar form irrespective of the litigation. Any such documents are not work product.

copromotion,” which entailed evaluating “the financial impact to [Boehringer]’s P&L, profit and loss statement” Dkt. 32, Ex. B Decl. Ex. 3 at 21:622:16 [JA-242-43]. The P&L analyses amounted to “simply doing the math for, if this changes, this is what it means to our P&L, a lot of adding and subtracting” at 265-9 [JA-244]. The analyses described by Cochrane are precisely the kind of financial forecasts one would expect Boehringer to conduct before entering a \$120 million business transaction. Indeed, Cochrane testified that when Boehringer has entered co-promotion agreements with other companies, it has conducted similar financial analyses Dkt. 33, Ex. 3 at 72:2123 [JA-1008]¹⁴

Paul Fonteyne, a Dkt. 32 snc-i Tw [(a)1 [(Dkt)-T dij 0.004 h iTw [(34010 Tw 0.949 0

he received from Cochran, Dkt. 37, Ex. 6 at 49:123, 62:1014 [JA-802, 806]

The testimony thus shows that Fonteyne examined the profit and loss forecasts produced by Cochran in order to determine whether the promotion made commercial sense for Boehringer. These documents were standard financial projections that likely would have been created in essentially similar form irrespective of the litigation.

Analyses of the copromotion are the most obvious documents that would likely have been prepared irrespective of litigation. However, the district court's error is not limited to these documents. Many of the other withheld documents are standard financial analyses that may have been created even in the absence of litigation. The district court acknowledged that "similar reports are prepared for BIPI executives as a matter of regular business." Dkt. 69 [JA-154].

Additionally, many of the withheld documents were created before settlement negotiations began or after the negotiations concluded, strongly suggesting that their creation was not due to the settlement negotiations.¹⁵ The district court should

¹⁵ See supra note (over 200 of the over 600 documents at issue in this case fall into this category). The district court's opinion contains no analysis articulating why these pre and post settlement documents are entitled to work product protection. Its finding that "[i]nformation used to assess settlement option [sic] clearly falls within the ambit of the work product doctrine," Dkt. 69 [JA-154],—the sole basis for the court's work product ruling—simply does not apply to roughly one third of the documents at issue in this case.

have ordered Boehringer to produce any documents that would have been created in essentially similar form irrespective of the litigation.

United States v. Adlman, 134 F.3d 1194, on which Boehringer relied extensively in the proceedings below, does not support the applicability of work product to the challenged documents. Adlman held that “[w]here a document is created because of the prospect of litigation, analyzing the likely outcome of that litigation, it does not lose protection under this formulation merely because it is created in order to assist with a business decision.” Id. at 1202. As the Adlman holding makes clear, a work product document must first have been “created because of the prospect of litigation” in order to qualify for protection. Id. Further, Adlman’s holding refers to “documents analyzing anticipated litigation, but prepared to assist in a business decision rather than to assist in the conduct of litigation.” Id. at 1201-02 (emphasis added). Thus, if a company contemplating a business deal asks its counsel to evaluate litigation that might form the deal, that analysis may be protected as work product under Adlman. Id. at 1199.¹⁶ But if a business deal is simply part of the consideration offered in settlements, documents created to assess the commercial value of the deal are “financial analyses one

¹⁶ Similar examples include an analysis by in-house counsel of a potential merger partner’s prospects in its existing litigation or a prediction of litigation outcomes prepared to aid in a financial forecast. Adlman, 134 F.3d at 1199-200.

would expect a company exercising due diligence to prepare” (Dkt. 69 at 132-133 [JA-155-56]), and do not become work product simply because an attorney was involved or due to the temporal connection to the settlement. Again, that conclusion follows with particular force if, as Boehringer insists, the business deal is economically independent of the settlement.

The record evidence supports the commonsense conclusion that many of the withheld documents, particularly the analyses of the promotion agreement, would have been created in essentially similar form irrespective of the litigation. The district court failed to consider this possibility, and Boehringer continues to insist that all such documents were prepared “because of” the Barr settlement. This Court should order Boehringer to produce any documents that would have been created in essentially similar form in the absence of litigation, especially those documents that

FTC Act, 15 U.S.C. §9.

ignoring these principles, and instead relying upon its own assessment of whether the documents “cast any light on the fundamental legal issue” (Dkt. 69 at -13 [JA 156]) of the existence of a violation of the FTC Act.

Moreover, both factually and institutionally, the district court could not have any basis for concluding that the “arithmetic of various potential scenarios adds nothing to what is already known about what the involved companies settled in settling their suit.” *Id.* [JA-156]. By definition, the proceeding was summary, with no discovery. See Fed. R. Civ. P. 81(a)(5); *FTC v. Carter*

B. The Information in the Withheld Documents is Highly Relevant to the FTC's Investigation and Available Only from Boehringer

Under a proper legal standard, there is no question that the Commission has established a substantial need for any of the materials in question that constitute fact work product. The district court itself indicated that the FTC had shown a substantial need for fact work product that can be segregated from opinion work product. Although the court's treatment of the generic entry and financial analyses was dominated by its erroneous categorical conclusion that fact work product could not be excised from opinion work product (Dkt. 69 at 131[56]), it elsewhere recognized the existence of genuine need for fact work product contained in transmittal emails, for example, the district court concluded that the FTC is entitled to fact work product "that can be reasonably excised from any indication of opinion work product." Dkt. 69 at 13A-156; see also id. at 17[JA-160]; see also Dkt. 71 at 6 [JA170] (holding that if a document found through search of Boehringer's backup tapes "contains some factual work product and some opinion work product, and the opinion work product can be excised from the rest of the document, BIPI should redact the privileged material and disclose the rest").

In any event, the FTC amply demonstrated "a substantial need for the materials and an undue hardship in acquiring the information any other way." Dir., Office of Thrift Supervision, 124 F.3d at 1307. The Commission's investigation

seeks to determine whether Boehringer agreed to share its monopoly profits on two branded drugs with its potential rival, Barr, in exchange for Barr's agreement to delay entry with low-priced generic products. Among other things, the Commission seeks to assess whether Boehringer is using the Aggrenox co-promotion deal, entered contemporaneously with the patent settlement, as a way to pay Barr not to enter, and to understand any potential justifications for such a payment.

Notably, in its recent *Actavis* decision, the Supreme Court considered an FTC complaint containing allegations that rely on the same kinds of contemporaneous internal financial analyses of settlement options and business deals that are at issue in this appeal. As the Supreme Court noted, the settling parties claimed the payments to the generic drug firms were "compensation for other services the generics promised to perform," while the FTC complaint alleges that the payments were compensation for the generics' agreement not to compete until 2015. *Actavis*, 133 S. Ct. at 2229. The FTC complaint in that case prominently par

57-59¹⁷ & Exhibit A.¹⁸ That is precisely the kind of document the Commission seeks here.

The Actavis exhibit contains various mathematical calculations showing that,

potential scenarios” that “do not cast any light on the fundamental legal issue of whether the deal was or was not anti-competitive in intent or effect.” Dkt. 69 at 13 [JA156]. In fact, as shown by the complaint in Actavis, such mathematical calculations go directly to “the relevant antitrust question” in an antitrust investigation of a reverse payment settlement: the reasons the parties used such payments. Actavis, 133 S. Ct at 2237. As the Eleventh Circuit recently observed, ordering that Exhibit A be part of the public record in Actavis, the financial analysis “had a direct bearing on the economic advantages that Solvay reaped by entering into a reverse payment settlement.” FTC v. AbbVie Prods. LLC, 13 F.3d 54, 64 (11th Cir. 2013).

Boehringer contended below that the FTC did not need the withheld documents because the FTC could reconstruct the company’s analyses based on the agreements themselves and the FTC’s own financial calculations. Dkt. 37 at 24 [JA-643]. This is incorrect for a number of reasons.

First, the inputs, assumptions and formulas for those analyses came from Boehringer’s business people. Dkt. 37, Ex. 4 at 123 [JA-776]. That information is not available to the FTC without access to Boehringer’s documents, the FTC cannot question the business people during investigational hearings about the specific inputs and assumptions in the withheld analyses. Indeed, the district court declared itself “sympathetic to the FTC’s arguments that

these financial analyses are the only documents that could demonstrate whether or not BIPI was using the promotion agreement to pay Barr not to compete.” Dkt. 69 at 13 [JA156].

Second, even if the FTC could run its own calculations using available data, such calculations could not replace Boehringer’s own. Courts routinely consider evidence of the parties’ purpose in order to “interpret facts and to predict consequences.” *Chi. Bd. of Trade v. U.S.*, 246 U.S. 231, 238 (1917); see also *Broad. Music Inc. v. CBS, Inc.*,

1985) (conduct under the antitrust laws to be evaluated at the time of contract).

that the statements imply [Persky's] questions from which inferences might be drawn as to [her] thinking, the inferences merely disclose the concerns a layman would have as well as a lawyer in these particular circumstances, and in no way reveal anything worthy of the description 'legal theory.'" John Doe Corp. v. Doe, 675 F.2d at 493.

IV. THE DISTRICT COURT ABUSED ITS DISCRETION

affidavits seem to be the only evidence supporting the district court's conclusion that the documents were prepared using "information and frameworks provided by BIPI attorneys," Dkt. 69 at 11 [JA54], given the sworn testimony that Persky did not provide the key inputs for many of the financial analyses. See Part IA.2, supra

The district court abused its discretion by allowing Boehringer to submit the affidavits on a *ex parte* in camera basis and then relying on them in its ruling. Though a district court has the discretion to accept *ex parte* affidavits under some circumstances, see *Halkin v. Helms*, 598 F.2d 1, 5 (D.C. Cir. 1978), this Court has long expressed reservations about the practice, especially in cases that do not involve national security issues:

The legitimacy of accepting in camera affidavits (as opposed to in camera review of withheld documents) has troubled this court in the past. Although in camera review of withheld documents is permissible (and even encouraged), we have held that a trial court should not use in camera affidavits unless necessary and, if such affidavits are used, it should be certain to make the public record as complete as possible.

Lykins v. U.S. Dep't of Justice, 725 F.2d 1455, 1465 (D.C. Cir. 1984) (addressing the use of in camera affidavits in FOIA case involving national security

exemption).¹⁹ In camera affidavits are problematic because our judicial system

requires "proShhexiing 0 Td [(aAC /P <i4()s)-9ford41(a)4(tic)4(n)]TJ (s po)8(se)12eble

the adversary system can function effectively insisting the trial court to make a determination and producing a record that is susceptible to appellate review.” Id.

The Court has stressed that camera proceedings should be preceded by as full as possible a public debate over the basis and scope of the claim.”

Ellsberg v. Mitchell, 709 F.2d 51, 63 (D.C. Cir. 1983) (FOIA case involving documents withheld on state secret grounds during discovery).

The more specific the public explanation, the greater the ability of the opposing party to contest it. The ensuing arguments assist the judge in assessing the risk of harm posed by dissemination of the information in question. This kind of focused debate is of particular aid to the judge when fulfilling his duty to disentangle privileged from non privileged materials—to ensure that no more is shielded than is necessary to avoid anticipated injuries.

Id.

In light of these concerns, a district court permitting in camera affidavits “must both make its reasons for doing so clear and make as much as possible of the in camera submission available to the opposing party.” Armstrong v. Executive Office of the President, 97 F.3d 575, 580 (D.C. Cir. 1996). Such affidavits should be used only where “absolutely necessary” and where “the interests of the adversary process are outweighed by other crucial interests.” Lytle, 525 F.2d at 1465 (internal quotes and cites omitted).

That is not the case here. Boehringer submitted the affidavits without any justification, and the district court met none of the requirements for acceptance of

in camera affidavits. Additionally, it failed to examine whether the affidavits contained any unprivileged information that should have been disclosed to the FTC.

In fact, there could be no justification for the use of in camera affidavits here. The facts necessary to lay the foundation for a ~~work-product~~ claim are not themselves protected by ~~Edna Seligman~~ The Attorney-Client Privilege and the Work-Product Doctrine, Vol. II at 112-24 (5th ed. 2007); see also ~~GlaxoSmithKline~~ 294 F.3d at 145-48 (relying on corporate affidavit that was filed publicly); ~~B.F.G. of Illinois, Inc. v. Ameritech Corp.~~ 2001 U.S. Dist. LEXIS 18930, at *10 (N.D. Ill. Nov. 8, 2001). In addition, this case does not involve the kind of subject matter as to which courts have endorsed in camera affidavits, principally national security, e.g., ~~Ellsberg~~ 709 F.2d 51; ~~Hayden v. NSA~~ 608 F.2d 1381 (D.C. Cir. 1979); state secrets, e.g., ~~Halkin~~, 598 F.2d 101 (D.C. Cir. 1979); or grand jury testimony, e.g., ~~Gordon v. U.S.~~ 722 F.2d 303 (6th Cir. 1983).

Boehringer's conduct and the district court's acquiescence harmed both the adversarial process and the ~~FTC~~

settlement offers should be accepted.” Dkta69[JA-152]. The district court “credit[ed] the declarations of Persky and [Taylor] that the various financial analyses were prepared for the client during settlement discussions and involved discussions among the attorneys and their agents who were handling the settlement negotiations.” Id. at 11[JA-154]. It further explained that Persky’s in camera affidavit claimed “that the documents were created by BIPI or Boehringer Ingelheim employees in response to her personal requests for financial and other information.” Id. [JA-154]. The affidavits appear to be the primary factual basis on which the district court concluded that “[t]his was information [Persky] needed in order to provide her client, BIPI, with legal advice regarding the potential settlement between BIPI and Barr.” [JA-154].

The district court’s decision, thus, relies in substantial part on camera testimony “unaided by the benefits of adversarial proceedings which buttress the validity of judicial decisions.” *Mead Data Cent. Inc. v. U.S. Dep’t of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977); see also *U.S. v. Sepenuk*, 864 F.Supp. 1002, 1007 (D.Or.1994) (rejecting privilege claims after reviewing in camera affidavits and stating that “[t]he government raises a valid objection to the camera affidavits which have made it impossible for them to respond in fairness to respondent’s claim of privilege”), *aff’d sub nom. Blackman*, 72 F.3d 1418, 1425 (9th Cir. 1995) (upholding without analysis review of in camera affidavits in

these circumstances)

Certificate of Compliance and Service

I hereby certify that this brief complies with the type and volume limitation of Fed.R. App. P. 32(a)(7)(B) because the brief contains 10,501 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I hereby certify that copies of the foregoing Brief were served upon the following counsel of record, via the Court's CM/ECF system, on the 10th day of September 2013.

Lawrence D. Rosenberg
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
ldrosenberg@jonesday.com

Michael Sennett
William F. Dolan
Pamela L. Taylor
JONES DAY
77 West Wacker Drive, Suite 3500
Chicago, IL 60601
msennett@jonesday.com

Attorneys for Respondent-Appellee
Boehringer Ingelheim Pharmaceuticals, Inc.

/s/ Mark S. Hegedus
Mark S. Hegedus