ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUBMIA 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)

REPLY BRIEF FOR APPELLANT FEDERAL TRADE COMMISSION

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SUMMARY OF ARGUMENT

Since early 2009, the FTC has sought to investigate two sets of agreements executed simultaneously by Boehringer and Barr in 2008. In one, Barr agreed to drop its challenges to patents on two of Boehringer's branded drugs, thus delaying competitive entry. In the other, Boehringer agreed to pay Barr over $100 million to co-promote one of those drugs, Aggrenox. Because of those agreements, Aggrenox will likely not appear in generic form before July 2015. Boehringer will continue

work product only if it "reveals the mental processes or impressions of an attorney," Dkt. 69 at 7 [JA-150], the court concluded—illogically—that *any*

Boehringer creates in the ordinary course. That point is particularly obvious with respect to financial analyses of the Aggrenox co-promotion agreement—a business deal that Boehringer insists was economically unrelated to the settlement. Companies do not enter into $100 million marketing agreements without first completing an economic analysis.

Nevertheless, Boehringer contends that, because it would not have entered the deal itself if it had not been in litigation with Barr, analyses of the deal were, in some highly attenuated sense, created "because of" litigation. Boehringer Br. 42. The logical extension of Boehringer's argument is that any time two parties might not have entered into a freestanding business deal if they had not encountered one another in litigation, *all* documents related to that deal, no matter how routine, are protected as work product. The law does not require that absurd result. Instead, documents cannot qualify as work product if they would have been produced in similar form in connection with similar, non-litigation-related deals.

Finally, Boehringer contests neither the obvious relevance of the documents to the FTC's investigation nor the inability of the FTC to obtain these analyses from some other source. Rather, it contends that the FTC can reconstruct Boehringer's own analyses through other materials that Boehringer has produced. Boehringer Br. 51. But such after-the-fact reconstructions are neither the same nor as valuable as Boehringer's contemporaneous analyses. In short, the FTC has

As the plain language of Rule 26 confirms, materials requested by a lawyer can receive the heightened protection of "opinion work product" *only* if they reveal the "mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation." Fed. R. Civ. P. 26(b)(3);

at 236.

Here, the documents at issue are plain-vanilla financial and business documents: profit and loss analyses of the Aggrenox co-promotion agreement, forecasts of generic entry, and assessments of the impact of settlement options. The

and asked the businesspeople to provide her with a "financial analysis" of the co-promotion agreement (*id.* at 127:2-15) [JA-781].[4]

Boehringer fails completely, however, to explain what *more* about Persky's mental processes, beyond the representations in Boehringer's own brief, would be revealed if these financial analyses themselves were released. In fact, the district court's own description of the withheld documents indicates that nothing more would be revealed. The court said that "similar reports are prepared for BIPI executives as a matter of regular business." Dkt. 69 at 11 [JA-154]. It described the documents as "financial analyses," *id.* at 11, 12-13 [JA-154, 155-56], and "arithmetical calculations," *id.* at 13 [JA-156], that, in its view, cast no "light on the fundamental legal issue of whether the deal was or was not anticompetitive in intendment or result," *id.* [JA-156]. Of course, the FTC disagrees with this last assertion on the merits—the notion that these financial documents are somehow irrelevant to the complex antitrust economic issues the FTC is investigating

financial analysis in *Actavis* is privileged." Boehringer Br. 44. But the same is almost certainly true of the corresponding financial documents that Boehringer seeks to suppress here.[6]

Moreover, other evidence confirms that Persky had only an attenuated involvement in the creation of the withheld documents, and that production of those documents therefore could not plausibly provide significant new insights into her mental processes as counsel. For example, some of the requests for these analyses did not even originate with Persky. Document 3058 (Dkt. 32, Ex. B Decl. Ex. 15 at 13) [JA-520]; Dkt. 59 at 19:22-24 [JA-90], 20:11-12 [JA-91], 20:13-19 [JA-91

provided legal advice regarding the agreements' compliance with antitrust laws or the merits of the underlying litigation. Boehringer Br. 13. But nothing in her testimony or that of other employees demonstrates how production of *the financial analyses* would themselves reveal new information about Persky's mental processes on either score. She testified that, as lead negotiator, she was responsible for business terms in the settlement and co-promotion agreements, Dkt. 37, Ex. 4 at 70:2-7, 71:10-12 [JA-755-56], and that her advice reflected business, not legal, perspectives. Dkt. 33, Ex. 2 at 68:19-24 [JA-990]. Thus, her testimony indicates that the analyses would disclose only 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.'" *In re John Doe Corp.*, 675 F.2d 482, 493 (2d Cir. 1982).[7]

Finally, the broad standard for opinion work product that Boehringer advocates and the court below accepted not only contradicts settled precedent, but would also lead to absurd results. Suppose, for example, that a defendant offered to settle a case by deeding over a parcel of real property, and the plaintiff's lawyer, with an eye toward advising the plaintiff whether to accept the offer, ordered an

[7] Although it appears that Persky may have had discussions with outside counsel about the legal terms of the agreements, *see* Dkt. 37, Ex. 4 at 70:8-22 [JA-755], the FTC is not seeking documents that reflect such discussions.

appraisal of the property. Such an appraisal would be relevant in making the legal decision whether to settle, and surely reveals that the attorney believed such a financial analysis was "necessary or important to determining an appropriate settlement." Dkt. 69 at 12 [JA-155]. Under the district court's approach, therefore, this routine property appraisal would have to be treated as virtually undiscoverable opinion work product. That is not, and cannot be, the applicable rule. 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 rule." *In re San Juan Dupont Plaza Hotel Fire Litig.*, 859 F.2d at 1015; *see also Sealed Case 1997*, 124 F.3d at 236.

In sum, the district court committed legal error when it concluded that Boehringer's counsel's requests for documents "necessarily" revealed opinion work product. Unless the Court, in reversing, holds that Boehringer has failed to prove that the withheld documents should be shielded at all by the work-product doctrine, *see* Part II, *infra*, it should remand the case with instructions to the district court to re-examine the documents in the stipulated sample, applying the correct

legal standard and permitting redaction only of true opinion work product. *See* FTC Br. 31-33.[8]

II. DOCUMENTS THAT WOULD HAVE BEEN CREATED IN SUBSTANTIALLY SIMILAR FORM IRRESPECTIVE OF LITIGATION DO NOT QUALIFY AS WORK PRODUCT

As discussed in our opening brief (*id.* at 33-41), the withheld materials are not work product in the first place, let alone "opinion" work product, if they would have been prepared in substantially the same form in the ordinary course of business, regardless of litigation. The district court ignored that independent rationale for ordering the production of the key documents at issue here. That is a remarkable oversight because the court repeatedly found that Boehringer often created these types of documents, in much the same form, in the ordinary course. Dkt. 69 at 9, 11, 12-13 [JA-152, 154, 155-56]. But the court nonetheless also found that the documents did *not* qualify as "business forecasts made in the ordinary course of business" *because they had been prepared for counsel*. Dkt. 69 at 11 [JA-154]. That is straightforward legal error. A business document prepared for

[8] In other words, the district court's review should not include the documents that Boehringer unilaterally selected and submitted to the district court without the

counsel is not work product if it "would have been created in essentially similar form irrespective of the litigation." *United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998).

The district court's error on this point is particularly indefensible with respect to financial analyses of Boehringer's more than $100 million co-promotion agreement with Barr. No sophisticated economic actor enters into such an agreement without performing a financial analysis first. Indeed, Boehringer concedes as much, insisting that it derives value from the co-promotion agreement commensurate with "what it pays Barr under the agreement *apart from the litigation settlement*." Boehringer Br. 42-43 (emphasis added). Of course,

on

litigation." Boehringer Br. 42-43.[9] In other words, Boehringer argues that the documents relating to this agreement must all be work product because the parties would not have negotiated *the underlying agreement itself* if the supposedly independent patent litigation had not brought the same parties to the negotiating table for supposedly unrelated reasons.

This exceptionally attenuated theory of causation misreads the appropriate legal standard. Materials qualify as work product only if they were "created because of anticipated litigation, *and* would not have been prepared in substantially similar form but for the prospect of that litigation." *United States v. Deloitte LLP*, 610 F.3d 129, 138 (D.C. Cir. 2010) (quoting *Adlman*, 134 F.3d at 1195) (emphasis added). Here, Boehringer does not dispute that it prepares financial documents "in substantially similar form" for commercial agreements of comparable magnitude, whether or not a given agreement of this type arises in the context of litigation. That fact disqualifies such documents from work-product protection. *See Adlman*, 134 F.3d at 1202.

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[9] There is no basis for Boehringer's reliance (Br. 42) on *Fair Isaac Corp. v. Experian Information Solutions, Inc.*, No. 0:06-cv-4112, slip op. (D. Minn. Nov. 3, 2008). In that case, work-product protection was applied to internal financial analyses of a business deal that was the very means by which the parties resolved their legal dispute. *Id.*, slip op. at 14, 15. The deal was not what Boehringer characterizes this co-promotion agreement to be here: merely an independent opportunity that happened to arise in the course of settlement discussions.

Indeed, Boehringer's contrary approach would produce absurd results. Suppose, for example, that one real estate developer sues another over development rights on their adjacent properties in Midtown Manhattan. Upon reaching settlement terms, the defendant developer separately proposes to sell to the plaintiff developer a minority interest, at fair market value,

Boehringer’s position, that the co-

court ordered Boehringer to produce "factual work product that can be reasonably excised from any indication of opinion work product." Dkt. 69 at 13 [JA-

because potential anticompetitive conduct is to be judged at the time of alleged agreement, a party's own contemporaneous documents play an important role in such an analysis. *See United States v. du Pont*, 353 U.S. 586, 602 (1957) (emphasizing evidence from "contemporaneous documents" that acquisition violated antitrust laws); *Polk Bros., Inc. v. Forest City Enters.*, 776 F.2d 185, 189 (7th Cir. 1985) (conduct under the antitrust laws to be evaluated at the time of contract).

Boehringer argues, however, that in lieu of Boehringer's own contemporaneous financial analyses, the FTC will just have to make do with whatever reconstruction of the events in question it can piece together from the documents and data that Boehringer has produced. Boehringer Br. 51-53.[12] But Boehringer does not, and cannot, deny the relevance of its contemporaneous financial analyses to the FTC's investigation. *See Linde Thomson Langworthy*

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fact work product requires substantial need and "undue hardship in acquiring the information any other way").

Moreover, the contemporaneous documents would provide unmatched insights into the reason the parties settled their patent disputes with an arrangement that called for Boehringer to pay Barr more than $100 million. *See* 7 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1504, at 402 (3d ed. 2010) ("There is no reason for the court creatively to imagine possible justifications that the defendants have not adduced."). Boehringer fails utterly to acknowledge (Br. 53-55) that evidence of its intent could be highly relevant to demonstrating the anticompetitive effects of the settlement and co-promotion agreements (or lack thereof). *See United States v. Brown Univ.*, 5 F.3d 658, 672 (3d Cir. 1993) ("[C]ourts often look at a party's intent to help it judge the likely effects of challenged conduct."); *Antitrust Law* ¶ 1504, at 401-02 ("we often speak of the defendant's purpose, because we look to the defendant, with its knowledge of its own situation, to identify the possible justifications for its conduct").[13]

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[13] Boehringer also argues that the FTC could have asked Boehringer's employees whether they intended to commit antitrust violations. Boehringer Br. 54. For good reason, however, courts credit contemporaneous documents over a company's after-the-fact justifications for its conduct. *See, e.g., United States v. U.S. Gypsum Co.*, 333 U.S. 364, 396 (1948) (noting importance of contemporaneous documents); *Copy-Data Sys., Inc. v. Toshiba America, Inc.*, 755 F.2d 293, 298, 301 (2d Cir. 1985) (same).

As noted, the district court asserted that the withheld documents were merely "arithmetical calculations" that cast no "light on the fundamental legal issue of whether the deal was or was not anti-competitive in intendment or result." Dkt. 69 at 13 [JA-156]. But as we explained in our opening brief (FTC Br. 45), the district court lacked any basis for judging

analysis attached as Exhibit A to the *Actavis* complaint illustrates how "arithmetical calculations of various potential scenarios," *see* Dkt. 69 at 13 [JA-156], have "a direct bearing on the economic advantages that [a company] reaped by entering into a reverse-payment settlement." *FTC v. AbbVie Prods., LLC*, 713 F.3d 54, 64 (11th Cir. 2013).

Finally, despite Boehringer's hyperbole (Br. 46), there is no threat here to legitimate work product claims.[14] Indeed, the threat points in the opposite direction: courts must take care not to let companies use attorney involvement in business decisions as cover for the creation and concealment of documents that contain none of the legal mental impressions that the work product doctrine is intended to protect. *See* FTC Br. 52-53.

[14] Boehringer is also mistaken in asserting that the FTC seeks a special work product doctrine applicable only in the patent-litigation context. Boehringer Br. 44. No such argument appears anywhere in the FTC's brief.

CONCLUSION

The Court should reverse the district court and hold that Boehringer has not proven that the withheld documents should be shielded by the work-product doctrine; or, in the alternative, it should remand the case to the district court for further proceedings consistent with the Court's decision.

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I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 5,810 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, this 30th day of September, 2013.

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