

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

FEDERAL TRADE COMMISSION,:

Petitioner, :

v. :

Misc. Action No. 09- 564 (JMF)

BOEHRINGER INGELHEIM  
PHARMACEUTICALS, INC., :

Defendant. :

**MEMORANDUM OPINION**

This matter was assigned to me for all purposes. Pending before me now is the Petition of the Federal Trade Commission for an Order Enforcing a Subpoena Duces Tecum [#1].<sup>1</sup> The Federal Trade Commission (“FTC”) seeks an order from this Court declaring that the documents requested in its subpoena *duces tecum* are not privileged under the attorney-client privilege or the work product doctrine, as claimed by respondents, Boehringer Ingelheim Pharmaceuticals, Inc. (“BIPI”), and requiring the respondent to turn over the documents within 10 days of this order. In light of the record before me and for the reasons stated herein, plaintiff FTC’s petition will be denied as to certain categories of documents as set forth below. For all others, BIPI will be ordered to redact privileged material and disclose the rest, if it has not already done so.

**I. BACKGROUND**

The subpoena filed by the FTC is part of an investigation into a settlement agreement in a separate, prior lawsuit between BIPI and a generic drug manufacturer, Barr Laboratories.



product until it entered the market. Id. This arrangement prompted the concern of the FTC that Barr agreed to delay marketing the generic versions of Aggrenox and Mirapex so as to allow BIPI to reap the sole profits, and in exchange, BIPI would “kick back” a portion of those profits to Barr. Id.

Shortly after the FTC investigation began, a subpoena was issued to BIPI, but BIPI did not comply with the deadline for production. [#1-4] at 5-6. Pursuant to Sections 9 and 16 of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. §§ 49, 56,<sup>2</sup> on October 23, 2009, the FTC filed this petition seeking enforcement of the subpoena. [#1]. Specifically, the FTC requested that the Court order BIPI to comply with the subpoena and turn over all relevant documents concerning the litigation between BIPI and Barr; sales, profits, and marketing of the brand-name drugs; the settlement agreement; co-marketing with Barr and other firms; the marketing of the generic substitutes by Barr; and analyst reports on the drugs. Id. at 5. Between December 2009 and May 2010, there were disputes regarding the scope and adequacy of BIPI’s search efforts. In May 2010, however, BIPI formally certified that it had fully complied with the FTC subpoena. See Status Memorandum Advising the Court of New Developments [#15] at 2.

The following month the FTC filed a status memorandum stating that BIPI’s “limited custodial-based search did not locate all responsive materials.” Federal Trade Commission’s Status Memorandum Advising the Court of New Developments [#17]. The FTC also objects to BIPI’s withholding of roughly 25% of its produced documents under claims of work product and attorney-client privilege.

between the District Court decision on June 26, 2008 and the settlement achieved on August 11, 2008.



actual litigation. That rule prevents against disclosure of “documents and tangible things prepared in anticipation of litigation or for trial by another party or its representative.” Fed. R. Civ. P. 26(b)(3)(A).

Accordingly, I will address the FTC’s claims and BIPI’s assertion of privilege under the standards of Rule 26 and interpreting case law.

**B. The Work Product Doctrine**

“The work-product doctrine ‘provides a working attorney with a zone of privacy within which to think, plan, weigh facts and evidence, candidly evaluate a client’s case, and prepare legal theories.’” Linde, 5 F.3d at 1515, (citing Coastal States Gas Corp. v. Dep.’t of Energy, 617 F.2d 854, 864 (D.C. Cir. 1980)). It “undeniably extends to communications with ‘one employed to assist the lawyer in the rendition of professional legal services.’” Id. at 1514 (internal quotations omitted). The work product doctrine is therefore broader in scope than the attorney-client privilege. Id. It protects against disclosure of not just communications, but also the “mental impressions, conclusions, opinions, or legal theories of an attorney.” Id. See also Tax Analysts v. Internal Revenue Serv., 117 F.3d 607, 619 (D.C. Cir. 1997).

As I have said previously, the Rule’s emphasis on documents prepared “in anticipation of litigation” contains two separate, yet related concepts – one temporal, the other motivational. Willingham v. Ashcroft, 228 F.R.D. 1, 4 (D.D.C. 2005). “In reviewing documents claimed to be protected by the work-product privilege, the court must determine ‘whether, in light of the nature of the document or the factual situation in a particular case, the document can fairly be said to

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another way, “[t]o be protected by the work-product doctrine, a document must have been created for use at trial or because a lawyer or party reasonably anticipated that specific litigation would occur and prepared the document to advance the party's interest in the successful resolution of that litigation.





yields, however, to a showing of substantial need and the inability to secure the materials by other means without undue hardship.

### **III. ANALYSIS**

The FTC takes issue with several categories of documents for which BIPI asserted claims of privilege: 1) the financial analyses of a co-promotion agreement regarding Aggrenox; 2) forecasting analyses of possible time lines for the generic drug to enter the market; 3) financial analyses of the business terms of the settlement agreement; and 4) notes taken by business executives. [#41] at 3. The FTC claims an overriding and compelling need for disclosure of these categories. Id. It also insists that attorney-client privilege claims regarding business documents that had no attorney as an author or recipient, or included an attorney only as part of a distribution to business executives, must be rejected. Id.

Having reviewed the documents *in camera*, I will now address the merits of BIPI's claims of privilege. I have sorted the different documents into four broad categories, and will address each in turn.

#### **A. Analyses of Co-Promotion Agreement, Forecasting Analyses, and Financial Analyses Used to Evaluate Potential Settlement Options**

Many of the documents for which BIPI claims a work product privilege are described in the privilege log using the labels in the title of this sub-section. BIPI claims that these analyses were prepared not in the ordinary course of business, but for the specific purpose of informing counsel whether the proposed BIPI-Barr settlement offers should be accepted. Tr. of Status Hearing of 12/9/11 [#59] at 20. BIPI concedes that financial projections and analyses are frequently conducted, even absent ongoing or contemplated litigation, but contends that the specific financial analyses at issue before the Court do not fall into this category. Id. at 22.

Rather, says BIPI, they were specially prepared at the request of counsel in response to litigation, and are therefore work product. Id.

Indeed, BIPI contends that it already turned over more than 270,000 pages of documents, including projections and financial analyses that *were* prepared in the ordinary course of business. [#59] at 22; 27-28. Attorneys for BIPI further argue that, even though the analyses in question were prepared by non-lawyers, the documents are still protected by attorney-client privilege or the work product doctrine because the analyses were premised on frameworks provided by Persky and were prepared for her use. Id. at 27-28. BIPI therefore requests that I hold each of the documents provided for *in camera* review to be privileged, and thus, not subject to disclosure. See Response of Boehringer Ingelheim Pharmaceuticals, Inc. to the Federal Trade Commission's Status Report [#44] at 2.

With regards to the analyses specific to the Aggrenox co-promotion agreement, the FTC claims that agreement was “distinct from the settlement agreement,” [#41] at 4, meaning it was not prepared for the BIPI-Barr litigation, and therefore cannot qualify for work product protection because the co-promotion was not even a part of the litigation. BIPI, on the other hand, claims that, while the co-promotion agreement was “freestanding,” in that it constituted a separate business arrangement, the terms of the co-promotion agreement were

processes qualify for protection since the process of deciding whether to settle a case is necessarily created because of the prospect of litigation. I credit the declarations of Persky and Pamela M. Taylor, partner at Jones Day, the firm representing BIPI in the FTC investigation, 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. The documents themselves establish the truth of Persky's claims in her affidavit that the documents were created by BIPI or Boehringer Ingelheim employees in response to her personal requests for financial and other information. This was information she needed in order to provide her client, BIPI, with legal advice regarding the potential settlement between BIPI and Barr. Information used to assess settlement option clearly falls within the ambit of the work product doctrine. See Willingham, 228 F.R.D. at 4. Consequently, these documents are work product and thus protected.

Although the FTC is correct in its assertion that similar reports are prepared for BIPI executives as a matter of regular business, the specific reports as to which BIPI claims the privilege were prepared using information and frameworks provided by BIPI attorneys, and constitute work product intended to aid these attorneys in the settlement process. Moreover, BIPI insists any freestanding non-litigation-based financial analyses were already disclosed to the FTC, meaning that the only additional information the documents at issue would yield is the mental thought processes of BIPI's attorneys as they prepared for settlement negotiations. Having reviewed the documents themselves, I find that BIPI is correct—these documents were prepared for counsel and were not business forecasts made in the ordinary course of business.

## **B. The FTC's Overriding and Compelling Need for the Analyses**

In the event that I found, as I just have, the various financial analyses to be work product, the FTC argues that the documents must be disclosed due to its overriding and compelling need for them to complete the administrative investigation. [#41] at 9-11. The documents, according to the FTC, and the documents cannot be obtained in any other way. Id. at 10. The FTC believes





**D. E-mails Reflecting Requests for Legal Advice or Conveying Requests From Attorneys for Information To Be Used in Settlement Negotiations**

A third category of documents encapsulated by the heading above poses a different issue – the attorney-client privilege on its own.

An example of the FTC's issue with this category of documents is document #724. BIPI asserts attorney-client privilege over this document because it reflects a request by in-house counsel, Bruce Banks, for information that would help inform BIPI in drafting its co-promotion agreement with Barr. Declaration of Pamela L. Taylor, submitted *in camera*, at 39. The FTC takes issue with this on the grounds that the communication was between two non-lawyers, and thus cannot be considered protected by the attorney client privilege. However, communications among employees of a client are still afforded the protection of the privilege, so long as the communications concern legal advice sought or received that was intended to be confidential. See, e.g., Long v. Anderson Univ., 204 F.R.D. 129 (S.D. Ind. 2001) (e-mails between one university employee and another regarding communications with counsel were privileged); Johnson v. Sea-Land Serv. Inc., No. 99-civ-9161, 2001 WL 897185, at \*2 (S.D.N.Y. Aug. 9, 2011) (holding that the privilege "affords confidentiality to communications among clients, their attorneys, and the agents of both, for the purpose of seeking and rendering an opinion on law or legal services, or assisting in some legal proceeding, so long as the communications were intended to be, and were in fact, kept confidential.").

I therefore hold that all e-mails conveying a request for or the provision of legal advice are protected by the attorney-client privilege. Out of the documents submitted for *in camera* review, this would include document #1599, which was already provided in redacted form with the privileged material excised; and document #724, described above.







If all else fails, BIPI will submit the disputed documents to me for *in camera* review and I will resolve them summarily and as quickly as I can.

My ruling as to the specific documents submitted for *in camera* review is set forth in the attached Appendix.

An Order accompanies this Memorandum Opinion.

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**APPENDIX A**

**Documents submitted for *in camera* review**

| <b>CATEGORY</b> |  | <b>DOCUMENTS</b>  |  |  | <b>RULING</b>  |
|-----------------|--|---|--|--|--|
| <b>A)</b>       | Presentations and documents regarding overview of litigation, options available, and/or estimated financial impact of various options for settlement; financial analyses of both the co-promote agreement and various settlement options; summaries of settlement discussions  | 3328<br>1365<br>1366<br>1367<br>1368<br>2921<br>1396<br>1397<br>1344<br>900/901/902<br>2364<br>2918/2919<br>2920/2921 | 928<br>1291<br>1580<br>1984<br>617<br>2250<br>1040/1041<br>1381<br>2364<br>810/811<br>832/833<br>973<br>1290 | 1947<br>233<br>790 <sup>3</sup><br>791<br>2333<br>2387<br>1057/1058<br>1004<br>992<br>2495<br>2946<br>2550<br>2578/2580<br>2983/2984<br>3058 | These documents are protected by the work product and/or attorney client privilege, and are not subject to disclosure. |
| <b>B)</b>       | E-mails, notes, and reports containing: <ul style="list-style-type: none"> <li>• strategic decisions</li> <li>• proposed settlement options and terms</li> <li>• delegation of responsibilities</li> <li>• analysis from executives, prepared for counsel, conveying mental impressions of counsel or strategy for litigation</li> </ul> | 780/781<br>621<br>574/575/576<br>729<br>1007/1008   | 927/928<br>1516 <sup>4</sup><br>2547<br>2540<br>859<br>891<br>1016/1017                                      | 821<br>1947<br>1093<br>3415 <sup>5</sup><br>1001   | These documents are protected by the work product and/or attorney client privilege, and are not subject to disclosure. |

<sup>3</sup> A redacted version of this document was already produced.

<sup>4</sup> It appears from the face of this document that it is notes taken during a conversation with an attorney. If that is the case, and these notes reflect the contents of that conversation, the notes would be privileged. As it is difficult to determine definitively whether or not this is the case, with regards to this document, I instruct BIPI to supplement the privilege log to indicate where and in what context these notes were taken.

<sup>5</sup> The report attached to this e-mail exchange was already produced. The e-

|    |   |              |             |                   |
|----|---|--------------|-------------|-------------------|
| C) | Requests for legal<br>advice or e-mails<br>containing legal<br>advice or opinions | 1599<br>1318 | 2190<br>724 | 2896 <sup>6</sup> |
|----|---|--------------|-------------|-------------------|