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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**MISCELLANEOUS**

## INTRODUCTION

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 earning monopoly profits for several years longer than it otherwise might have, and consumers may pay hundreds of millions of dollars more than they otherwise might have.

To date, Boehringer has not produced to the FTC a single contemporaneous financial analysis of its Aggrenox co-promotion agreement. Those analyses would greatly help answer a central question: Did Boehringer conclude that the value it would derive from this agreement would be fully commensurate with the large sums that it paid Barr? If the answer is no, the documents will provide the Commission with direct contemporaneous evidence that Boehringer used the co-promotion agreement to compensate Barr for delaying its competitive entry.

The district court authorized Boehringer to suppress all of these documents, by pushing the concept of super-protected "opinion work product" to an extreme. Although the court apparently recognized that a document can qualify as opinion

work product only if it "reveals the mental processes or impressions of an attorney," Dkt. 69 at 7 [JA</At>>BDJ  0.04

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

at 236. “Where the context suggests that the lawyer has not sharply focused or weeded the materials,

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 district court stated, and Boehringer reasserts, that all such documents are subject to "opinion work product" super-protection on the theory that "disclosure of any aspect of the financial analyses would *necessarily* reveal [Boehringer] attorneys' thought processes regarding the BIPI-Barr settlement." Dkt. 69 at 12 [JA-___] (emphasis added); *see* Boehringer Br. 36. But that proposition misreads the applicable precedent. An attorney's request for documents does not "necessarily" reveal that attorney's thought processes and convert them into opinion work product. Rather, the documents' contents must somehow pr

Boehringer Br. at 33, they do not even explain what the term "framework" means here, much less suggest how, given Persky's testimony, such "frameworks" might somehow reveal Persky's actual legal opinions. For example, Persky testified that she did not provide legal assumptions, such as odds of success in litigation, to use in the analyses. Dkt. 32, Ex. B Decl. Ex. 19 at 117:2-7 [JA-___]; Dkt. 37, Ex. 4 at 118:3-7 [JA-___], and that her assessment of whether the agreements made sense reflected business, not legal, advice, Dkt. 33, Ex. 2 at 68:19-24 [JA-___]. Boehringer and the district court also utterly fail to explain how profit-and-loss analyses of the Aggrenox co-promotion deal could provide insights into any attorney's legal theories beyond those already acknowledged in Boehringer's own brief.

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and asked the businesspeople to provide her with a "financial analysis" of the co-promotion agreement (*id.* at 127:2-15) [JA-___].[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-___]. It described the documents as "financial analyses," *id.* at 11, 12-13 [JA-___], and "arithmetical calculations," *id.* at 13 [JA-___], 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.* 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. But the district court's observation that the documents make no direct reference to any lawyer's antitrust

[4] Boehringer also cites testimony that Persky asked "Dr. Marlin" for an analysis of the Mirapex patent challenge (*id.* at 120:6-12 [JA-___]). It is the FTC's understanding that, at thaCe.i8006 Twdti com.008 Tw 1.256 03.658.

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 rBr.orrhe s

appraisal of the property.

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, Boehringer could draw this conclusion only if, as it testified before the FTC, it conducts financial analyses when it enters into co-promotion agreements. Dkt. 33, Ex. 3 at 72:19-23 [JA-___]. Yet the district court categorically deemed all such routine analyses to be attorney work product.

That ruling is legally untenable. Boehringer does not deny that it conducted financial forecasts to determine whether the co-promotion agreement was profitable. And it insists that this agreement was "freestanding," having value independent of the parties' patent settlement. Boehringer Br. 43. But Boehringer argues nonetheless that these financial analyses should be withheld anyway because the co-promotion agreement arose in the context of "contentious

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, in the defendant's new commercial real estate development in Connecticut, but only if the Manhattan development-rights settlement is finalized. To evaluate the proposal, the general counsel for the plaintiff

Boehringer's position, that the co-promotion agreement was not "a vehicle to pay Barr not to compete on generic Aggrenox." Dkt. 33, Ex. 2 at 113:3-6 [JA-___]. At the same time, Boehringer seeks to withhold all of the financial analyses of the co-promotion agreement—the very documents that it maintains support its position that the agreement is an economically freestanding business deal. Dkt. 33, Ex. 2 at 127:12-15 [JA-___]; 133:23-134:4 [JA-___]. Courts are appropriately reluctant, however, to allow a party to use privilege claims "to deprive its adversary of access to material that might disprove or undermine the party's contentions." *In re Grand Jury Proceedings*, 350 F.3d 299, 302 (2d Cir. 2003); *see also In re Subpoena Duces Tecum*, 738 F.2d 1367, 1371-72 (D.C. Cir. 1984); *United States v. Nobles*, 422 U.S. 225, 239-40 (1975); FTC Br. 35 n.11. Particularly given that the resolution of work-product disputes properly "turns on a balancing of policy concerns rather than application of abstract logic," *United States v. Textron Inc.*, 577 F.3d 21, 26 (1st Cir. 2009), this Court should prevent Boehringer from inequitably invoking work-product protection to conceal the very documents that

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-___]. This directive, of course, presupposes that the FTC had shown substantial need for this work product. Boehringer has not challenged that conclusion.[10]

Boehringer does not offer any persuasive rebuttal to the FTC's showing of substantial need.[11] The FTC's investigation seeks to examine whether Boehringer agreed to share its monopoly profits on one or two branded drugs with its potential rival, Barr, in exchange for Barr's agreement to delay entry with lower-priced generic products. Among other thingsFfe (t)9 ( 135<a20.325 0 t)9 (he)4 ( F)5 (T)8 (17 (n )r)4 (e)

Although the parties may have reasons to prefer settlements that include reverse payments, the relevant antitrust question is: What are those reasons? If the basic reason is a desire to maintain and to share patent-

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*

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-___]. But as we explained in our opening brief (FTC Br. 45), the district court lacked any basis for judging whether the "arithmetical calculations" and "financial analyses" it reviewed cast light on the highly complex economic issues the FTC is investigating. And this Court has rightly recognized the concerns raised when a district court seeks to make "an *ex ante* determination of what claims, if any, may eventually be pursued by an agency undertaking a broad investigation pursuant to its clear statutory mandate." *Linde Thomson*, 5 F.3d at 1512. Contrary to Boehringer's assertion (Br. 56-57), that recognition in no way represents a departure from the standards for assessing the need for work product.

The district court's blanket dismissal of these documents' antitrust significance also crashes headlong into the realities of antitrust investigations. Such analyses need not, and often will not, contain "smoking guns" (Dkt. 69 at 12 [JA-___]. Indeed, one reason that Congress gave the Commission broad investigative authority is that smoking guns are rare, and antitrust analyses can be economically very complex. *See FTC v. Texaco, Inc.* 555 F.2d 862, 872 (D.C. Cir. 1977) (*en banc*) (investigative power seeks "information from those who best can give it and who are most interested in not doing so"). Again, the co-promotion agreement

analysis attached as Exhibit A to the *Actavis* complaint illustrates how "arithmetical calculations of various potential scenarios," *see* Dkt. 69 at 13 [JA-___], 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.

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