No. 16-5356 and 16-5357 (consolidated)

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

FEDERAL TRADE COMMISSION,
Petitioner/Appellant/Cross-Appellant,

v.

BOEHRINGER INGELHEIM
PHARMACEUTICALS, INC.,
Respondent/Appellee/Cross-Appellant

On Appeal from the United States District Court
for the District of Columbia
No. 1:09-mc-564
Hon. G. Michael Harvey

REPLY AND RESPONSE BRIEF OF THE FEDERAL TRADE COMMISSION

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GLOSSARY

Amici	Chamber of Commerce of the United States of America and Association of Corporate Counsel
Barr	Barr Pharmaceuticals, Inc. (including its wholly-owned subsidiary, Duramed 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-00564 (D.D.C.))
JA	Joint Appendix
FTC	Federal Trade Commission
Persky	Marla Persky, senior vice president, general counsel and corporate secretary of Boehringer

communications are not presumed privileged merely because they were made to or requested by in-house counsel.

As we showed in our opening brief, the district court erred by making that very presumption and not requiring a clear showing from Boehringer that its general counsel, Marla Persky, was acting as a lawyer rather than a businessperson when she requested the documents at issue. That holding was legally wrong and factually untenable. Persky handled both legal and business aspects of the litigation-settlement and co-promotion agreement under FTC investigation. As a senior executive, she was responsible for the "business decision" to settle the case and the business terms of the settlement. Reflecting that business function, Boehringer's privilege log does not state that any of the disputed documents under review were created for the purpose of seeking or providing legal advice even though the log identified other documents, not challenged by the FTC, as having been created for that purpose.

Boehringer's inability to satisfy the elements of a valid privilege claim is unsurprising given Persky's own testimony, which highlighted her business responsibilities. Indeed, after previously reviewing the documents in dispute, this Court found that they showed Persky's role in the deal to be providing "business judgment, not legal counsel." FTC v. Boehringer Ingelheim Pharms., Inc., 778 F.3d 142, 152 (D.C. Cir. 2015) ("Boehringer I"). That record does not support a

"clear showing" that, with respect to the documents in dispute, Persky was acting in a legal capacity and providing legal advice.

Instead of engaging with these facts, Boehringer's brief (amici's brief, too) argues largely against a caricature of the FTC's argument. As Boehringer puts it, the FTC's position is that otherwise privileged documents lose their privilege if they also have a business purpose. In fact, our position is that Boehringer bears a burden to make a clear showing that a corporate lawyer who also serves a business function acted in her role as a lawyer with respect to a given communication made for the purpose of legal advice—and that Boehringer did not meet that burden.

As we detailed in our opening brief, Boehringer failed to prove that for each communication Persky acted in her legal capacity to provide legal advice. Its own privilege log does not even describe the disputed documents as having been created for the purposes of providing legal advice. Boehringer's blanket assertions in correspondence with the FTC and its briefs to the district court fail to connect facts showing Persky's functioning as a lawyer and advising on legal issues to each communication for which Boehringer claims the privilege. Boehringer's ex parte affidavits do not overcome Boehringer's failure of proof. Even the district court kept the affidavits at arm's length in the remand proceeding.

In the absence of the required clear showing that the communication involved Persky's acting in her role as a lawyer providing legal advice, In re

Kellogg Brown & Root, Inc., 756 F.3d 754 (D.C. Cir. 2014), plays no part in the analysis. In-house counsel in *Kellogg* were undisputedly acting as lawyers and the withheld documents undisputedly involved legal advice. This case, by contrast, presents the antecedent questions of whether Persky was acting in her legal or business role and whether or not the communications were made for the purpose of legal advice. *Kellogg* does not address those questions. *Sealed Case* and *Lindsey* do—and they establish that Boehringer has the burden to show clearly that Persky was acting as lawyer and providing legal advice. Boehringer did not do so..]0 1B dE8.4 (ihe)3.6

the large majority of Boehringer's privilege claims. Accepting Boehringer's

I

Kellogg, business purposes also associated with those communications do not strip them of attorney-client privilege. Boehringer's argument is wrong and would flip the burden to show privilege, requiring the FTC to disprove that privilege applies rather than Boehringer to prove that communications are privileged. The argument also rests on a fundamental misreading of *Kellogg* that would dramatically alter this Court's longstanding precedent about attorneys with multiple roles.

1. *Kellogg* applies only after a clear showing that an attorney was acting as a lawyer and that a significant purpose of the communication was legal advice

As shown in our opening brief (FTC Br. 24-29), the district court committed legal error when it concluded that *Kellogg* governed this case before it determined whether Persky acted as a lawyer advising on legal matters or a businessperson advising on business matters. Under this Court's precedents, where corporate counsel also acted in a non-legal capacity, it was Boehringer's burden to clearly show (and the district court to find) that the disputed communications sought Persky's legal advice in her legal role, and not business advice in her business role. *Sealed Case*, 737 F.2d at 99 (citing *SEC v. Gulf & W. Indus., Inc.*, 518 F.Supp. 675, 683 (D.D.C. 1981)). The district court failed to require this showing. The case therefore should at least be remanded. But because Boehringer did not meet its burden of clearly showing Persky's role, the Court should rule on the existing record that Boehringer has not substantiated its claim of privilege. The latter course

is the better one, given that this investigative subpoena dispute has been pending for eight years and counting.

Boehringer's defense of the district court's decision rests on two mistaken premises. First, it caricatures the FTC's argument as a claim "that attorney

showing requirement

settlement of pending litigation *only* from a business standpoint." Boehringer Br. 43. That is the very proposition the Court rejected decades ago when it recognized that common sense also teaches that in-house counsel often have responsibilities "outside the lawyer's sphere." *Sealed Case*, 737 F.2d at 99; *Lindsey*, 158 F.3d at 1270; *see also In re City of Erie*, 473 F.3d 413, 421 (2d Cir. 2007) ("When an attorney is consulted in a capacity other than as a lawyer, as (for example) a policy advisor, media expert, business consultant, banker, referee or friend, the consultation is not privileged."). And that is precisely why established law required Boehringer to make a "clear showing" that in-house counsel was acting "in a professional legal capacity" to provide legal advice. *Sealed Case*, 737 F.2d at 99.

It stretches credulity to conclude, as the district court did, that Persky functioned as a lawyer providing legal advice in every disputed communication. She was a senior vice president and part of Boehringer's executive leadership. She plainly functioned as a businessperson, not a legal advisor, with respect to at least some aspects of the deals under investigation. This Court has already held that questions about whether the agreements under investigation made financial sense were matters of "business judgment," that Persky's work was that of a "layman,"

as lawyer is not protected.'" Lindsey,158 F.3d at 1270 (quoting Restatement (Third) of the Law Governing Lawyers § 122 cmt. c. (Proposed Final Draft No. 1,

1082 (D.C. Cir. 2001) (citation omitted). Blanket or categorical assertions—such as Boehringer's position that all of Persky's communications are privileged because she was general counsel—do not suffice. *See Lindsey*, 158 F.3d at 1270; *cf. Boehringer I*, 778 F.3d at 153 (rejecting categorical conclusion that all work product was opinion work product because in-house counsel requested it in the context of litigation).[3] Although a party need not "detail the contents of each

because it would permit the FTC to "lob[] vague and unparticularized challenges at hundreds of documents at a time." Boehringer Br. 51

In contrast to Boehringer's general claims of privilege, the FTC identified specific documents (Dkt. 32, Ex. A [JA–218-20]), including ones in the in camera sample, and noted recurring deficiencies associated with Boehringer's claims for those documents. Relying on the material provided to the FTC by Boehringer to support its attorney-client privilege claims—the privilege log, correspondence with the FTC, and briefs submitted to the district court—we demonstrated that

privilege to each communication. Despite controlling much of the relevant facts, Boehringer completely failed to do so. There is no reason to believe that it could not have supported each privilege claim, if a factual foundation truly existed.

For their part, amici mischaracterize Kellogg when they assert that a communication-by-

privilege claim is valid. For example, in Sealed Case, the Court examined the content of specific conversations between a corporate president and the general counsel to determine whether they discussed antitrust compliance. 737 F.2d at 101. In Lindsey, the Court considered the content of several specific conversations involving White House counsel, noting that "[a] blanket assertion of the privilege will not suffice." 158 F.3d at 1270. In Gulf & Western Industries, the court examined an attorney's "many roles" and the content of his communications when concluding that "it cannot be assumed that all of his discussions with corporate officials involved legal advice." 518 F.Supp. at 683. Describing the inquiry in County of Erie, the Second Circuit said that "it should be assessed dynamically and in light of the advice being sought or rendered, as well as the relationship between the advice that can be rendered only by consulting with the legal authorities and advice that can be given by a non-lawyer." 473 F.3d at 420-21. It continued, "an attorney's dual legal and non-legal responsibilities may bear on whether a particular communication was generated for the purpose of soliciting or rendering legal advice." Id. at 421 (emphasis added).

3. Boehringer's ***ex parte*** affidavits do not prove that Persky acted as a lawyer providing legal advice

The disputed communications, as described by this Court0 Tc 0 T0hid byid6omt 6(i)8.5ca

matters. FTC Br. 34-40. And those conclusions are supported by Persky's extensive testimony at an

Id. at 153, 158. Judge Harvey addressed the privilege claims, Dkt. 101 at 40-51 [JA–___], but he never cited Boehringer's first two affidavits and his ruling gives no indication that he even considered them. Given his ruling in the remand proceedings

that she was the "lead negotiator" on "business terms" of the various agreements associated with the settlement. Dkt. 37, Ex. 4 at 70:2-12; 71:10-12 [JA–755-56]. Regarding her responsibilities in the negotiations, the FTC asked her directly whether she was providing "business or legal advice," and she responded that "[w]hether [the agreements made] sense from a financial business perspective is business." Dkt. 33, Ex. 2 at 68:19-24 [JA–990]. The FTC challenges application of privilege to those documents. By contrast, when the FTC asked about the purpose of financial analyses of the Aggrenox and Mirapex patent challenges that she requested *before* settlement negotiations began, she testified that their purpose was "to help me assess litigation strategy." Dkt. 37, Ex. 4 at 121:1-8 [JA–778]. The FTC does not challenge application of the privilege to those documents.

Boehringer's later prepared, *ex parte* affidavits do not rebut Persky's earlier, unvarnished testimony. As Boehringer's general counsel, Persky certainly had the experience and knowledge to make clear whether or not she was carrying out her legal responsibilities. Her testimony convincingly shows that when she requested the analyses to support business decisions, she said so, and when she requested analyses to support legal decisions, she also said so. [9]

[9] As for testimony that Persky directed the creation of some documents, Boehringer Br. 45, this Court has held that such direction by itself is an insufficient basis to conclude that the communications reflected legal matters. *Boehringer I*, 778 F.3d at 152.

Nor is Boehringer helped by prior judicial descriptions of the documents. This Court's finding that financial analyses were created "because of" litigation (and thus qualified as work product) does not prove that Persky acted as a lawyer with respect to them. Boehringer Br. at 43 (citing Boehringer I, 778 F.3d at 150). Work product does not necessarily constitute attorney-client communications. Boehringer I, 778 F.3d at 149. The conclusions of Judges Facciola and Harvey are equally unprobative. Boehringer Br. at 44. This Court reversed Judge Facciola's conclusions. Boehringer I, 778 F.3d at 153, 158. And as the FTC is demonstrating in this appeal, Judge Harvey's conclusions regarding Boehringer's attorney-client privilege claims are flawed.

4. The clear showing requirement does not threaten the work of in-house counsel

Boehringer and its amici proffer a parade of horribles that they contend will transpire if the Court enforces its "clear showing" requirement for attorney-client privilege claims involving in-house lawyer-executives. Boehringer Br. 37 ("Lawyers—and particularly in-house counsel—cannot render effective legal advice without considering the business aspects of any variety of situations, including proposed mergers or acquisitions, contract negotiations, internal investigations of potential wrongdoing, or, as in this case, complex patent settlement agreements with potential antitrust implications."); Amici Br. 14-21 ("FTC's approach would upend settled law and undermine the ability of in-house

counsel to function.").[10] Their doomsaying is unwarranted, particularly in light of the fact that the FTC's position has been the settled law of this Circuit (and others) for decades.

Boehringer's and its amici's own examples show why. In each example, the lawyer is clearly acting in her legal capacity providing legal services to the corporation. Boehringer Br. 37; Amici Br. 14-21. In that situation, confidential communications with the lawyer for the purpose of obtaining legal assistance remain privileged, even if the communications also concern business 0 Td ((unic)(n if7lhTj 0.

Cases that determine whether specific communications are privileged rebut the contention that the requirement to make such determinations is "wholly unworkable." Amici Br. 14. In Gulf & Western Industries, the district court examined the various roles performed by the company's general counsel, stating that it could not "assume[] that all of his discussions with corporate officials involved legal advice." 518 F.Supp. at 683. In some communications involving legal issues, the court found that the lawyer expressed his views as a corporate director, not in his legal capacity. Id. In other instances, the lawyer's advice addressed business issues, not legal issues. Id.

Similarly in Lindsey, this Court examined the specific role played by the White House counsel before it determined whether his advice was legal or non-legal on specific matters. 158 F.3d at 1270.[11] In King Drug Co. of Florence, Inc. v. Cephalon, Inc., No. 2:06-cv-1797, 2011 WL 2623306 (E.D. Pa. July 5, 2011), the court reviewed numerous

dispute here, one document involved a lawyer's communication of information about possible generic launch dates. The court had no trouble engaging in the analysis.[12]

This Court's examination of the communications at issue in Sealed Case, 737 F.2d at 99-100, is especially illuminating. The Court reviewed the specific content of in-house counsel's communication with an executive and concluded that the lawyer was acting in his legal role as general counsel and his advice addressed the company's antitrust compliance. Id. at 101.

I, 778 F.3d at 151 (citation omitted). "[T]here must be some indication that the lawyer sharply focused or weeded the materials" and that its production poses "a real, nonspeculative danger of revealing the lawyer's thoughts." Id. at 152 (citations and internal quotation marks omitted).

The Court provided two additional guidelines for evaluating opinion work product claims. First, disclosure of the document must reveal something additional about the attorney's thoughts beyond what is already known. "There is no real, nonspeculative danger of revealing the lawyer's thoughts when the thoughts are already well-known." Id. at 152 (internal quotation marks and citation omitted). Thus, for example, if a document reveals only an attorney's "general interest in the financials of the deal," it is not protected because "such interest reveals nothing at all." Id. Second, the impressions revealed must be non-

business people and often not even sent to Persky, could reveal her (or other attorneys') mental impressions.

In addition to explaining the correct legal standard, the Court reviewed the disputed documents and concluded that many of them do not reveal protected mental impressions. "Much of what the FTC seeks is factual information produced by non-lawyers that, while requested by Ms. Persky and other attorneys, does not reveal any insight into counsel's legal impressions or their views of the case." Id. at 152. To the extent that Persky provided information or frameworks for the documents, the Court determined that many were "obvious or non-legal in nature" and "have no legal significance." Id. at 153. "For example, in several documents, the 'frameworks' provided by counsel are simply time frames for requested financial data[.]" Id. Finally, the court indicated that many documents related primarily to business—rather than legal—concerns. Id. at 152 ("[A]s Ms. Persky observed in her testimony before the FTC, questions about whether the agreements made financial sense were a matter of business judgment, not legal counsel.").

2. The district court correctly applied the standards established in *BoehringerI*

On remand, the district court correctly applied the foregoing standards. It concluded that most of the business and financial analyses were fact, not opinion, work product. The court found that Persky's involvement, if any, in these analyses was akin to what "any reasonable businessperson in her position would analyze in

this situation." Dkt. 101 at 34 [JA–___].[13] "Persky's mental impressions, if any, in these analyses were no more than a layman would have in the circumstances and do not reveal 'something of legal significance.'" Id. at 35 (quoting Boehringer I, 778 F.3d at 152-53) [JA–___]. It did not matter whether Persky or businesspeople selected variables reflected in the documents. "Persky's due diligence as a data

Boehringer attacks the district court's decision on several grounds, but the arguments are unavailing. First, Boehringer proposes that to qualify as opinion work product "[a] document need not express an attorney's final, legal advice," but will be protected if it reveals "[t]he process of getting to the final advice," especially when the advice concerns compliance. Boehringer Br. 53. But while a lawyer's interim legal impressions surely should be protected as opinion work product, the documents here contained no such impressions and the district court did not violate that precept. To the contrary, after reviewing the documents, it concluded that they "give no indication that they were prepared for use in a discussion of antitrust liability." Dkt. 101 at 38 [JA–___]. In other words, they revealed no legal advice or mental impressions, preliminary, interim, or final.[14]

Next, Boehringer contends that, by directing business people to create the financial analyses, Persky was, in fact, "culling information" in a way that revealed her legal impressions. Boehringer Br. 54. The argument fails from the get-go, as this Court has already rejected it. Boehringer I held that "an attorney's mere request for a document [is not] sufficient to warrant opinion work product

[14] The cases cited by Boehringer (Boehringer Br. 53-54) are unhelpful, since they do not address the question of how to differentiate fact work product from opinion work product. See Concord Boat Corp. v. Brunswick Corp., No. OR-C-95-781, 1997 WL 34854479, at *2 (E.D. Ark. June 13, 1997); Nguyen v. Excel Corp., 197 F.3d 200, 210-11 (5th Cir. 1999); United States v. Nat'l Assoc. of Realtors, 242 F.R.D. 491, 496 (N.D. Ill. 2007); and Beloit Liquidating Trust v. Century Indemnity Co., No. 02 C 50037, 2003 WL 355743, at *13 (N.D. Ill. Feb. 13, 2003).

protection." 778 F.3d at 152. Undeterred, Boehringer suggests that *Upjohn Co. v. United States*, 449 U.S. 383, 390-91 (1981), supports its claim. That case, however, had nothing to do with work product or the distinction between fact and opinion work product. It concerned only attorney-client privilege. *Hickman v. Taylor*, 329 U.S. 495, 511 (1947), is of no more help here; the language Boehringer quotes simply describes why the law protects attorney work product. *Id.* *Hickman* does not show that Persky's requests for financial analyses revealed her legal impressions, especially given the district court's conclusion (echoing this Court's earlier one) that the financial variables selected by Persky were "ones which any reasonable businessperson in her position would analyze in this situation." Dkt. 101 at 34 [JA–___].

Finally, Boehringer relies heavily on Persky's second *ex parte* affidavit to contest the district court's conclusions. Boehringer Br. 55-57. That document is of no help because the district court rejected its admission (properly, as discussed below) and held in any event that it "undermines rather than strengthens Boehringer's arguments." Dkt. 101 at 35 [JA–___]. With or without the second Persky affidavit, the court found that "[n]one of the documents reveal how she analyzed the data she requested or what data or scenarios she presented to her client." *Id.* at 36 [JA–___]. It concluded "she did not 'sharply focu[s] and wee[d]'

Boehringer Br. 56, such use does not prove that the underlying documents themselves reflect her own "weeding" of the materials.

Boehringer also claims that Persky "considered whether potential settlement options … were justified in light of the litigation uncertainties that they would eliminate." Boehringer Br. 55. Assuming for the sake of argument that Boehringer has correctly described Persky's analysis, the documents themselves do not reveal

Barr] make sense from a financial business perspective is business." Dkt. 32, Ex. B Decl. Ex. 19 at 68:19-24 [JA–596]. It is hardly surprising that this Court held in Boehringer that "as Ms. Persky observed in her testimony

would come to market and how would that impact our sales and profitability." Dkt. 33, Ex. 5 at 60:5-19 [JA–1026]. Another testified that in analyzing the impact of generic entry on Mirapex, he had done "quite a bit of scenario planning around different timing of [generic] entry" to "understand the impact of different scenarios in the marketplace on the business. From a sales and investment standpoint." Dkt. 33, Ex. 4 at 28:16-24 [JA–1014]. And Boehringer's financial executives in charge of the co-promotion analyses characterized these analyses as "quantif[ying] the Duramed copromotion and the impact to the business" and "taking a look at the parameters of the copromotion and what that would mean to our P&L." Dkt. 33, Ex. 3 at 21-22 [JA–1005].

security, id. (citing Lykins v. U.S. Dep't of Justice, 725 F.2d 1455, 1465 (D.C. Cir. 1984)) [JA–___]. As this Court has held, "a court should resort to in camera review only in limited circumstances." Labow, 831 F.3d at 533 (citation omitted). The district court thus properly ruled that the interest in open proceedings was not "outweighed" by Boehringer's private business interests, which are not "on par with national security or grand jury secrecy." Dkt. 101 at 29 [JA–___].

Boehringer suggests that ex parte affidavits would be appropriate in any attorney-client privilege dispute because the "privilege is an extremely important societal interest that itself justified admitting an in camera declaration." Boehringer Br. 57. In support of this proposition, Boehringer cites this Court's decisions in In re Miller, 438 F.3d 1141, 1151 (D.C. Cir. 2006), and American Immigration Council v. U.S. Department of Homeland Security, 950 F. Supp. 2d 221, 224 (D.D.C. 2013),[16] but it does not even acknowledge that those precedents involved the very "limited circumstances" where ex parte affidavits may be appropriate, namely, national security and grand jury secrecy. Boehringer has not shown that the societal interest in the attorney-client privilege rises to that level. Discovery disputes involving the attorney-client privilege are common, and a rule that

[16] Boehringer also cites some district court decisions that do not address this Court's precedents on the topic, are non-binding, and are unpersuasive. Boehringer Br. 58 (citing FPL Group, Inc. v. IRS, 698 F. Supp. 2d 66, 84 (D.D.C. 2010); Alexander v. FBI, 192 F.R.D. 12, 16 n.3 (D.D.C. 2000)).

permitted ex parte affidavits every time would violate the "strong public interest in open, adversarial proceedings," Dkt. 101 at 29 (citing Armstrong, 97 F.3d at 580) [JA–___].

B. Boehringer May Not Relitigate *Boehringer I*

1. The earlier decision is law of the case and law of the circuit

The doctrines of law-of-the-case and law-of-the-circuit both make it inappropriate for a panel of this Court to reconsider the earlier decision. See LaShawn A. v. Barry, 87 F.3d 1389, 1395 (D.C. Cir. 1996). The law-of-the-case doctrine provides that "the same issue presented a second time in the same case in the same court should lead to the same result." Id. at 1393. That rule flatly precludes Boehringer from relitigating the Court's earlier decision, which now binds the remainder of this case, as Boehringer recognizes. Boehringer Br. 59 n.7.

The law-of-the-circuit doctrine is based in legislation and the structure of the federal courts of appeals and means that a decision of a panel is a decision of the court. Barry, 87 F.3d at 1395. Accordingly, "[o]ne three-judge panel … does not have the authority to overrule another three-judge panel of the court"; only the en banc court may do so. Id. (citations omitted). Were it otherwise, "the finality of … appellate decision would yield to constant conflicts within the circuit." Id. (citation omitted).Thus, even if the panel that hears this case disagrees with the holding Boehringer I, the decision nevertheless remains binding.

2. *Boehringer I* does not conflict with the decisions of any other court

Even if Boehringer could challenge the Court's first decision, its challenge would fail. This is the fourth time Boehringer has tried to convince an appellate court that Boehringer I conflicts with decisions of other courts. This Court twice rejected Boehringer's arguments: when it denied Boehringer's request to stay the mandate in Boehringer I[17] and its petition for rehearing[18] of that decision. Boehringer's arguments were rejected a third time when the Supreme Court denied Boehringer's petition for certiorari.[19] The fourth go-round fares no better.

There is no split between Boehringer I and United States v. Adlman, 134 F.3d 1194 (2d Cir. 1998). See Boehringer Br. 59-61. Boehringer I addressed the distinction between fact work product and opinion work product. Adlman did not address that issue at all. It considered whether a document is work product in the

[17] See Motion to Stay Issuance of the Mandate in No. 12-5393 (Jun. 11, 2015); Reply in Support of Motion to Stay Issuance of Mandate, No. 12-5393 (Jun. 29, 2015); Order Denying Motion to Stay Issuance of Mandate, No. 12-5393 (Jul. 2, 2015).

[18] See Petition for Panel Rehearing or Rehearing En Banc at 9, No. 12-5393 (Apr. 6, 2015); Order Denying Panel Rehearing and Order Denying Rehearing En Banc, No. 12-5393 (Jun. 2, 2015).

first place. *See* 134 F.3d at 1195-1203; *see id.* at 1197 ("This case involves [the] question … whether Rule 26(b)(3) is inapplicable to a litigation analysis prepared by a party or its representative … .") (emphasis added).

Boehringer's claimed split is especially hollow because it seriously misstates the Court's earlier opinion. It claims that the Court held that "lawyer's thoughts relating to financial and business decisions" are not opinion work product, whereas *Adlman* held that a "business-related" purpose did not negate work product status. Boehringer Br. 59. Boehringer is once again quoting selectively from prior rulings. In fact, *Boehringer I* held that "the lawyer's thoughts relating to financial and business decisions are not opinion work product when she is simply parroting the thoughts of the business managers." 178 F.3d at 153 (emphasis added). Thus, even if *Adlman* had addressed fact vs. opinion work product, there still would not be conflict.

There likewise is no split between this Court and other circuits regarding the "substantial need" standard. S73 0 Td [(i)(be)3 3.598 CTJ 1(oe)3.5(m)212(g t)8.5(o)8.7(f)

it is required. And in any event, Boehringer fails to explain how the financial analyses sought by the FTC would not meet the J-M standard of having "great

CONCLUSION

In the FTC's appeal, the judgment of the district court should be reversed. In Boehringer's appeal, the judgment of the district court should be affirmed.

Respectfully submitted,

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July 17, 2017

/s/ Mark S. Hegedus
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CERTIFICATE OF COMPL IANCE AND SERVICE

I certify that the foregoing brief complies with Federal Rule of Appellate Procedure 32.1(e)(2)(A)(i) in that it contains 10,713 words.

I further certify that copies of the foregoing brief were served upon the following counsel of record, via the Court's CM/ECF system, on the 17th day of July, 2017.

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