Nos. 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-Appellee,

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

BRIEF OF THE FEDERAL TRADE COMMISSION

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FINAL

CERTIFICATE AS TO PARTIES, RULINGS

GLOSSARY

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

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INTRODUCTION

This case involves a recurring, serious problem that can arise when companies use executives who are also lawyers to negotiate business deals. If a deal becomes subject to a government investigation or litigation, companies may improperly rely on the incidental fact that the negotiator was a lawyer to make overly broad privilege claims covering virtually all documents related to the deal, including business and financial analyses showing why the company entered into it. Often, however, the "lawyer" acted as a businessperson, not a legal advisor, and the documents concern business matters, not legal ones. A district court therefore must carefully examine the precise role played by the lawyer/businessperson with regard to each communication before it can resolve the claim of privilege. Otherwise, companies may use in-hd tha.5(ga) bs auscimo6aitivs

the court did not require Boehringer to show that Marla Persky, its senior vice president, general counsel, and corporate secretary, acted in her capacity as an attorney with respect to the disputed documents. Instead, the court assumed that the general counsel sought each document at least in part to provide legal advice in her capacity as a lawyer, and it sustained all the claims of privilege.

That was reversible error. Indeed, this Court held in an earlier round of this case involving the very same documents that they concerned "questions about whether the agreements made financial sense" which "were a matter of business judgment, not legal counsel." *FTC v. Boehringer Ingelheim Pharms., Inc.*, 778 F.3d 142, 152 (D.C. Cir. 2015), *reh'g denied* (June 4. 2015), *cert. denied*, 136 S. Ct. 924 (2016). After reviewing the documents *in camera*, the Court determined that the general counsel's role was, in many cases, that of a "layman," *id*. at 153 (internal quotation marks and citation omitted), and that many of the documents contained nothing of "legal significance," *id*. Such findings underscore why the district court should have required Boehringer to show that the documents reflected Persky's acting as a lawyer and providing legal advice; instead, it accorded categorical protection to all documents created by her or at her request simply because she was general counsel.

This Court should reverse the district court's judgment and hold that Boehringer did not clearly show that each communication was made to obtain legal

advice from its general counsel on matters that required her professional skill as a lawyer. It should direct the district court to enter an order requiring Boehringer to produce the disputed documents subject to this appeal within 30 days, and remand the case so that the district court may oversee any proceedings needed to address Boehringer's application of this Court's rulings to the remaining documents.

JURISDICTION

The district court had subject-matter jurisdiction pursuant to 15 U.S.C. § 49 (authorizing district courts to enforce FTC subpoenas) and 28 U.S.C. §§ 1331, 1337, and 1345. On September 27, 2016, the district court entered an order that resolved all claims in this case, granting in part and denying in part the FTC's subpoena enforcement petition. Dkt. 101, 102 [JA–1179-1230]. The Commission filed a timely notice of appeal on Novemu1.4(u13.7(4 Tc 0.004 Tw 6.l5(i)84)]TJ 0.3(11)-8.36.

by the attorney-client privilege simply because the communications were made to or by an attorney and without regard to whether she sought or made them in her role as a lawyer advising on legal matters.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceeding, and Prior Dispositions

On February 5, 2009, the FTC issued a subpoena *duces tecum* to Boehringer seeking documents relevant to an investigation into whether Boehringer unlawfully paid Barr Pharmaceuticals, Inc. ("Barr") not to launch competing generic versions of brand-name drugs as part of a patent litigation settlement. After Boehringer failed to comply with the subpoena, 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].[1]

Before the district court, the FTC challenged, *inter alia*, Boehringer's refusal to produce hundreds of financial analyses and other similar documents based on claims of attorney-client privilege and the work-product doctrine. On September 27, 2012, the district court held that all of the withheld financial analyses prepared in connection with the settlement of the patent litigation—including all analyses

[1] The first three volumes of the joint appendix in this appeal have the same content and pagination as the appendix in the prior appeal. Pleadings and exhibits

related to the business agreement that Boehringer entered into with Barr at the time of settlement—

opinion work product while the remainder were only fact work product. But the court also concluded that most of the financial analyses found in those documents nonetheless were privileged attorney-client communications. Because the company

Reverse-payment settlements arise in the context of the Drug Price Competition and Patent Term Restoration Act of 1984 ("Hatch-Waxman Act"), Pub. L. No. 98-417, 98 Stat. 1585, a regulatory framework established by Congress to encourage generic drug entry into the market. When a company seeks approval from the Food and Drug Administration to market a generic version of a brand-name drug before expiration of a patent covering that drug, it 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 generic drug companies to challenge the validity of pharmaceutical patents. *See Actavis*, 133 S. Ct. at 2234. Once a generic company files a Paragraph-IV certification, the patent holder may sue immediately for infringement, without waiting for the generic applicant to market its product. *See* 35 U.S.C. § 271(e)(2).

When the litigants settle the patent lawsuit using a reverse-payment settlement, the alleged generic infringer agrees not to enter the market for a period of time, and in return the patent holder "pay[s] the alleged infringer, rather than the other way around," the way patent litigation is ordinarily settled. *Actavis*, 133 S. Ct. at 2227. Reverse-payment settlements are anticompetitive if, in economic reality, the brand-name company shares its monopoly profits with the potential generic competitor to prevent the risk of generic competition. *Id.* at 2236; *see also*

12 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 2046c, at 338-47 (3d ed. 2012).

The Supreme Court held in *Actavis* that the antitrust analysis of reverse-payment settlements should focus on the size of the payment and its potential justifications. 133 S. Ct. at 2236-2237. A reverse payment may not raise antitrust concerns if it "amount[s] to no more than a rough approximation of the litigation expenses saved through the settlement," or if it constitutes "compensation for other services that the generic has promised to perform." *Id.* at 2236. Such compensation does not necessarily take the form of explicit cash payments; instead, the settling firms can bundle the payment into a separate business deal executed simultaneously with the settlement. Thus, when the FTC investigates drug-patent-litigation settlements, it often seeks companies' contemporaneous internal financial analyses and business forecasts to determine whether the branded firm has compensated the generic firm for abandoning its patent challenge and agreeing to stay off the market.

Boehringer held patents on the two branded products at issue here: Mirapex, which treats the symptoms of Parkinson's Disease, and Aggrenox, which can reduce the risk of stroke. Dkt. 1-1 at 3 [JA–22]. After Barr filed Paragraph-IV certifications for Mirapex in 2005 and Aggrenox in 2007, Boehringer promptly

filed in the United States District Court for the District of Columbia a petition to enforce the subpoena. Dkt. 1-4 at 1-20 [JA–47-66].

Boehringer claimed attorney-client privilege or work-product protection with regard to 3420 documents. *See* Dkt. 32, Ex. B at 5 [JA–226]; Dkt. 32, Ex. B. Decl. Ex. 17 at 1 [JA–562]. Based on Boehringer's descriptions in its privilege log and the sworn testimony of Boehringer's personnel taken at investigational hearings (essentially depositions taken during the investigation), the FTC challenged 631 of those claims. Dkt. 69 at 4 [JA–147]. In particular, the agency challenged Boehringer's attorney-client privilege claims over many business and financial analyses that were largely not created by (or even sent to) lawyers, addressed only business matters, and did not appear to have been created for the purpose of legal advice. Dkt. 32 at 21-22 [JA–209-210]; Dkt. 33 at 15-17 [JA–960-62].[3]

supported the FTC's argument: No entry concerning a disputed document in the sample states that the communication was made for the purpose of seeking or providing legal advice.[5]

Although Boehringer now maintains that the disputed documents were prepared at Persky's request, the privilege log indicates that she authored only two and received just nine of them.[6] Regardless, the record showed that, even if she requested the disputed documents, Persky's role was that of a business executive, not a lawyer providing legal advice. She testified that she served as Boehringer's lead negotiator on the "business terms" and "the broad economic arrangement" for "all of the agreements," including the "key business terms of the co-promotion agreement." Dkt. 37, Ex. 4 at 70:2-12, 71:10-12 [JA–755-756]. She did not serve as patent litigation counsel but rather was responsible for the economic and business terms of the agreements. Dkt. 37, Ex. 4 at 16:18-20:40 [JA–739-741]; *id.* at 70:8-22 [JA–755]. She also testified that the decision to enter that agreement was a "business decision" that had to make sense from a "financial business perspective." Dkt. 33 Ex. 2 at 67:16-22, 68:6-16 [JA–989-990]. It is clear that she requested the disputed documents to assist her in her role as lead business

[5] The privilege log entries for the disputed documents subject to review in this appeal are identified in the appendix at the end of this brief. For eight of these entries, Boehringer subsequently sought to expand its claims while the parties were preparing the *in camera* sample. We address that effort below in n.12 *infra*.

[6] *Id.*

negotiator. Dkt. 37, Ex. 4 at 70:2-12, 71:10-12 [JA–755-756]. As she testified repeatedly, she requested "financial information," Dkt. 37, Ex. 4 at 113:11-116:1 [JA–772

role was to "quantify the [Aggrenox] copromotion," which entailed evaluating "the financial impact to [Boehringer]'s P&L, profit and loss statement." Dkt. 32, Ex. B Decl. Ex. 3 at 21:6-22:16 [JA-242-43]. 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. 20 at 48:7-9 [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. Dkt. 32, Ex. B Decl. Ex. 18 at 7 [JA-577].

Despite Boehringer's insistence that it had provided all non-privileged ordinary course financial analyses, Dkt. 69 at 10 [JA–153], Boehringer produced no financial analyses of the co-promotion business deal in response to the FTC's subpoena. Boehringer withheld every single financial analysis of this "arms-length business arrangement."

(2) Non-legal business documents analyzing settlement options.

Boehringer's privilege log describes over 300 documents as "regarding" or "prepared as a result of" the patent litigation. They were prepared by non-lawyers and circulated to non-lawyer business executives. The log s

The district court further concluded that the "factual inputs" provided by Persky when she requested the reports "cannot be reasonably segregated from the analytical outputs," and that disclosing "any aspect" of the analyses therefore would shed light on the nature of Persky's request. Dkt. 69 at 12 [JA–155]. Having classified all of the financial analyses as opinion work product, the court ruled that the FTC had not demonstrated an "overriding need" to discover such documents. Dkt. 69 at 12-13 [JA–155-156] (citing *Dir., Office of Thrift Supervision v. Vinson & Elkins, LLP*, 124 F.3d 1304, 1307 (D.C. Cir. 1997)).

Because the district court upheld Boehringer's work-product claims, it did not rule separately on any additional claims of attorney-client privilege that Boehringer made for the same documents. *Boehringer*, 778 F.3d at 148.

4. The prior appeal

On appeal, this Court affirmed in part and reversed in part. *Boehringer*, 778 F.3d 158. After *in camera* review of the disputed documents and *ex parte* affidavits, the Court reversed the district court's holding that all of the disputed documents qualified as opinion (rather than fact) work product. *Id.* at 151-53. The Court explained that, "not every item which may reveal some inkling of a lawyer's mental impressions … is protected as opinion work product." *Id.* at 151. Rather, "[o]pinion work product protection is warranted only if the selection or request reflects the attorney's focus in a meaningful way." *Id*. In this case, many of the

financial documents contained only "factual information produced by non-lawyers that, while requested by Persky … and other attorneys, does not reveal any insight into counsel's legal impressions or their views of the case." *Id.* at 152. Often, Persky's input amounted to "simply time frames for requested financial data—for example, forecasting in x-month intervals"hs inp—l och tnegs vhnc ficned fo "d finn-0.005 470c

The Court stated that on remand the district court "should determine which of the sampled documents may be produced, in full or in redacted form, as factual work product." *Id.* at 158. It also instructed the district court to determine whether attorney-client privilege provides a separate bar to discovery. *Id*.

5. The remand proceedings

On remand, the district court concluded that most of the business and financial analyses were fact, not opinion, work product. The court found that n8004 d.7(di)8.5(s)5(ha)12.1 coinv fveled as f

lawsuit." *Id.* at 47 [JA–1225]. Even though the "documents do not reflect express requests for or provision of legal advice," *id.*, the court held that they had "prevalent legal overtones" given the circumstances of their creation. *Id.* at 47-48 [JA–1225-26]. Accordingly, "one of the significant purposes of these communications was to report on facts gathered at the request of Persky and other Boehringer counsel for the purposes of providing legal advice." *Id.* at 48-49 [JA–1226nt lent v1 Tc 0 Tc2S2((t 6-31.957 -2.291 Td e 0 Td -)12.1(ts)8.7 [(16Er)1se)12.1(l f)12

The court failed to analyze whether Persky acted as a lawyer or as a businessperson when she directed the creation of the disputed documents. Instead, it wrongly determined from the "context" of the documents that this Court's decision *In re Kellogg*, 756 F.3d 754, is "on all fours" with this case and therefore dictated the outcome. Not so. The rule announced in *Kellogg*—that communications qualify as privileged attorney-client communications if "a primary purpose" of the communication was legal advice—can only apply *after* the proponent of the privilege makes a "clear showing" that the communication was made to a lawyer acting in her legal capacity. In *Kellogg*, in-house lawyers were undisputedly acting as lawyers; the Court therefore did not address the central question presented here: whether a lawyer-executive acted in a business capacity and not as a lawyer. Persky, Boehringer's in-house lawyer, was also the lead negotiator for the business terms of the co-promotion agreement and settlement. As this Court previously observed, the financial analyses she asked for would have been requested by any competent negotiator. The mere fact that this negotiator happened also to be a lawyer does not make the documents privileged. Thus, reflexively applying *Kellogg* without examining Persky's precise role with respect to the documents in dispute was error.

As a result of its erroneous reliance on *Kellogg*, the district court wrongly failed to require that Boehringer make a clear showing that Persky sought or

received each of the disputed communications in her capacity as lawyer for purposes of providing legal advice, as the law of privilege requires. *See In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir. 1984). Because Persky acted as both lawyer and business executive, Boehringer's burden to prove which hat she wore was important and substantial. The company could not satisfy its burden with categorical claims or conclusory statements, but that is all that Boehringer offered. Its privilege log entries for the disputed documents now before the Court do not even claim that the communications involved legal advice. Such a paltry record does not show clearly and conclusively that the communications involved Persky in her capacity as a lawyer providing legal services.

Given this failure of proof, it is not enough to rely, as the district court did, solely on "context"—that Persky was involved in settling litigation. Businesspeople also serve that function, particularly when a purely business arrangement, like the co-promotion agreement, is part of the settlement. Judicial findings throughout this case, both in this Court and in the district court, show that Persky functioned at least some of the time as a typical business executive and that she requested many documents in that capacity and not in her role as a lawyer. The same findings also describe the content of the disputed communications, which plainly addressed business and financial matters.

lawyer-executive, used the documents at issue in her functions as a lawyer advising on legal matters rather than a businessperson. In fact, prior findings by both this Court and the district court plainly demonstrate that, with respect to the documents at issue, she acted as a business negotiator.

The district court's approach has troubling implications for government investigation of corporate wrongdoing. It would allow companies under scrutiny to shield important, but non-privil//u4 Tw 10.37egotiator

In *Kellogg*, the company in-house attorneys investigated allegations of government contracting fraud. A former employee filed a False Claims Act lawsuit and sought discovery of documents related to the internal investigation. The company claimed that the documents were protected by attorney-client privilege. The Court held the documents protected because the "investigation was conducted under the auspices of [the company's] in-house legal department, *acting in its legal capacity*." *Kellogg*, 756 F.3 at 757 (emphasis added). There was "no serious dispute that one of the significant purposes of [the company's] internal investigation was to obtain or provide legal advice." *Id.* at 760.

It is an entirely different circumstance when an in-house lawyer acts in a non-legal business role. A general counsel who also serves as a corporate vice president has "certain responsibilities outside the lawyer's sphere" and "[t]he [c]ompany can shelter [that counsel's] advice only upon a clear showing that [she] gave it in a professional legal capacity." *In re Sealed Case*, 737 F.2d at 99. Thus, "[w]here one consults an attorney not as a lawyer but as a friend or a *business advisor* or banker, or *negotiator*, … the consultation is not professional nor the statement privileged." *In re Lindsey*, 158 F.3d 1263, 1270 (D.C. Cir. 1998) (emphasis added). Because in *Kellogg* the company's in-house counsel were

privilege applies when lawyers act as businesspeople or how to distinguish between the two capacities.

The district court thus put the cart before the horse by applying *Kellogg* without first determining whether Boehringer had proven that Persky was acting as a lawyer when she asked for the disputed documents. Persky, Boehringer's senior vice president, general counsel, and corporate secretary, led negotiations of the business terms of the Aggrenox co-promotion agreement and patent litigation settlements. Dkt. 37, Ex. 4 at 70:2-12, 71:10-12 [JA–755-756]. As this Court noted, Persky engaged in "both legal and business activities," including "evaluating and negotiating the business terms of the settlement." *Boehringer*, 778 F.3d at 146. Persky testified that these kinds of "questions about whether the agreements made financial sense were a matter of business judgment, not legal counsel." *Id.* at 152. Indeed, this Court previously observed that many of the withheld documents related only to Persky's "general interest in the financials of the deal" and that one "would expect a competent negotiator to request financial analyses like those performed here." *Id.* Had these same analyses been requested by a non-lawyer negotiator, they would not be privileged. Given Persky's dual roles, controlling Circuit precedent required the district court to determine whether she made or received any of the communications in her capacity as a businessperson rather than her role as in-house counsel. It did not do so.

The "context" of the case—settlement of litigation—does not salvage the district court's approach. As explained in greater detail in Part II.B below, the court itself suggested that it did not believe Persky was acting as a lawyer dispensing legal advice with regard to the analyses contained in the disputed documents. The court concluded, for example, that "Boehringer's documents themselves give no indication that they were prepared for use in a discussion of antitrust liability," Dkt. 101 at 38 [JA–1216], and that "the documents do not reflect express requests for or provision of legal advice." Dkt. 101 at 47 [JA–1225]. This Court also determined that Persky acted as a businessperson and not as a lawyer with respect to many of the documents, in some cases merely "parroting the thoughts of the business managers." *Boehringer*, 778 F.3d at 153. On that record, and regardless of the context in which these documents were created, the district court needed to determine whether Boehringer had proven that Persky was acting as a lawyer, rather than a businessperson, when she requested each document.

The district court's categorical, "context"-based approach would dramatically expand the attorney-client privilege. Any time a company's general counsel negotiates the business terms of an agreement, all of the information requested by that counsel—including basic financial analyses like the ones at issue here—would be privileged. Yet, if a non-lawyer negotiated the business terms and

communications made in the context of litigation or even a specific dispute." *Coastal States Gas Corp. v. Dept. of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980).

Second, the district court opined that, like the plaintiff in *Kellogg*, the FTC could pursue the withheld facts on its own and "is perfectly capable of analyzing the same litigation and settlement outcomes Boehringer considered." Dkt. 101 at 50 [JA–1228]. This Court has already rejected that view, explaining that "although Boehringer asserts that the FTC possesses equivalent documents or could reproduce similar analyses on its own, none of these arguments [is] persuasive." *Boehringer*, 778 F.3d at 157-58. In fact, the Court credited the district court's earlier observation that "Boehringer's contemporaneous financial evaluations provide unique information about Boehringer's reasons for settling in the manner that it did." *Id.* at 158 (citations omitted).

II. BOEHRINGER DID NOT CLEARLY SHOW THAT THE DOCUMENTS WERE PRIVILEGED

Because the district court short-circuited the process by relying incorrectly on *Kellogg*, it did not conduct a proper privilege analysis. It failed to assess whether Boehringer had shown that the communications involving Persky were made in her capacity as a lawyer providing legal advice, and instead wrongly determined categorically that all communications sought by Persky were privileged because of their context. The court's categorical approach was legal error, and its judgment cannot be squared with judicial findings and record evidence showing

that many of the business and financial analyses contain only non-legal, factual information related to "counsel's general interest in the financials of the deal," *Boehringer*, 778 F.3d at 152. Communications that neither seek nor provide legal advice are not privileged simply because counsel asked for them, even if she may have provided legal advice on other issues during negotiations leading to the agreements.

A. Boehringer Did Not Clearly Show That Persky Acted as a Lawyer Providing Legal Advice

The attorney-client privilege protects "[c]onfidential disclosures by a client to an attorney made in order to obtain legal assistance … ." *Fisher*, 425 U.S. at 403

logic of its principle." *In re Lindsey*, 158 F.3d at 1272 (internal quotation marks and citations omitted).

Boehringer has the burden to demonstrate that the privilege applies. *FTC v. TRW, Inc.*, 628 F.2d 207, 212 (D.C. Cir. 1980). And that burden is even higher when it comes to communications involving an in-house counsel executive with "responsibilities outside the lawyer's sphere." *In re Sealed Case*, 737 F.2d at 99. In that circumstance, "[t]he Company can shelter [her] advice only upon a clear showing that [she] gave it in a professional legal capacity." *Id.*; *see also* 1 Paul R. Rice, *Attorney-Client Privilege in the United States*, § 7:30 at 1313 (2016) (hereinafter 1 Rice, "*Attorney-Client Privilege*") ("The presumption that the client sought legal advice may not operate in the context of in-house counsel particularly when the person holding that position also holds an executive position within the client company."). Because Persky served as both a corporate executive and in-house counsel, Boehringer needed to make a specific, "clear showing" that Persky sought or received each of the disputed communications in her capacity as a lawyer for purposes of providing legal advice—not as a business negotiator seeking to

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communication for which it is asserted." *United States v. Legal Servs. for N.Y. City*, 249 F.3d 1077, 1082 (D.C. Cir. 2001) (citation omitted). It must prove each element "conclusively," *In re Lindsey*, 158 F.3d at 1270 (internal quotation marks and citation omitted), and provide "sufficient facts to state with reasonable certainty that the privilege applies," *TRW, Inc.*, 628 F.2d at 213. Because Boehringer has the burden to prove conclusively that all the elements of the privilege are met, ambiguities are construed against the company. *See Scholtisek v. Eldre Corp.*, 441 F. Supp. 2d 459, 462 (W.D.N.Y. 2006); *Koumoulis v. Indep. Fin. Mktg. Grp., Inc.*, 295 F.R.D. 28, 38 (E.D.N.Y. 2013), *objections overruled*, 29 F. Supp. 3d 142 (E.D.N.Y. 2014).

Boehringer did not come close to meeting its heavy burden. Instead, it provided conclusory statements that "its privilege assertions are appropriate because the communications at issue represent (1) its counsel requesting information for purposes of rendering legal advice or (2) its employees providing information to counsel for purposes of providing legal advice for the company."

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this Court has already stated that a company "may select an executive who is a lawyer to negotiate the terms of a settlement; this does not mean that the lawyer's thoughts relating to financial and business decisions are opinion work product when she is simply parroting the thoughts of the business managers." *Boehringer*, 778 F.3d at 153.[13] The Court noted that in this case questions about whether the agreements made financial sense were matters of "business judgment," as Persky herself admitted in sworn testimony. *Id.* at 152.

Both this Court and the district court have reviewed Boehringer's documents *in camera* in connection with Boehringer's work-product claims, and both have rendered conclusions strongly suggesting that Persky was not called upon to use her legal training, skills, and expertise to advise on legal matters.[14] To the contrary, this Court characterized her work as that of a "layman." *Boehringer*, 778 F.3d at 153. It noted that requested "financial analyses" were "often general and routine,"

[13] Consistent with the Court's understanding, even today Persky describes her role at Boehringer as having served as "a key member of the executive management team" and provided "strategic and business planning/development advice." https://www.linkedin.com/in/marlapersky/. She describes her legal work for the company as simply "managerial." *Id.*

[14] Although the attorney-client privilege and work-product doctrine serve

reflected a "general interest in the financials of the deal," and contained nothing of "legal significance." *Id.* at 152-53.

The district court similarly reviewed all of the disputed communications and concluded that Persky's participation in them did not disclose her legal analysis. Dkt. 101 at 34 [JA–1212]. Rather, her actions were only those of a "reasonable businessperson," *id.*, who functioned as a "data analyst for her client." *Id.* at 35 [JA–1213]. The court added that the documents' analyses of "possible factual scenarios affecting the Boehringer-Barr settlement and the co-promotion agreement" did not "sufficiently reflect [Persky's] mental impressions regarding which scenarios were legally feasible or desirable." *Id.* at 34 [JA–1212]. The business focus of these documents led the court to conclude that they "do not reflect Persky's impressions as a legal advisor." *Id.* at 35 [JA–1213]. Indeed, the court found that "Boehringer's documents themselves give no indication that they were prepaw [(a)3.5(le)bTA

1216], despite the fact that Boehringer repeatedly asserted in its pleadings that Persky was advising on antitrust risks and compliance. Dkt. 90 at 9 [JA–1120].[15]

Boehringer itself described Persky's role as one that called for business, not legal, judgment. It explained that communications were made to her to help her determine whether settlement options would be "cost-prohibitive," Dkt. 90 at 9 [JA–1120], and to allow her to develop "economic parameters" related to settlement. In that capacity, she "asked the businesspeople at Boehringer to gather information regarding these economic parameters," *id.*, Dkt. 91-2 at 3, ¶ 5 [JA–1138], and she requested financial valuations of the co-promotion agreement in order to assess the "commercial feasibility" of the settlement." Dkt. 91-2 at 3-4 ¶¶ 5-6 [JA–1138-39].

On that record, the conclusion that Persky acted as a businessperson advising on business matters is consistent not only with this Court's decision in *Lindsey*, 158 F.3d at 1270, but with the analyses of other courts examining both the lawyer's role and the content of the communications claimed to be privileged. For

[15] Consistent with the district court's conclusion is the fact that Persky was the recipient of only nine of the twenty-nine disputed communications listed in the appendix to this brief. Boehringer made no effort to show that the many documents that were never sent to Persky (or other attorneys) were created to support a privileged communication. Even if Boehringer business people needed to communicate between themselves to prepare analyses needed for legal advice, Boehringer should have explained how those communications were tied to an actual request for, or provision of, legal advice. Boehringer never did so.

example, the district court here in D.C. considered

"never alluded to a legal principle in the documents nor engaged in legal analysis," but rather "collected facts just as any business executive would do in determining whether to pay an obligation." *Id.*

The fact that the disputed communications arose in the context of ongoing litigation also does not convert them into privileged attorney-client communications. In *King Drug Co. of Florence, Inc. v. Cephalon, Inc.*, 2011 WL 2623306 (E.D. Pa. Jul. 5, 2011), the court had to determine whether the privilege applied to a communication from *outside* counsel handling her client's patent litigation. The communication involved possible launch dates for generic drugs (as did some of the communications at issue here). The court concluded that the communication was not privileged, stating that it "contains no legal advice and pertains entirely to financial concerns regarding generic launch dates and product orders." *Id.* at *7. It did not matter that the communication "juxtaposes speculation about launch dates with the expected progress of litigation." *Id.*

* * * * *

The FTC did not challenge the vast majority of Boehringer's privilege claims,

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

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APPENDIX:

PRIVILEGE LOG ENTRIES FOR DISPUTED DOCUMENTS SUBJECT TO REVIEW

No. 617, Dkt. 32, Ex. B Dec. Ex. 11 at 44 [JA–331]
No. 791, Dkt. 32, Ex. B Dec. Ex. 11 at 56 [JA–343]
No. 811, Dkt. 32, Ex. B Dec. Ex. 11 at 58 [JA–345]

CERTIFICATE OF COMPLIANCE AND SERVICE

I certify that the foregoing brief complies with Federal Rule of Appellate Procedure 32(a)(7),