Other Authorities

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.

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"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. Itstd0 Tw ides6.5(om)

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.

Boehringer's contention that

the large majority of Boehringer's privilege claims. Accepting Boehringer's approach, by contrast, would expand the law of privilege in ways that are contrary to its fundamental purpose and would impede the search for truth. If the mere use of a lawyer to perform ordinary business activity can cloak that activity from later scrutin6(j)8.5 wusiness 8.3(e)3.56s

Boehringer I, they do not. Persky's second *ex parte* affidavit does not change things. The district court properly rejected it, but found that it undermined Boehringer's claims in any event.

Boehringer may not relitigate *Boehringer I*. The decision is now law of the case and is no longer subject to revisitation. It is also law of the circuit, not subject to reversal by a new panel. Boehringer recognizes as much and notes that it raises its challenges merely as a placeholder to preserve them for review by the Supreme Court—which has already denied certiorari on this issue. *Boehringer I* was correct in any event. This Court's standards for differentiating fact from opinion work product do not conflict with those of any other circuit. Nor has Boehringer shown that this Court's standard for assessing "substantial need" and "undue burden" under Federal Rule of Civil Procedure 26(b)(3)(ii) conflicts with ones applied in other circuits.

Kellogg,

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-client communications with a 'business' purpose cannot also have a significant 'legal' purpose." Boehringer Br. 36. Untrue. The FTC's position is that a party claiming privilege for communications created at the direction of or by an in-house lawyer-businessperson must show that the person was acting as a lawyer and not a businessperson when she made positi(o)8.6a.2(n in)tedirsans tss d.2(n in)tinenotah a signifa

purpose—and a communication made to a lawyer acting as a businessperson. The *Kellogg* Court had no need to determine whether there had been a "clear showing" that in-house counsel were acting "in a professional legal capacity" for the purpose of legal advice, as required by *Sealed Case*, 737 F.2d at 99. Nor did it *sub silentio* eliminate those requirements.

Boehringer is thus wrong when it argues that the Court's application of privilege to a dual-purpose communication means that there is no difference for privilege purposes between legal and business advice rendered by in-house lawyers. *See* Boehringer Br. 40. As *Sealed Case* established, there is a difference when in-house counsel has "responsibilities outside the lawyer's sphere." 737 F.2d at 99. Boehringer had to show that disputed communications involved Persky's acting in a legal capacity for purposes of providing legal advice. It did not do so.

2. Persky's position as general counsel does not by itself satisfy the clear showing requirement

a. In-house counsel serve both legal and non-legal roles

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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, 1996)). The Second Circuit has similarly recognized that "in the private sector … 'in-house attorneys are more likely to mix legal and business functions.'" *Cty. of Erie*, 473 F.3d at 421 (quoting *Bank Brussels Lambert v. Credit Lyonnais (Suisse)*, 220 F. Supp. 2d 283, 286 (S.D.N.Y. 2002)).[2]

Because the privilege "has the effect of withholding relevant information from the fact-finder, it applies only where necessary to achieve its purpose." *Fisher v. United States*, 425 U.S. 391, 403 (1976). Fundamental principles underpinning the attorney-client privilege thus demand that companies seeking its protection for communications with in-house counsel make a "clear showing" that each communication at issue involves the lawyer's role as a lawyer. That showing helps a gd

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 communication," it "must supply the court with sufficient information from which it could reasonably conclude that the communications: (1) concerned the seeking of legal advice; (2) was between a client and an attorney acting in his professional capacity; (3) was related to legal matters; and (4) is at the client's insistence permanently protected." *Gulf & W. Indus.*, 518 F.Supp. at 682 (quoting *FTC v. Shaffner*, 626 F.2d 32, 37 (7th Cir. 1980)).

b. A clear showing for each disputed communication is practicable and consistent with Kellogg

Boehringer and its amici contend that companies should not have to prove privilege for each document. Boehringer says that doing so is too hard and unfair

[3] Amici misrepresent the FTC's brief when they write that "the FTC candidly states that under its view '[t]he burden is even higher' when claiming privilege for communication involving in-house lawyers than for communications involving outside counsel because in-house lawyers are more commonly called upon to consider the company's business interest in giving legal advice. FTC Br. 30-31." Amici Br. 8. That statement does not appear in the FTC's brief. If the lawyer is giving legal advice, the inquiry into her role is unnecessary. But the inquiry must be conducted when in-house counsel has responsibilities outside the legal sphere. *See Sealed Case*, 737 F.2d at 99.

because it would permit the FTC to "lob[] vague and unparticularized challenges at hundreds of documents at a time." Boehringer Br. 51. Amici assert that a communication-by-[illegible]

Indeed, Boehringer prepared such a log here, proving that the burden was tolerable. The problem is not that the company failed to assert the privilege document-by-document, but that its privilege log entries for the disputed documents did not substantiate the privilege claims. They failed principally by not stating that the purpose of the communication was legal advice. Other entries, not challenged by the FTC, included that description.[4] Moreover, Boehringer's correspondence with the FTC and briefs to the district court did not connect Persky's role as a lawyer advising on legal matters to the disputed communications, despite the fact that Boehringer had far superior access to the information needed to make a clear showing. Rather, Boehringer, like the district court, relied on generalities about Persky's role as general counsel. That failure of proof dooms its privilege claims.[5]

[4] For example, Boehringer claims attorney-client privilege for document entry no. 617, which it describes as "Analysis of '577 Patent Litigation and potential settlement prepared at the direction of counsel and as a result of litigation (email attachment)." Dkt. 32, Ex. B. Decl. Ex. 11 at 44 [JA-331]. The description does not mention legal advice and no lawyer is listed as author or recipient. *Id.* By contrast, Boehringer claims privilege for document entry no. 1542, which it describes as "Request for legal advice from counsel regarding Aggrenox co-promotion, supply and license agreements and Mirapex license agreement relating to '555 and '086/008 Tw [(Id)-12.2(.)]TJ /d]TJ.nt L

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 lawyer providing legal advice

matters. FTC Br. 34-40. And those conclusions are supported by Persky's extensive testimony at an investigational hearing. Although Boehringer disagrees with the conclusions to be drawn from the courts' description of the documents' contents, it does not dispute that the descriptions are accurate, and it hardly mentions the testimony. Rather, Boehringer largely relies on three *ex parte* affidavits, two filed by Persky and one by outside counsel Pamela Taylor.[7] All allegedly show that Persky at all times acted as a lawyer providing legal advice, but none appears to meet Boehringer's burden of proof.[8]

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 “businrli

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

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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. As a result, the privilege applied. *Id.* By contrast, the district court here found 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].

These cases refute the idea that courts are unable to determine in-house counsel's roin

If anything, Boehringer and its amici's position that communications with corporate counsel are categorically privileged would seriously undermine both private litigation and government investigation of corporate wrongdoing. As mentioned at page 12 above, privileges impede the search for truth and therefore must be confined to serving their intended purposes. Boehringer's approach, by contrast, would turn corporate lawyers into absolute shields for potentially harmful documents, whether or not the lawyer is acting as a lawyer advising on legal issues or simply performing a business function that would otherwise be performed by a businessperson. This will encourage companies to simply route communications through lawyers and then claim privilege. That system would be far more unworkable than the current rule, which requires the attorney-client privilege to be substantiated for each communication.

II. RESPONSE IN NO. 16-5357: THIS COURT SHOULD AFFIRM THE DISTRICT COURT

A. The District Court's Work-Product Rulings Were Consistent With *Boehringer I* and Should be Sustained

1. *Boehringer I* established the applicable standards

In its earlier decision, this Court made clear that, for a document to qualify as opinion work product, its disclosure must actually reveal an attorney's mental impressions. Where the document consists only of factual information requested o8.5(if)ShB5(d

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—

this situation." Dkt. 101 at 34 [JA–1212].[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–1213]. It did not matter whether Persky or businesspeople selected variables reflected in the documents. "Persky's due diligence as a data analyst for her client does not mean that every piece of data she touched becomes opinion work product." *Id.* at 35 [JA–1213]. The documents did "not reflect Persky's impressions as a legal advisor." *Id*. Indeed, the court concluded that "Boehringer's documents themselves give no indication that there were prepared for use in a discussion of antitrust liability." *Id.* at 38 [JA–1216]. The court thus held that all but three of Boehringer's documents qualify as fact work product only. Dkt. 101 at 39 [JA–1217].

[13] Boehringer's description of the district court's work-product rulings is misleading. Boehringer Br. 27-28. Boehringer characterizes as the court's own "analysis" its recitation of Boehringer's positions. Most egregiously, Boehringer ascribes to the court the statement that "'[I]t was Persky, not any business executive, who initially determined which factors were important to her in rendering legal advice to her client about economic desirability and antitrust exposure of settlement.'" *Id.* at 27 (quoting Dkt. 101 at 33 [JA–1211]). In fact, Boehringer deceptively omits the court's lead-

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–1216]. 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. Boehri(n)8.3(a)3.5x,kcT(ri(n)8.er Br.Tc -0.00 -0.008 Tc 0.004 Tw 1 0 T

the facts contained in these documents such that revealing these facts would reveal her legal impressions of the case." *Id.*

3. Labeling Persky's actions as "weeding" or "sharply focusing" does not prove that the documents reveal her legal impressions

Boehringer unsurprisingly characterizes Persky's work as "weeding" and "sharply focusing." *E.g.*, Boehringer Br. 56 (citing Dkt. 91-2 at 3, Supp. Persky Decl. ¶ 5 [JA–1138]). But those conclusory descriptions cannot overcome evidence revealed by the documents themselves or the testimony of Persky and other Boehringer employees. For example, Boehringer states that "[i]n assessing antitrust risk, Ms. Persky needed to consider what the FTC might argue is fair market value of the proposed settlement options." *Id.* at 56. Boehringer, however, has previously made clear that Persky was interested in the financial value of the settlement and the "fair market value" of the co-promotion agreement. "There is no real, nonspeculative danger of revealing [Persky's] thoughts when [her] thoughts are already well-known." *Boehringer I*, 778 F.3d at 152 (citation and internal quotation marks omitted). Furthermore, a valuation of a business deal such as a co-promotion agreement included in a settlement is precisely the kind of financial analysis "anyone familiar with such settlements would expect a competent negotiator to request." *Id.* Even if Persky later used the fair market value analyses to "weed through various settlement s(e)3.5(m)21.12.s2 C.s73.6(m)21.3(a)3.5(r:m s6(om)lU7 0

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 Perksy's legal impressions. Persky testified that she did not give the business people legal assumptions to use in their analyses. When asked whether she provided the business staff "with any sort of assumption about Boehringer's odds of success in the patent litigation," she answered "no." Dkt. 32, Ex. B Decl. Ex. 19 at 117:2-7 [JA–593]. When asked whether she provided them "with any other sort of legal assumption, a figure of some kind to use in their analysis," she testified that she "did not provide them with figures. I asked them to provide me with figures." Dkt. 37, Ex. 4 at 118:3-7 [JA–776].

Persky also claims that she "asked the businesspeople at Boehringer to gather information regarding those economic parameters," *id.*, Dkt. 91-2 at 3, ¶ 5 [JA–1138], and that 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]. These matters plainly involve business, not legal, judgment, as Persky confirmed in her testimony: "Whether [the agreements with

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 I* that

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].[15]

Perhaps the redacted portions of Persky's *ex parte* affidavit attempted to supply the attorney mental impressions that this Court found were not revealed by the documents themselves. But explaining what mental impressions Persky had or developed about these documents is fundamentally different from explaining "specifically how disclosure would reveal the attorney's legal impressions and thought processes." *Boehringer*, 778 F.3d at 153. Moreover, an *ex parte* affidavit explaining Ms. Persky's opinions and impressions would be unnecessary if the

[15] Although Persky insisted that Boehringer negotiated the co-promotion deal "as a free-standing agreement," Dkt. 37, Ex. 4 at 112:21-23 [JA–771], Boehringer withheld every contemporaneous financial analysis of it, either as privileged or work product. The Court has rejected as "unpersuasive" Boehringer's argument that the FTC has access to equivalent analyses. *Boehringer I*, 778 F.3d at 157-58.

disputed documents themselves "create[d] a real, nonspeculative danger of revealing" those thoughts. *See id.* at 152 (citation and internal quotation markets omitted).

4. The district court correctly rejected the *ex parte* affidavit

Although the district court's acceptance of the second Persky *ex parte* affidavit would not have changed the outcome below, Dkt. 101 at 35 [JA–1213], Boehringer nonetheless on appeal argues that the district court erred in rejecting it. Of course, given the district court's findings, any error would have been harmless. But there was no error at all; Boehringer's position is contrary to this Court's precedents and would make use of *ex parte* affidavits in discovery disputes the rule rather than the exception.

Whether or not to accept an *ex parte* affidavit is a matter of the district court's discretion. *Labow v. United States Dep't of Justice*, 831 F.3d 523, 533 (D.C. Cir. 2016). The district court properly exercised that discretion here. It explained that it rejected the *ex parte* affidavit because Boehringer did not meet "its high burden to show that the affidavit is necessary or appropriate in these circumstances." Dkt. 101 at 28 [JA–1206]. The court noted both the "strong public interest in open, adversarial proceedings," *id.* at 29 (citing *Armstrong v. Exec. Office of the President*, 97 F.3d 575, 580 (D.C. Cir. 1996)) [JA–1207], and this Court's "reservations" about *ex parte* proceedings outside the realm of national

security, *id*. (citing *Lykins v. U.S. Dep't of Justice*, 7250.00n-0s5(c)3.5(e)]TJ /TT0t7fustft

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–1207].

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. 4, 2015).

[19] Petition for Certiorari in No. 15-560 at 17-24 (Oct. 2, 2015); *Boehringer Ingelheim Pharms., Inc. v. FTC*, Denial of Petition for Writ of Certiorari, 136 S.Ct. 925 (2016). Boehringer will likely try to discount the denial on the ground that the FTC argued that the case was interlocutory. That argument consumed less than 2 pages of a nearly 30-page brief that mostly addressed the merits of the same arguments Boehringer raises now. Brief of Respondent in Opposition in No. 15-560 at 16-17 (Dec. 16, 2015).

first place. *See* 134 F.3d at 1195-1203; *see id.* at 1197 ("This case involves [the] question …

155 (citations and internal quotation marks omitted). The Court rejected Boehringer's desire for "some sort of heightened probative value beyond mere relevance" (Boehringer Br. 61). *See Boehringer I*, 778 F.3d at 154. Boehringer claims that five other courts have imposed the higher standard. That contention is baseless.

Logan v. Commercial Union Insurance Co., 96 F.3d 971 (7th Cir. 1996), did not impose a higher standard. The court found that insurance company claim-processing documents to be protected work product even though they were the only available evidence of bad faith, an essential element of the plaintiff's claim. *Id.* at 977. The court held that "a mere allegation of bad faith is insufficient to

In *Belcher v. Bassett Furniture Indus., Inc.*, 588 F.2d 904 (4th Cir. 1978), the court

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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CERTIFICATE OF COMPLIANCE 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 10,676 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 21st day of August, 2017.

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