GLOSSARY

Barr	Barr Pharmaceuticals, Inc. (including its wholly-owned subsidiary, Duramed Pharmaceuticals, Inc.)
Boehringer	

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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

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 filed in the district court during the remand proceedings and cited in the briefs are included in the fourth volume of the joint appendix. A separate volume, submitted by Boehringer, contains its *ex parte* and *in camera* submissions.

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's general counsel allegedly requested the financial analyses in the context of patent litigation settlement talks, the court determined that obtaining legal advice was "one of the significant purposes" of the communications. Dkt. 101 at 46, 47 (citing *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 759 (D.C. Cir. 2(.)6..7(n)B 2.291.504 0 Td ( )Tj -0.008 Tc 0.008 Tw 0.248 0 Td B3(v94(.)6.2(3J -21

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-

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

filed infringement suits. *Id*. In August 2008, Boehringer and Barr entered simultaneous agreements settling both suits. *Id.* at 4 [JA–23].

Under the settlement agreements, Barr agreed not to market generic Mirapex

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

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

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–772-775], directed Boehringer businesspeople to provide her with figures

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 "regard]TJ C68.8.7(de)3.ntCTrizir

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"—and Boehringer had failed to explain how disclosing those time frames could reveal anything of "legal significance." *Id.* at 153.

The Court described Persky's role in the patent settlement as providing "business judgment, not legal counsel." *Id.* at 152. It described her requests as "often general and routine" and said that her "general interest in the financials of the deal … reveals nothing at all: anyone familiar with such settlements would expect a competent negotiator to request financial analyses like those performed here." *Id.* Rather than reflecting legal judgment, the acceptable financial parameters for the agreements came from Boehringer's board of directors and business managers. *Id.* At bottom, the Court observed, "[a] company may select an executive who is a lawyer to negotiate the business terms of a settlement," but doing so "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." *Id.* at 153 (citations omitted).

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 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–___]. "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*, 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 analyst for her client does not mean that every piece of data she touched becomes opinion work product." *Id.* at 35 [JA–___]. The documents did "not reflect Persky's impressions as a legal advisor." *Id*. Indeed, Id. the court concluded that "Boehringer's documents themsel6TA3.5(um)ooe 4.8.6(B)4

The court thus held that all but three of Boehringer's documents qualify as fact work product only. Dkt. 101 at 39.[7] At the same time, however the district court held that the attorney-client privilege nonetheless protected nearly all of the same business and financial analyses. Dkt. 101 at 40 [JA–___].[8] It held that its ruling

lawsuit." *Id.* at 47 [JA–___]. 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–___]. 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.

The court implicitly acknowledged the tension between its conclusion that Persky had acted only as a businesspered.5(d a)3(ow)161.004 Tw ed poses of t thework.6(le)]TJ

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*

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 ca

disputed financial documents, Persky was not acting as a lawyer or providing legal advice and therefore the documents are not privileged. It should direct the district court to order Boehringer to produce the documents within 30 days of the Court's mandate, while also remanding the case so that the district court may oversee Boeheringer's production when Boehringer applies this Court's decision to the remaining withheld documents.

STANDARD OF REVIEW

In subpoena enforcement cases, this Court undertakes a *de novo* review of whether a district court applied the correct legal standard. *See Boehringer*, 778 F.3d at 148; *U.S. Int'l Trade Comm'n v. ASAT, Inc.*, 411 F.3d 245, 253 (D.C. Cir. 2005); *FTC v. Texaco, Inc.*, 555 F.2d 862, 876 n.29 (D.C. Cir. 1977) (*en banc*). Where the district court applies the wrong standard, its judgment receives no deference. *See In re Subpoena Served upon the Comptroller of the Currency & Sec'y of Bd. of Governors of Fed. Reserve Sys.*, 967 F.2d 630, 633 (D.C. Cir.

ARGUMENT

A party asserting attorney-

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-privileged, factual information merely by assigning lawyers to perform business tasks. When in-house counsel serves in both legal and business capacities, a court considering claims of privilege must make a searching inquiry into the precise role at issue. The district court did not do so here, and its judgment should not stand.

I. IN RE KELLOGG DOES NOT CONTROL THIS CASE

The district court premised its ruling on the conclusion that "[t]his case is on all fours with *In re Kellogg*." Dkt. 101 at 47 [JA–___]. It is not. *Kellogg* addressed whether privilege applies when in-house counsel acted in a legal capacity and the documents were used to provide legal advice. Here, the questions are whether Persky acted in a legal role at all when she directed creation of the disputed documents and whether those documents had a primary purpose that was legal. *Kellogg* does not address those questions, and the district court erred when it held that case to govern this one.

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 unquestionably acting in a legal capacity, the Court did not address either how the 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-

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–___], and that "the documents do not reflect express requests for or provision of legal advice." Dkt. 101 at 47 [JA–___].

protect a pre-existing document forwarded to a lawyer for legal advice); *Banks v.*

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. "[T]he privilege applies only if the person to whom the communication was made is 'a member of the bar of a court' who 'in connection with th[e] communication is acting as a lawyer' and the communication was made 'for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding.'" *In re Lindsey*, 158 F.3d at 1270 ((quoting *In re Sealed Case*, 737 F.2d at 98-99 (citation omitted)).[9] "[S]ince the privilege has the effect of withholding relevant information from the fact-finder, it applies only where necessary to achieve its purpose." *Fisher*, 425 U.S. at 403. It "must be strictly confined within the narrowest possible limits consistent with the 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

[9] The privilege also covers communications made with a non-attorney who is

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 com(le)3.6c3(ut)tn7 ca[4.5(h o)8.3(f)3 putdinin 21(ut)88

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." Dkt. 101 at 41 [JA–___] (citing Dkt. 37 at 30-31 [JA–649-50]).[10] In support, it only cited a letter it sent to the FTC (Dkt. 37, Ex. 3 at 8-10 [JA–732-34]) and its privilege log. Dkt. 37 at 30-31 [JA–649-50]. But the letter addressed none of the documents reviewed by the district court, *compare* Dkt. 37, Ex. 3 at 8-

34] (Boehringer's identification of privilege entries addressed) to Dkt. 101 at 44-45 (court's listing of a different set of privilege entries reviewed). As such, it did not, as a matter of law, satisfy Boehringer's obligation to "show that the privilege applies to each communication for which it is asserted." *Legal Servs. for N.Y. City*, 249 F.3d at 1082 (citation omitted). Nor did the privilege log fill the gap.

Boehringer thus plainly did not satisfy its burden to make a "clear showing" that each disputed communicat

Instead, as this Court held in *In re Lindsey*, communications with lawyers who also serve other roles must be carefully examined to determine which "hat" the lawyer was wearing. 158 F.3d at 1270. In that case, the White House sought to claim the privilege on communications associated with White House Counsel Lindsey's advice on preventing ongoing litigation from interfering with other White House functions. *Id*. This Court ruled that application of the privilege turned on the specific role played by Lindsey—who was equivalent to a corporate in-house lawyer. The Court noted that "[a]ccording to the Restatement, 'consultation with one admitted to the bar but not in that other person's role as lawyer is not protected.'" *Id*. (quoting Restatement (Third) of the Law Governing Lawyers § 122 cmt. c). The Court continued: "'[W]here one consults an attorney not as a lawyer but as … a business advisor or banker, or negotiator … the consultation is not professional nor the statement privileged." *Id*. (quoting 1 McCormick on Evidence § 88, at 322-24 (4th ed. 1992)). Examining the White House's claims, the Court concluded that Lindsey's advice on "political, strategic, or policy issues, valuable as it may have been, would not be shielded from disclosure by the attorney-client privilege." *Id*.

Thus, to establish that advice is legal and that the communication is intended to seek that advice, Boehringer needed to have shown that it called upon Persky's professional skill and training to interpret and apply legal principles to the facts

communicated. The Rice treatise approvingly cited in *Kellogg*, 756 F.3d at 758, states that "the legal standard requires that the lawyer's services involve interpretation and application of legal principles to specific facts in order to guide future conduct." 1 Rice, *Attorney-Client Privilege* § 7:10 at 1237. In other words, "[l]egal assistance requires the involvement of the 'judgment of a lawyer in his capacity as a lawyer.'" *Id.* at 1239-41 (citations omitted).

But the district court made no such finding that Persky acted as a lawyer and not a business executive with respect to any of the disputed documents at issue. This is a necessary determination for communications with in-house counsel who have dual roles. *In re Sealed Case*, 737 F.2d at 99. Referring specifically to Persky, 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.

[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.*

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."

as a legal advisor." *Id.* at 35 [JA–___]. Indeed, the court 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–___], despite the fact that Boehringer repeatedly asserted in its pleadings that Persky was advising on antitrust risks and compliance. Dkt. 90 at 9 [JA–___].[15]

Boehringer itself described Persky's role as one that called for business, not

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 example, the district court here in D.C. considered the role of a lawyer-executive in *SEC v. Gulf & Western Industries, Inc.*, 518 F.Supp. 675 (D.D.C. 1981). In that case, the lawyer (actually, an outside general counsel) wore several corporate and executive hats, including corporate directory, secretary, and member of the pension advisory committee. *Id.* at 678. Given the lawyer's roles, the court refused to "assume[] that all of his discussions with corporate officials involved legal advice." *Id.* at 683. Instead, it examined the specific role the lawyer played and the content of each the communications for which the defendants claimed privilege. It found that defendants did not clearly show that any advice was given in the lawyer's legal capacity. *Id.* The court found that his concerns and views on a variety of legal issues were expressed in his role as corporate director, not company counsel. *Id.* It said that his advice regarding the purchase of certain securities was business. *Id.* Because the defendant did not show that the "advice was given in a professional legal relationship," the court denied the privilege claims. *Id.*

Similarly, in *MSF Holding, Ltd. v. Fiduciary Trust Co. International*, 2005 WL 3338510 (S.D.N.Y. Dec. 7, 2005), the court examined the emails of a senior vice-president and deputy general counsel whose company had to decide whether to honor a letter of credit "against the background of any legal obligation to do so." *Id.*

* * * * *

The FTC did not challenge the vast majority of Boehringer's privilege claims, some of which likely involved documents intended to assist Persky in providing legal advice. But given her dual roles as both lawyer and businessperson, as evidenced by multiple courts' findings, it is clear that not *all* documents created or sent at her request served that function. The mere fact that the disputed financial documents were created during litigation settlement talks does not suffice for the "clear showing" required by this Court to treat them as privileged communications. The actual content of the disputed documents and the specific circumstances of their creation show that they should not be considered privileged.

On the record before it, the Court should rule that Boehringer failed to prove its privilege claims in the disputed documents. It should direct the district court to order Boehringer to produce those documents found in the *in camera* sample to the FTC within 30 days of the Court's mandate in this case. It should also remand the case to the district court for any needed further proceedings as Boehringer applies this Court's ruling to the remaining documents.

CONCLUSION

The judgment of the district court should be reversed.

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CERTIFICATE OF COMPLIANCE AND SERVICE

I certify that the foregoing brief complies with Federal Rule of Appellate Procedure 32(a)(7), in that it contains 9,938 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 27th day of March, 2017.

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