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

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

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

v.

BOEHRINGER INGELHEIM

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GLOSSARY

Amici	Chamber of Commerce of the United States of America and Association of Corporate Counsel
Barr	Barr Pharmaceuticals, Inc. (including its wholly owned subsidiary, Duramed Pharmaceuticals, Inc.)
Boehringer	Boehringer Ingelheim Pharmaceuticals, Inc.
Commission	Federal Trade Commission
Dkt.	Docket entry in district court case below (FTC v. Boehringer Ingelheim Pharmaceuticals, Inc., Case 1:09-mc-00564 (D.D.C.))
JA	Joint Appendix
FTC	Federal Trade Commission
Persky	Marla Persky, senior vice president, general counsel and corporate secretary of Boehringer

SUMMARY OF ARGUMENT

Attorney-Client Privilege (Reply in No. 16-5356)

Evidentiary privileges must be construed narrowly because they impede the search for truth. The proponent of a privilege therefore bears the burden to show that it applies. Boehringer now tries to flip that burden and put on the FTC the responsibility to show that communications are not privileged. It effectively asks the Court to presume that communications involving its general counsel are privileged simply because they involve an attorney, unless the FTC proves otherwise. And Boehringer expects the FTC to do so even though it has not seen the communications and is at a decided information disadvantage. That is not how the law of privilege works.

The attorney-client privilege protects communications with a lawyer only when she acts in her professional legal capacity to provide legal advice. In re Lindsey, 158 F.3d 1263, 1270 (D.C. Cir. 1998). Because in-house counsel often serve in both legal and non-legal

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

"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, the FTC's position is that Boehringer bears a burden to make a clear showing that a corporate lawyer who also serves a business function acted in her role as a lawyer with respect to a given communication made for the purpose of legal advice—and that Boehringer did not meet that burden.

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

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

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 these 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 because Persky was general counsel she necessarily acted in a legal capacity and her communications therefore must have had a legal purpose is circular and wrong. Sealed Case recognized that in-house counsel have "responsibilities outside the lawyer's sphere," as Persky plainly did. 737 F.2d at 99. Boehringer's position would effectively create a presumption that communications with in-house lawyers are privileged and place on the FTC the

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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 scrutiny, businesses will use lawyers as shields to protect themselves from legal exposure to wrongdoing.

Work Product Response in No. 16-5357)

The district court correctly applied this Court's prior decision in this case, Boehringer I, 778 F.3d 142. There, the Court made clear that a document may qualify as opinion work product only if its disclosure would actually reveal an attorney's mental impressions. Id. at 151 (ss

The district court ec0-4.5(n)-2Cfteliy16

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)(A)(ii) conflicts with ones applied in other circuits.

ARGUMENT

I. REPLY IN NO. 16-5356: THIS COURT SHOULD R

Kellogg, business purposes also associated with those communications do not strip them of attorney-client privilege. Boehringer's argument is wrong and would flip

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 an in-house lawyer or businessperson must show that the person was acting as a lawyer and not a businessperson when she made the request and that the request had a significant purpose of providing legal advice. We do not question that these documents would be privileged if requested by a lawyer acting as a lawyer for the purpose of providing legal advice—and indeed, we did not challenge that below.

showing requirement, and shifted the burden of proof from Boehringer to the FTC. That is a gross misreading of *Kellogg*.

The communications at issue in *Kellogg* undisputedly involved in-house counsel acting in a legal capacity for the purpose of providing legal assistance. They arose in the context of an investigation "conducted under the auspices of [the company's] in-house legal department, acting in its legal capacity." *Kellogg*, 756 F.3d at 757 (emphasis added). The Court found "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. In that posture, even if those communications also had a business purpose, the attorney-client privilege attached so long as "obtaining or providing legal advice was one of the significant purposes of the attorney-client communication." *Id.*[1]

Kellogg did not address, and cannot be read to affect, the logically antecedent requirement that the proponent of the privilege must show that an attorney involved in a communication was acting in a legal role and providing legal advice in the first place. There is a world of difference between a communication like the one in *Kellogg*—made to a lawyer acting as a lawyer for the purpose of providing legal advice that also happens to have a business

[1] The Court rejected the idea that a communication could not have a primary legal purpose if it also had a non-legal purpose. *Kellogg*, 756 F.3d at 759. The FTC has not advanced that argument.

purpose—and a communication made to a lawyer acting as a businessperson. The Kellogg Court had no need to determine whether

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

It stretches credulity to conclude, as the district court did, that Persky functioned as a lawyer providing legal advice in every disputed communication. She was a senior vice president and part of Boehringer's executive leadership. She plainly functioned as a businessperson, not a legal adviser, with respect to at least some aspects of the deals under investigation. This Court has already held that questions about whether the agreements under investigation made financial sense were matters of "business judgment," that Persky's work was that of a "layman," and that the documents contain nothing of "legal significance." Boehringer I, 778 F.3d at 152–153. Such circumstances are precisely why this Court has recognized that "'consultation with one admitted to the bar but not in that other person's role

as lawyer is not protected.'" Lindsey, 158 F.3d at 1270 (quoting Restatement (Third) of the Law Governing Lawyers § 122 cmt. c.

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

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

In contrast to Boehringer's general claims of privilege, the FTC identified specific documents (Dkt. 32, Ex. A [JA 18-20]), including ones in the in camera sample, and noted recurring deficiencies associated with Boehringer's claims for those documents. Relying on the material

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 "[p]lanket assertion of the privilege will not suffice." 158 F.3d at 1270. In Gulf & Western Industries, the court examined an attorney's "many roles" and the content of his communications when concluding that "it cannot be assumed that all of his discussions with corporate officials involved legal advice." 518 F.Supp. at 683. Describing the inquiry in County of Erie, the Second Circuit said that "it should be assessed dynamically and in light of the advice being sought or rendered, as well as the relationship between the advice that can be rendered only by consulting with the legal authorities and advice that can be given by a non-lawyer." 473 F.3d at 420-21. It continued, "an attorney's dual legal and non-legal responsibilities may bear on whether a particular communication was generated for the purpose of soliciting or rendering legal advice." Id. at 421 (emphasis added).

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

The disputed communications, as described by this Court[illegible] hid by id [illegible]

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

Id. at 153, 158. Judge Harvey addressed the privilege claims, Dkt. 101 at 40-51 [JA–___], but he never cited Boehringer's first two affidavits and his ruling gives no indication that he even considered them. Given his ruling in the remand proceedings that Boehringer had not satisfied this Court's stringent standards for acceptance of such affidavits and his understanding of the limited circumstances where such affidavits would be appropriate, Dkt. 101 at 28-29 [JA–___], it is not surprising that he avoided them in ruling on the privilege claims.

Outside counsel Pamela Taylor's ex parte affidavit submitted in the earlier proceedings suffers from another problem: she had no personal knowledge of the communications. According to Boehringer's privilege log, Taylor did not author or receive any of the documents in the ex parte sample for which Boehringer claims attorney-client privilege. Taylor's name appears nowhere in Boehringer's privilege log. Dkt. 59 at 5 [JA76].

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; 71:10–72:5 [A755-56]. Regarding her responsibilities in the negotiations, the FTC asked her directly whether she was providing "business or legal advice," and she responded that "[w]hether [the agreements made] sense from a financial business perspective is business." Dkt. 33, Ex. 2 at 68:19-24 [A990]. The FTC challenges application of privilege to those documents. By contrast, when the FTC asked about the purpose of financial analyses of the Aggrenox and Mirapex patent challenges that she requested before settlement negotiations began, she testified that out ts TJ 5d0o thohesed

Cases that determine whether specific communications are privileged rebut the contention that the requirement to make such determinations is "wholly unworkable." Amici Br. 14. In Gulf & Western Industries, the district court examined the various roles performed by the company's general counsel, stating that it could not "assume[] that all of his discussions with corporate officials involved legal advice." 518 F.Supp. at 368. In some communications involving legal issues, the court found that the lawyer expressed his views as a corporate director, not in his legal capacity. Id. In other instances, the lawyer's advice addressed business issues, not legal issues. Id.

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

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

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

These cases refute the idea that courts are unable to determine in-house counsel's role or whether a communication reflects the giving or requesting of legal advice. Not one court expressed any concerns that it could not discern the lawyer's role or the purpose of the communication. Nor was there any indication that the clear showing required to prove privilege was categorically impossible to make

[12] Contrary to Boehringer's contention, Boehringer Br. 49, Cephalon is apposite because the court had to address whether a lawyer served in her capacity as a lawyer providing legal advice.

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

The Court provided two additional guidelines for evaluating opinion work product claims. First, disclosure of the document must reveal something additional about the attorney's thoughts beyond what is already known. "There is no real, nonspeculative danger of revealing the lawyer's thoughts when the thoughts are already well-known." Id. at 152 (internal quotation marks and citation omitted). Thus, for example, if a document reveals only an attorney's "general interest in the financials of the deal," it is not protected because "such interest reveals nothing at all." Id. Second, the impressions revealed must be non-obvious and legal in nature. "Where an attorney's mental impressions are those that a layman would have as well as a lawyer in these particular circumstances, and in no way reveal anything worthy of the description 'legal theory,' those impressions are not opinion work product." Id. at 153 (citation and internal quotation marks omitted).

Based on these standards, the Court concluded that it was "incumbent" upon Boehringer "to explain specifically how disclosure would reveal the attorney's legal impressions and thought processes." Id. Boehringer must show why the factual information in these documents, which were created by attorney

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 t

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

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 3 [JA___]. In other words, they revealed no legal advice or mental impressions, preliminary, interim, or final.[14]

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

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

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

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

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

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

Barr] make sense from a financial business perspective is business." Dkt. 32, Ex. B Decl. Ex. 19 at 68:19–24 [JA–596]. It is hardly surprising that this Court held in Boehringer I that "as Ms. Persky observed in her testimony before the FTC, questions about whether the agreements made financial sense were a matter of business judgment, not legal counsel." 778 F.3d at 152.

In fact, the record demonstrates that these financial analyses and forecasts are largely spreadsheets and PowerPoint presentations prepared by Boehringer business employees with no discernable legal involvement. Key parameters for the financial analyses originated from business executives. [illegible]

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 point of view." Dkt. 33, Ex. 4 at 28:16-24 [JA–1014]. And Boehringer's financial executives in charge of the copromotion 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 copromotion deal "as a freestanding agreement," Dkt. 37, Ex. 4 at 112:21-22 [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, 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 marks 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 ___], 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 when 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–]. 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–___]

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

Boehringer suggests that ex parte affidavits would be appropriate in any attorney-client privilege dispute because the "privilege is an extremely important

permitted *ex parte* affidavits every time would violate the "strong public interest in open, adversarial proceedings," Dkt. 101 at 29 (citing *Armstrong*, 197 F.3d at 580) [JA–___].

B. Boehringer May Not Relitigate Boehringer I

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

The doctrines of law-of-the-case and law-of-the-circuit both make it inappropriate for a panel of this Court to reconsider the earlier decision. See *LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996) (en banc). 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 as 4 Tc -0.01

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 of that decision.[18] 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

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[17] See Motion to Stay Issuance of the Mandate in No. 5312 at 3 (Jun. 11, 2015); Reply in Support of Motion to Stay Issuance of Mandate, No. 5312 at 3 (Jun. 29, 2015); Order Denying Motion to Stay Issuance of Mandate, No. 5312 at 3 (Jul. 2, 2015).

[18] See Petition for Panel Rehearing or Rehearing En Banc at 9, No. 5312 at 13 (Apr. 6, 2015); Order Denying Panel Rehearing and Order Denying Rehearing En Banc

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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, 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. [illegible]

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it is required And in any event,

CONCLUSION

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

Respectfully submitted,

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July 17, 2017

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

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

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

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