ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUBMIA CIRCUIT

NO. 12-5393

FEDERAL TRADE COMMISSION,
Petitioner-Appellant,

v.

BOEHRINGER INGELHEIM PHARMACEUTICALS, INC.,
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA (NO. 1:09-MC-00564-JMF)

REPLY BRIEF FOR APPELLANT FEDERAL TRADE COMMISSION

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RULES

MISCELLANEOUS

SUMMARY OF ARGUMENT

Since early 2009, the FTC has sought to investigate two sets of agreements executed simultaneously by Boehringer and Barr in 2008. In one, Barr agreed to drop its challenges to patents on two of Boehringer's branded drugs, thus delaying competitive entry. In the other, Boehringer agreed to pay Barr over $100 million to co-promote one of those drugs, Aggrenox. Because of those agreements, Aggrenox will likely not appear in generic form before July 2015. Boehringer will continue earning monopoly profits for several years longer than it otherwise might have, and consumers may pay hundreds of millions of dollars more than they otherwise might have.

To date, Boehringer has not produced to the FTC a single contemporaneous financial analysis of its Aggrenox co-promotion agreement. Those analyses would greatly help answer a central question: Did Boehringer conclude that the value it would derive from this agreement would be fully commensurate with the large sums that it paid Barr? If the answer is no, the documents will provide the Commission with direct contemporaneous evidence that Boehringer used the co-promotion agreement to compensate Barr for delaying its competitive entry.

The district court authorized Boehringer to suppress all of these documents, by pushing the concept of super-protected "opinion work product" to an extreme. Although the court apparently recognized that a document can qualify as opinion

work product only if it "reveals the mental processes or impressions of an attorney," Dkt. 69 at 7 [JA-150], the court concluded—illogically—that *any* document would "necessarily" meet that test if it was requested by a Boehringer attorney in connection with the litigation settlement, *id.* at 12 [JA-155]. On this basis, the court denied the FTC access to hundreds of documents, even though many of them appear simply to be standard profit-and-loss analyses.

That ruling is untenable, and Boehringer struggles in vain to defend it. Unlike the attorney notes and other documents at issue in the vast majority of cases that Boehringer cites, the documents at issue here were not even prepared by lawyers. The fact that Boehringer's general counsel may have requested them does not convert these documents into *opinion* work product unless they provide real insights into the general counsel's legal opinions. Neither the district court nor Boehringer has established that all of the hundreds of withheld documents actually reveal such legal impressions or opinions, and it is implausible to suggest that they do.

In any event, many of these documents do not qualify as "work product" in the first place, let alone "opinion" work product, for the independent reason that they would have been created in the ordinary course of business. The district court found, Dkt. 69 at 9, 11, 12-13 [JA-152, 154, 155-56], and Boehringer concedes, *id.* at 9 [JA-152], that the withheld documents are substantially similar to those that

Boehringer creates in the ordinary course. That point is particularly obvious with respect to financial analyses of the Aggrenox co-promotion agreement—a business deal that Boehringer insists was economically unrelated to the settlement. Companies do not enter into $100 million marketing agreements without first completing an economic analysis.

Nevertheless, Boehringer contends that, because it would not have entered the deal itself if it had not been in litigation with Barr, analyses of the deal were, in some highly attenuated sense, created "because of" litigation. Boehringer Br. 42. The logical extension of Boehringer's argument is that any time two parties might not have entered into a freestanding business deal if they had not encountered one another in litigation, *all* documents related to that deal, no matter how routine, are protected as work product. The law does not require that absurd result. Instead, documents cannot qualify as work product if they would have been produced in similar form in connection with similar, non-litigation-related deals.

Finally, Boehringer contests neither the obvious relevance of the documents to the FTC's investigation nor the inability of the FTC to obtain these analyses from some other source. Rather, it contends that the FTC can reconstruct Boehringer's own analyses through other materials that Boehringer has produced. Boehringer Br. 51. But such after-the-fact reconstructions are neither the same nor as valuable as Boehringer's contemporaneous analyses. In short, the FTC has

demonstrated substantial need for the withheld documents. This Court should order them to be produced.

ARGUMENT

I. DOCUMENTS ARE NOT OPINION WORK PRODUCT SIMPLY BECAUSE AN ATTORNEY REQUESTS THEM

The district court duly recited that a document can qualify for super-protected *opinion* work product status only if it actually "reveals the mental processes or impressions of an attorney." Dkt. 69 at 7 [JA-150]. But the court then collapsed the distinction between opinion and fact work product by categorically concluding that "disclosure of *any aspect* of" the financial analyses requested by an attorney "would *necessarily* reveal the attorneys' thought processes[.]" Dkt. 69 at 12 [JA-155] (emphasis added); *see also* FTC Br. at 23-24. Because the rule effectively applied by the court is legally erroneous, its decision is reviewed *de novo*. *See, e.g., In re Subpoena Served upon the Comptroller of the Currency*, 967 F.2d 630, 633 (D.C. Cir. 1992).[1]

[1] The FTC has not argued, as Boehringer suggests (Br. at 48-49), that the district court should have reviewed all the challenged documents, not just the ones in the sample. Boehringer also errs in characterizing the procedures used below as ones to which the FTC agreed. Boehringer Br. 1, 15. Apart from Boehringer's eleventh-hour submission of *ex parte* affidavits (see FTC Br, 53-58), Boehringer now reveals for the first time that it submitted additional documents to the court beyond those the parties had agreed upon. Boehringer Br. 15. These documents are not limited to cover emails purportedly providing context (*id.*), but included numerous privileged documents the FTC did not challenge. In other words, Boehringer used

As the plain language of Rule 26 confirms, materials requested by a lawyer can receive the heightened protection of "opinion work product" *only* if they reveal the "mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation." Fed. R. Civ. P. 26(b)(3); *Upjohn Co. v. United States*, 449 U.S. 383, 400 (1981). Because every document requested by an attorney in preparation for litigation provides some clue as to the attorney's thinking, there must be something more to distinguish opinion work product from fact work product. *See In re San Juan Dupont Plaza Hotel Fire Litig.*, 859 F.2d 1007, 1015 (1st Cir. 1988). As this Court has held, the key issue is whether a document "reveals [the lawyer's] view of the case." *Dir., Office of Thrift Supervision v. Vinson & Elkins*, 124 F.3d 1304, 1308 (D.C. Cir. 1997); *accord In re Sealed Case*, 124 F.3d 230, 236-37 (D.C. Cir. 1997) (*"Sealed Case 1997"*), *rev'd on other grounds*, *Swidler & Berlin v. United States*, 524 U.S. 399 (1998). "Purely factual material" requested by an attorney does not qualify for "super-protective" treatment as opinion work product simply because, in some attenuated way, it "may reflect the attorney's mental processes." *Sealed Case 1997*, 124 F.3d

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documents that the FTC had conceded were properly protected from disclosure to persuade the court that the agency was seeking protected material, and it hid that fact from the FTC.

at 236. "Where the context suggests that the lawyer has not sharply focused or weeded the materials, the ordinary Rule 26(b)(3) standard should apply." *Id.*[2]

On that basis, this Court has denied "opinion work product" treatment even to interview notes *written by a lawyer*. *See id.* It follows *a fortiori* that such treatment should also be denied to garden-variety financial documents that, like those at issue here, were prepared by non-lawyer businesspeople at the general request of a lawyer. Indeed, cases cited by Boehringer itself (Br. 36-37) confirm the same key distinction between documents written or closely organized by attorneys (opinion work product) and routine business documents prepared by non-lawyers at a lawyer's general direction (at most, fact work product). *See Better Gov't Bureau, Inc. v. McGraw*, 106 F.3d 582, 608 (4th Cir. 1997) (documents were written by an attorney and indicated "her theories and opinions regarding this litigation"); *Willingham v. Ashcroft*, 228 F.R.D. 1, 5 (D.D.C. 2005) (documents embodied counsel's "pure legal analysis of this case").[3]

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[2] Boehringer erroneously suggests that the Supreme Court's decision in *Swidler & Berlin* casts doubt on this work-product holding. Boehringer Br. 48. But as district courts in this Circuit have recognized, "[t]he [*Swidler & Berlin*] Court did not reach … the D.C. Circuit's analysis of work-product privilege," and thus "the work product discussion in *Sealed Case 1997* remains controlling precedent." *In re HealthSouth Corp. Sec. Litig.*, 250 F.R.D. 8, 12 (D.D.C. 2008).

[3] *United States v. Duke Energy Corp.*, 208 F.R.D. 553, 557 & n.5 (M.D.N.C. 2002), cited by Boehringer (Br. at 37), held that a formula used to calculate projected emissions after receipt of a notice of violation was opinion work product.

Here, the documents at issue are plain-vanilla financial and business documents: profit and loss analyses of the Aggrenox co-promotion agreement, forecasts of generic entry, and assessments of the impact of settlement options. The district court stated, and Boehringer reasserts, that all such documents are subject to "opinion work product" super-protection on the theory that "disclosure of any aspect of the financial analyses would *necessarily* reveal [Boehringer] attorneys' thought processes regarding the BIPI-Barr settlement." Dkt. 69 at 12 [JA-155] (emphasis added); *see* Boehringer Br. 36. But that proposition misreads the applicable precedent. An attorney's request for documents does not "necessarily" reveal that attorney's thought processes and convert them into opinion work product. Rather, the documents' contents must somehow provide real insights into the thought processes of those attorneys. Neither the district court nor Boehringer identifies any reason to draw the highly counterintuitive conclusion that *all* of these documents provide such insights.

In particular, although both the court and Boehringer vaguely assert that the documents reveal "frameworks" provided by Persky, Dkt. 69 at 10-11 [JA-153-

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The court, however, reached that conclusion because counsel had strategically chosen one method of calculation out of eight possible methods, and disclosure of the document would reveal that strategic choice. There is no indication that disclosure of the documents here would reveal any remotely comparable insights into any lawyer's strategic choices. Dkt. 32, Ex. B Decl. Ex. 19 at 117:2-7, 23-25 [JA-593]; Dkt. 37, Ex. 4 at 118:1-7 [JA-776].

54]; Boehringer Br. at 33, they do not even explain what the term "framework" means here, much less suggest how, given Persky's testimony, such "frameworks" might somehow reveal Persky's actual legal opinions. For example, Persky testified that she did not provide legal assumptions, such as odds of success in litigation, to use in the analyses. Dkt. 32, Ex. B Decl. Ex. 19 at 117:2-7 [JA-593]; Dkt. 37, Ex. 4 at 118:3-7 [JA-776], and that her assessment of whether the agreements made sense reflected business, not legal, advice, Dkt. 33, Ex. 2 at 68:19-24 [JA-990]. Boehringer and the district court also utterly fail to explain how profit-and-loss analyses of the Aggrenox co-promotion deal could provide insights into any attorney's legal theories beyond those already acknowledged in Boehringer's own brief.

In this regard, Boehringer acknowledges Persky's basic motivation in requesting the financial analyses, stating that "she requested such analyses to help in her legal analysis of possible settlement, including how to settle the lawsuits on commercially reasonable terms that could withstand antitrust scrutiny." Boehringer Br. 13. For this statement, Boehringer cites testimony in Persky's investigational hearing ("IH") in which Persky repeatedly stated that she requested "financial information" (Dkt. 37, Ex. 4 at 113:11-116:1) [JA-772-75]; directed Boehringer businesspeople to provide her with figures concerning the acceptable "financial terms" for the settlement and co-promotion agreements (*id.* at 118:8-23) [JA-776];

and asked the businesspeople to provide her with a "financial analysis" of the co-promotion agreement (*id.* at 127:2-15) [JA-781].[4]

Boehringer fails completely, however, to explain what *more* about Persky's mental processes, beyond the representations in Boehringer's own brief, would be revealed if these financial analyses themselves were released. In fact, the district court's own description of the withheld documents indicates that nothing more would be revealed. The court said that "similar reports are prepared for BIPI executives as a matter of regular business." Dkt. 69 at 11 [JA-154]. It described the documents as "financial analyses," *id.* at 11, 12-13 [JA-154, 155-56], and "arithmetical calculations," *id.* at 13 [JA-156], that, in its view, cast no "light on the fundamental legal issue of whether the deal was or was not anticompetitive in intendment or result," *id.* [JA-156]. Of course, the FTC disagrees with this last assertion on the merits—the notion that these financial documents are somehow irrelevant to the complex antitrust economic issues the FTC is investigating. But the district court's observation that the documents make no direct reference to any

[4] Boehringer also cites testimony that Persky asked "Dr. Marlin" for an analysis of the Mirapex patent challenge (*id.* at 120:6-12 [JA-777]). It is the FTC's understanding that, at that time, Dr. Marlin was a vice president for U.S. business development and alliance management. Boehringer does not identify what kind of attorney mental processes would be disclosed in the document he provided.

lawyer's antitrust concerns further indicates that these documents do not actually reflect the legal opinions of counsel.

Exhibit A to the FTC's complaint considered by the Supreme Court in *FTC v. Actavis*, 133 S. Ct. 2223 (2013), illustrates how such documents can reveal key economic insights, but not attorney opinions. Second Amended Complaint ¶¶ 57-59 & Exhibit A,[5] *FTC v. Actavis, Inc.*, No. 1:09-cv-00955-TWT (N.D. Ga.). Exhibit A is a financial analysis of a co-promotion agreement between a generic firm, Watson (now Actavis), and a branded firm, Solvay (now AbbVie), and it is likely similar to analyses that Boehringer wants to suppress here. It contains various mathematical calculations showing (1) that a settlement in which generic competitors agree to a later entry date would increase the total pool of profits available to all the manufacturers, and (2) that possible side business arrangements with the generic challengers would result in net costs rather than profits. While these facts are highly pertinent to the Commission's investigation, they reveal nothing about the mental impressions of any attorneys working on or preparing for litigation. Indeed, as Boehringer itself points out, "there is no indication that the

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[5] The Second Amended Complaint is available at http://www.ftc.gov/os/caselist/0710060/090528androgelfinalcmpt.pdf. Exhibit A to the Second Amended Complaint is reproduced in Volume 2 of the Joint Appendix filed in the Supreme Court and is available at http://www.ftc.gov/os/caselist/0710060/130122watsonappendix2.pdf.

financial analysis in *Actavis* is privileged." Boehringer Br. 44. But the same is almost certainly true of the corresponding financial documents that Boehringer seeks to suppress here.[6]

Moreover, other evidence confirms that Persky had only an attenuated involvement in the creation of the withheld documents, and that production of those documents therefore could not plausibly provide significant new insights into her mental processes as counsel. For example, some of the requests for these analyses did not even originate with Persky. Document 3058 (Dkt. 32, Ex. B Decl. Ex. 15 at 13) [JA-520]; Dkt. 59 at 19:22-24 [JA-90], 20:11-12 [JA-91], 20:13-19 [JA-91]. As previously noted, Persky testified that she did not supply legal assumptions in requesting their creation. Dkt. 32, Ex. B Decl. Ex. 19 at 117:2-7 [JA-593]; Dkt. 37, Ex. 4 at 118:3-7 [JA-776]. And as for the forecasts reflected in these analyses, the marketing team supplied data to the forecasting team, which then chose the assumptions used in forecasts. Dkt. 32, Ex. B Decl. Ex. 20 at 109:10-16 [JA-601]. Persky was not the source.

Boehringer (Br. 13) also cites Persky's *in camera* affidavit, ¶¶ 6, 10-11, which the FTC has not seen, but which presumably contains a claim that Persky

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[6] Though Boehringer notes that its withheld documents "state on their face that they are privileged and confidential," Boehringer Br. at 11, the Solvay analysis contained a similar statement on each page. The use of that routine "privilege" header obviously does not itself resolve whether a document is actually privileged.

provided legal advice regarding the agreements' compliance with antitrust laws or the merits of the underlying litigation. Boehringer Br. 13. But nothing in her testimony or that of other employees demonstrates how production of *the financial analyses* would themselves reveal new information about Persky's mental processes on either score. She testified that, as lead negotiator, she was responsible for business terms in the settlement and co-promotion agreements, Dkt. 37, Ex. 4 at 70:2-7, 71:10-12 [JA-755-56], and that her advice reflected business, not legal, perspectives. Dkt. 33, Ex. 2 at 68:19-24 [JA-990]. Thus, her testimony indicates that the analyses would disclose only the "concerns 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.'" *In re John Doe Corp.*, 675 F.2d 482, 493 (2d Cir. 1982).[7]

Finally, the broad standard for opinion work product that Boehringer advocates and the court below accepted not only contradicts settled precedent, but would also lead to absurd results. Suppose, for example, that a defendant offered to settle a case by deeding over a parcel of real property, and the plaintiff's lawyer, with an eye toward advising the plaintiff whether to accept the offer, ordered an

[7] Although it appears that Persky may have had discussions with outside counsel about the legal terms of the agreements, *see* Dkt. 37, Ex. 4 at 70:8-22 [JA-755], the FTC is not seeking documents that reflect such discussions.

appraisal of the property. Such an appraisal would be relevant in making the legal decision whether to settle, and surely reveals that the attorney believed such a financial analysis was "necessary or important to determining an appropriate settlement." Dkt. 69 at 12 [JA-155]. Under the district court's approach, therefore, this routine property appraisal would have to be treated as virtually undiscoverable opinion work product. That is not, and cannot be, the applicable rule. If "every item which may reveal some inkling of a lawyer's mental impressions, conclusions, opinions, or legal theories" were to be classified as opinion work product, "the exception would hungrily swallow up the rule." *In re San Juan Dupont Plaza Hotel Fire Litig.*, 859 F.2d at 1015; *see also Sealed Case 1997*, 124 F.3d at 236.

In sum, the district court committed legal error when it concluded that Boehringer's counsel's requests for documents "necessarily" revealed opinion work product. Unless the Court, in reversing, holds that Boehringer has failed to prove that the withheld documents should be shielded at all by the work-product doctrine, *see* Part II, *infra*, it should remand the case with instructions to the district court to re-examine the documents in the stipulated sample, applying the correct

legal standard and permitting redaction only of true opinion work product. *See* FTC Br. 31-33.[8]

II. DOCUMENTS THAT WOULD HAVE BEEN CREATED IN SUBSTANTIALLY SIMILAR FORM IRRESPECTIVE OF LITIGATION DO NOT QUALIFY AS WORK PRODUCT

As discussed in our opening brief (*id.* at 33-41), the withheld materials are not work product in the first place, let alone "opinion" work product, if they would have been prepared in substantially the same form in the ordinary course of business, regardless of litigation. The district court ignored that independent rationale for ordering the production of the key documents at issue here. That is a remarkable oversight because the court repeatedly found that Boehringer often created these types of documents, in much the same form, in the ordinary course. Dkt. 69 at 9, 11, 12-13 [JA-152, 154, 155-56]. But the court nonetheless also found that the documents did *not* qualify as "business forecasts made in the ordinary course of business" *because they had been prepared for counsel*. Dkt. 69 at 11 [JA-154]. That is straightforward legal error. A business document prepared for

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[8] In other words, the district court's review should not include the documents that Boehringer unilaterally selected and submitted to the district court without the FTC's consent or knowledge. *See* note 1, *supra*.

Boehringer also suggests that resolution of the work-product issues would still require the district court to resolve many attorney-client privilege claims that the court never reached. Boehringer Br. 21. But Boehringer has claimed *only* work-product protection on well over half of the disputed documents, thus making any remaining attorney-client claims readily manageable on remand.

counsel is not work product if it "would have been created in essentially similar form irrespective of the litigation." *United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998).

The district court's error on this point is particularly indefensible with respect to financial analyses of Boehringer's more than $100 million co-promotion agreement with Barr. No sophisticated economic actor enters into such an agreement without performing a financial analysis first. Indeed, Boehringer concedes as much, insisting that it derives value from the co-promotion agreement commensurate with "what it pays Barr under the agreement *apart from the litigation settlement*." Boehringer Br. 42-43 (emphasis added). Of course, Boehringer could draw this conclusion only if, as it testified before the FTC, it conducts financial analyses when it enters into co-promotion agreements. Dkt. 33, Ex. 3 at 72:19-23 [JA-1008]. Yet the district court categorically deemed all such routine analyses to be attorney work product.

That ruling is legally untenable. Boehringer does not deny that it conducted financial forecasts to determine whether the co-promotion agreement was profitable. And it insists that this agreement was "freestanding," having value independent of the parties' patent settlement. Boehringer Br. 43. But Boehringer argues nonetheless that these financial analyses should be withheld anyway because the co-promotion agreement arose in the context of "contentious

litigation." Boehringer Br. 42-43.[9] In other words, Boehringer argues that the documents relating to this agreement must all be work product because the parties would not have negotiated *the underlying agreement itself* if the supposedly independent patent litigation had not brought the same parties to the negotiating table for supposedly unrelated reasons.

This exceptionally attenuated theory of causation misreads the appropriate legal standard. Materials qualify as work product only if they were "created because of anticipated litigation, *and* would not have been prepared in substantially similar form but for the prospect of that litigation." *United States v. Deloitte LLP*, 610 F.3d 129, 138 (D.C. Cir. 2010) (quoting *Adlman*, 134 F.3d at 1195) (emphasis added). Here, Boehringer does not dispute that it prepares financial documents "in substantially similar form" for commercial agreements of comparable magnitude, whether or not a given agreement of this type arises in the context of litigation. That fact disqualifies such documents from work-product protection. *See Adlman*, 134 F.3d at 1202.

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[9] There is no basis for Boehringer's reliance (Br. 42) on *Fair Isaac Corp. v. Experian Information Solutions, Inc.*, No. 0:06-cv-4112, slip op. (D. Minn. Nov. 3, 2008). In that case, work-product protection was applied to internal financial analyses of a business deal that was the very means by which the parties resolved their legal dispute. *Id.*, slip op. at 14, 15. The deal was not what Boehringer characterizes this co-promotion agreement to be here: merely an independent opportunity that happened to arise in the course of settlement discussions.

Indeed, Boehringer's contrary approach would produce absurd results. Suppose, for example, that one real estate developer sues another over development rights on their adjacent properties in Midtown Manhattan. Upon reaching settlement terms, the defendant developer separately proposes to sell to the plaintiff developer a minority interest, at fair market value, in the defendant's new commercial real estate development in Connecticut, but only if the Manhattan development-rights settlement is finalized. To evaluate the proposal, the general counsel for the plaintiff buyer orders an appraisal of the Connecticut site. Both Boehringer and the district court would treat that appraisal as work product simply because it was requested by counsel and because the parties might not have thought to enter the investment deal with each other had they not been together at the bargaining table in the unrelated litigation. Indeed, under that approach, work-product protection would extend implausibly to everything from an inventory of the Connecticut site's utility connections to preparation of the property survey. Not only would these documents all be work product, but any such document prepared at an attorney's request would be virtually undiscoverable opinion work product. That is not, and cannot be, the law.

Finally, if there were any doubt about the proper disposition of this dispute, it should be resolved against the party—Boehringer—that has adopted an inequitable litigation position at war with itself. Persky testified, consistent with

Boehringer's position, that the co-promotion agreement was not "a vehicle to pay Barr not to compete on generic Aggrenox." Dkt. 33, Ex. 2 at 113:3-6 [JA-992]. At the same time, Boehringer seeks to withhold all of the financial analyses of the co-promotion agreement—the very documents that it maintains support its position that the agreement is an economically freestanding business deal. Dkt. 33, Ex. 2 at 127:12-15 [JA-993]; 133:23-134:4 [JA-995-96]. Courts are appropriately reluctant, however, to allow a party to use privilege claims "to deprive its adversary of access to material that might disprove or undermine the party's contentions." *In re Grand Jury Proceedings*, 350 F.3d 299, 302 (2d Cir. 2003); *see also In re Subpoena Duces Tecum*, 738 F.2d 1367, 1371-72 (D.C. Cir. 1984); *United States v. Nobles*, 422 U.S. 225, 239-40 (1975); FTC Br. 35 n.11. Particularly given that the resolution of work-product disputes properly "turns on a balancing of policy concerns rather than application of abstract logic," *United States v. Textron Inc.*, 577 F.3d 21, 26 (1st Cir. 2009), this Court should prevent Boehringer from inequitably invoking work-product protection to conceal the very documents that supposedly justify its conduct.

III. THE DISTRICT COURT FOUND THE FTC HAD A SUBSTANTIAL NEED FOR FACT WORK PRODUCT

A party may discover fact work product based on a showing of substantial need and undue hardship in acquiring the materials by other means. Fed. R. Civ. P. 26(b)(3), *Dir., Office of Thrift Supervision*, 124 F.3d at 1308. Here, the district

court ordered Boehringer to produce "factual work product that can be reasonably excised from any indication of opinion work product." Dkt. 69 at 13 [JA-156]. This directive, of course, presupposes that the FTC had shown substantial need for this work product. Boehringer has not challenged that conclusion.[10]

Boehringer does not offer any persuasive rebuttal to the FTC's showing of substantial need.[11] The FTC's investigation seeks to examine whether Boehringer agreed to share its monopoly profits on one or two branded drugs with its potential rival, Barr, in exchange for Barr's agreement to delay entry with lower-priced generic products. Among other things, the FTC seeks to assess whether Boehringer is using the Aggrenox co-promotion deal as a way to pay Barr not to enter. As the Supreme Court recently explained:

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[10] Boehringer's argument (Br. at 50) that the district court determined that the FTC failed to meet the substantial need standard for access to fact work product is thus incorrect. The district court held only that the FTC had not satisfied the more demanding standard for access to *opinion* work product. Dkt. 69 at 12-13 [JA-155-56] (noting that "a showing of substantial need is not sufficient to merit disclosure of opinion work product" and finding that the FTC did not have an "overriding need" for the documents).

[11] Boehringer also states that the FTC must show that "it faces undue hardship from failing to obtain such documents." Boehringer Br. 53. But that is not the standard to obtain fact work product. The FTC needs to show merely that it "cannot, without undue hardship, obtain their substantial equivalent by other means." Fed. R. Civ. P. 26(b)(3)(A)(ii). Indeed, it cannot be the case that a party must show that fact work product is essential to its case. If that were the standard, a party would not risk seeking the materials because its failure to obtain them could give rise to arguments that it cannot prove its case without them.

> Although the parties may have reasons to prefer settlements that include reverse payments, the relevant antitrust question is: What are those reasons? If the basic reason is a desire to maintain and to share patent-generated monopoly profits, then, in the absence of some other justification, the antitrust laws are likely to forbid the arrangement.

Actavis, 133 S. Ct. at 2237. In short, the parties' reasons for entering into any side agreements—including any independent business justification for such agreements—are a significant focus of the antitrust inquiry.

In *Actavis*, the Court considered an FTC complaint containing allegations that rely on the same kinds of contemporaneous internal financial analyses of settlement options and side deals that are at issue here. The complaint prominently features an internal financial analysis by the branded drug manufacturer, Solvay, of various settlement scenarios, which provides direct evidence of how Solvay valued the settlement and side deal. *See, supra*, note 5. Here, the Commission seeks similar types of documents reflecting Boehringer's reasons for this deal.

Although Boehringer suggests otherwise (Br. 51-55), a party's own contemporaneous documents are especially valuable in an antitrust inquiry. *See* FTC Br. 50-51. "[I]n cases of ambiguity we presume that the defendants, who are in the best position to know their business, are also rational actors. As a result, knowledge of their own expectations can aid a tribunal in determining whether the likely effects of a restraint are competitive or anticompetitive." 11 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1912g, at 367 (3d ed. 2011). And

because potential anticompetitive conduct is to be judged at the time of alleged agreement, a party's own contemporaneous documents play an important role in such an analysis. *See United States v. du Pont*, 353 U.S. 586, 602 (1957) (emphasizing evidence from "contemporaneous documents" that acquisition violated antitrust laws); *Polk Bros., Inc. v. Forest City Enters.*, 776 F.2d 185, 189 (7th Cir. 1985) (conduct under the antitrust laws to be evaluated at the time of contract).

Boehringer argues, however, that in lieu of Boehringer's own contemporaneous financial analyses, the FTC will just have to make do with whatever reconstruction of the events in question it can piece together from the documents and data that Boehringer has produced. Boehringer Br. 51-53.[12] But Boehringer does not, and cannot, deny the relevance of its contemporaneous financial analyses to the FTC's investigation. *See Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corp.*, 5 F.3d 1508, 1513 (D.C. Cir. 1993) (subpoena to be enforced if documents are relevant to purpose of the investigation); *Dir., Office of Thrift Supervision*, 124 F.3d at 1307 (disclosure of

[12] The district court's conclusion that the FTC had not met the more demanding standard for opinion work product was not based on a finding that it could reconstruct Boehringer's analyses from other sources. Dkt. 69 at 11 [JA-154].

fact work product requires substantial need and "undue hardship in acquiring the information any other way").

Moreover, the contemporaneous documents would provide unmatched insights into the reason the parties settled their patent disputes with an arrangement that called for Boehringer to pay Barr more than $100 million. *See* 7 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1504, at 402 (3d ed. 2010) ("There is no reason for the court creatively to imagine possible justifications that the defendants have not adduced."). Boehringer fails utterly to acknowledge (Br. 53-55) that evidence of its intent could be highly relevant to demonstrating the anticompetitive effects of the settlement and co-promotion agreements (or lack thereof). *See United States v. Brown Univ.*, 5 F.3d 658, 672 (3d Cir. 1993) ("[C]ourts often look at a party's intent to help it judge the likely effects of challenged conduct."); *Antitrust Law* ¶ 1504, at 401-02 ("we often speak of the defendant's purpose, because we look to the defendant, with its knowledge of its own situation, to identify the possible justifications for its conduct").[13]

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[13] Boehringer also argues that the FTC could have asked Boehringer's employees whether they intended to commit antitrust violations. Boehringer Br. 54. For good reason, however, courts credit contemporaneous documents over a company's after-the-fact justifications for its conduct. *See, e.g., United States v. U.S. Gypsum Co.*, 333 U.S. 364, 396 (1948) (noting importance of contemporaneous documents); *Copy-Data Sys., Inc. v. Toshiba America, Inc.*, 755 F.2d 293, 298, 301 (2d Cir. 1985) (same).

As noted, the district court asserted that the withheld documents were merely "arithmetical calculations" that cast no "light on the fundamental legal issue of whether the deal was or was not anti-competitive in intendment or result." Dkt. 69 at 13 [JA-156]. But as we explained in our opening brief (FTC Br. 45), the district court lacked any basis for judging whether the "arithmetical calculations" and "financial analyses" it reviewed cast light on the highly complex economic issues the FTC is investigating. And this Court has rightly recognized the concerns raised when a district court seeks to make "an *ex ante* determination of what claims, if any, may eventually be pursued by an agency undertaking a broad investigation pursuant to its clear statutory mandate." *Linde Thomson*, 5 F.3d at 1512. Contrary to Boehringer's assertion (Br. 56-57), that recognition in no way represents a departure from the standards for assessing the need for work product.

The district court's blanket dismissal of these documents' antitrust significance also crashes headlong into the realities of antitrust investigations. Such analyses need not, and often will not, contain "smoking guns" (Dkt. 69 at 12 [JA-155]). Indeed, one reason that Congress gave the Commission broad investigative authority is that smoking guns are rare, and antitrust analyses can be economically very complex. *See FTC v. Texaco, Inc.* 555 F.2d 862, 872 (D.C. Cir. 1977) (*en banc*) (investigative power seeks "information from those who best can give it and who are most interested in not doing so"). Again, the co-promotion agreement

analysis attached as Exhibit A to the *Actavis* complaint illustrates how "arithmetical calculations of various potential scenarios," *see* Dkt. 69 at 13 [JA-156], have "a direct bearing on the economic advantages that [a company] reaped by entering into a reverse-payment settlement." *FTC v. AbbVie Prods., LLC*, 713 F.3d 54, 64 (11th Cir. 2013).

Finally, despite Boehringer's hyperbole (Br. 46), there is no threat here to legitimate work product claims.[14] Indeed, the threat points in the opposite direction: courts must take care not to let companies use attorney involvement in business decisions as cover for the creation and concealment of documents that contain none of the legal mental impressions that the work product doctrine is intended to protect. *See* FTC Br. 52-53.

[14] Boehringer is also mistaken in asserting that the FTC seeks a special work product doctrine applicable only in the patent-litigation context. Boehringer Br. 44. No such argument appears anywhere in the FTC's brief.

CONCLUSION

The Court should reverse the district court and hold that Boehringer has not proven that the withheld documents should be shielded by the work-product doctrine; or, in the alternative, it should remand the case to the district court for further proceedings consistent with the Court's decision.

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Certificate of Compliance and Service

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 5,810 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I hereby certify that copies of the foregoing brief were served upon the following counsel of record, via the Court's CM/ECF system, this 30th day of September, 2013.

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