ORAL ARGUMENT NOT YET SCHEDULED
Nos. 16-5356 & 16-5357 (consolidated)

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

FEDERAL TRADE COMMISSION,

Petitioner/Appellant/Cross-Appellee,

v.

BOEHRINGER INGELHEIM PHARMACEUTICALS, INC.,

Respondent/Appellee/Cross-Appellant.

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

REPLY BRIEF ON CROSS-APPEAL OF BOEHRINGER INGELHEIM PHARMACEUTICALS, INC.

Lawrence D. Rosenberg
JONES DAY
51 Louisiana Avenue, NW
Washington, DC 20001-2113
Telephone: (202) 879-3939
Fax: (202) 626-1700
ldrosenberg@jonesday.com

Counsel for Boehringer Ingelheim Pharmaceuticals, Inc.

Michael Sennett
Pamela L. Taylor
Erin L. Shencopp
Nicole C. Henning
JONES DAY
77 W. Wacker Drive, Suite 3500
Chicago, Illinois 60601-1692
Telephone: (312) 782-3939
Fax: (312) 782-8585

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

* *Authorities on which we chiefly rely are marked with an asterisks*

OTHER AUTHORITIES

GLOSSARY OF ABBREVIATIONS

Boehringer or BIPI	Appellee Boehringer Ingelheim Pharmaceuticals, Inc.
Boehringer I	*FTC v. Boehringer Ingelheim Pharms., Inc.*, 778 F.3d 142 (D.C. Cir. 2015)
FTC	Appellant Federal Trade Commission
Resp. Br. at __	Citation to Reply and Response Brief of Federal Trade Commission (Dkt. No. 1684541)

In its response, the FTC continues to distort the record in this case, ignoring or misreading the facts that are inconsistent with its impossible narrative about the origin of the financial analyses at issue. Based on its selectively chosen and/or distorted factual premises, it argues that the analyses cannot be protected as opinion work product because they do not reveal any legal thinking. And, instead of defending the substance of the district court's actual analysis and reasoning, the FTC primarily argues that the district court's conclusion was preordained by the *Boehringer I* decision. The FTC does not even try to explain why, if that were true, the Court remanded to the district court for a work-product analysis and review.

When the record as a whole is examined, it cannot reasonably be disputed that the work-product financial analyses at issue in this appeal were created at the direction of Boehringer's general counsel as she considered the desirability and feasibility—including from an antitrust compliance perspective—of various options to settle complex patent litigation. That was the driving purpose—particularly including antitrust compliance—for the creation of the disputed financial analyses undertaken by the business team at her request. There is also no real dispute that settlement analysis is the sort of legal thought process that the work-product privilege was designed to protect. Yet, the district court found that the analyses at issue do not reveal "legal" mental impressions because they do not

reflect the lawyer's final advice regarding settlement, and do not state on their face that they were created for a lawyer to make legal judgments about compliance with the law. That logic ignores that *the process of sifting through facts to get to* final legal advice reveals key (and protected) mental impressions. *Boehringer I* never stated or implied otherwise. The analyses at issue reveal such quintessentially legal mental impressions, and should be protected as opinion work product.

ARGUMENT

I. THE DISTRICT COURT ERRED WHEN IT DID NOT ACCORD WORK PRODUCT PROTECTION TO THE DOCUMENTS AT ISSUE ON APPEAL

A. The Evidence Supports Boehringer's Arguments, Not the FTC's

Before beginning the analysis of whether the documents at issue are work product, it is important to focus on the actual content and context of those documents, as opposed to the FTC's mischaracterizations of them. The FTC implies that Ms. Persky requested these analyses purely in the role of a businessperson and not in her capacity as a lawyer. Resp. Br. at 28-29. That notion is false. As set forth below, the evidence is clear that Ms. Persky requested the analyses at issue as part and parcel of her legal analyses of the proposed settlement agreements.

As Boehringer pointed out in its opening brief, the district court determined that many of the work product documents at issue in this case "reflect[] a broad-ranging factual analysis of many possible litigation and settlement outcomes."

JA___, Dkt. 101 at 34. And, the FTC does not seriously dispute (and the district court found, in accord with the record evidence) that the analyses at issue were requested by Ms. Persky as she advised her client on settlement of ongoing litigation and legal risk associated with the settlement, including the very antitrust considerations underlying the FTC investigation giving rise to this action. *See* JA___, Dkt. 101 at 47-48 ("Boehringer's counsel ordered the creation of these factual analyses to assist in ongoing litigation" and noting documents' "prevalent legal overtones").

The record evidence provides far more specifics, including the nature of the advice Ms. Persky was giving her client and the process used to create the documents. The FTC weakly implies that the Court should ignore such salient evidence—particularly Ms. Persky's declarations, including the public portions of her supplemental, redacted declaration—because the district court purportedly "rejected" or did not consider that evidence. Resp. Br. at 20, 36 That is wrong for a variety of reasons. First, as to the unredacted portions of Ms. Persky's supplemental declaration, there was nothing to "reject." They are simply part of the public record. *See* JA___, Dkt. 91-2. Indeed, far from "rejecting" the public portions of that declaration, the district court *cited* them as it reached its work-product rulings. JA___, Dkt. 101 at 34, 36. Similarly, the district court never purported to "reject" the *ex parte* declarations submitted to Magistrate Judge

Facciola before *Boehringer I*, and the FTC concedes that it can no longer challenge the admission of those declarations. Resp. Br. at 19, n.8.

There is a reason the FTC wants to avoid this evidence. It is devastating to the FTC's position that Ms. Persky was acting as a mere businessperson when she requested the analyses at issue. The only way the FTC can even reach that conclusion in the first place is by attempting to imbue meaning into out-of-context snippets of Ms. Persky's hearing testimony and ignore real-world context (*i.e.* what occurs when a company's in-house counsel negotiates settlement agreements). *See* Resp. Br. at 33-34. As Ms. Persky testified in her hearing, "I did not provide them [my client] with business advice, I provided them with legal advice." JA___, Dkt. 37, Ex. 4, Persky Tr. at 66:4-5.

Further, as Ms. Persky's public and sworn supplemental declaration explains, those out-of-context snippets of hearing testimony do nothing to undermine Boehringer's contention that the financial analyses at issue were made as Ms. Persky considered legal strategy and rendered legal advice to her client because of and in anticipation of litigation. As the FTC well knows, the public portion of Ms. Persky's supplemental declaration states:

> I used [the information in the analyses at issue] to assess the legal and economic viability of various settlement options, which I then presented to my client to obtain settlement authority. Therefore, by requesting economic parameters from the businesspeople, I was acting as a lawyer weeding through various settlement options to

> provide legal advice to my client regarding the desirability and feasibility of settlement. . . . This is true, even though, as I testified at the investigative hearing in this matter, my client made final business decisions and the businesspeople provided the economic parameters I requested to me.

JA___, Dkt. 91-2 at ¶ 5. She also unequivocally (and publicly) testified, "I requested most of the financial analyses remaining at issue in this matter in significant part in order to render antitrust advice to my client." *Id.* at ¶ 6.

More damning for the FTC, even the out-of-context testimony it cites does not advance its dubious premise that the general counsel of a major corporation somehow did not bring her legal skill and training to bear as she analyzed a proposed settlement of complex litigation. The hearing testimony snippets at best establish that: (1) Ms. Persky did not ask Boehringer businesspeople to assume any particular odds of success in patent litigation when she requested the financial analyses at issue (hardly surprising, since those odds would have been irrelevant to the analysis she needed from them); (2) Ms. Persky's request to businesspeople sought financial information on the way certain proposed settlement scenarios would affect the business (which is fully consistent with her sworn declaration, including the public portions of her supplemental declaration, *see, e.g.*, JA__, JA-91-2 at ¶¶ 6, 8); and (3) her client had final settlement authority and ultimately determined "whether [the proposed agreements] make sense from a financial business perspective" (again, fully consistent with her sworn testimony, *see id.* at ¶

5). *See* Resp. Br. at 33-34. None of those facts even comes close to establishing that Ms. Persky requested the analyses at issue for anything other than legal analysis.

Moreover, contrary to the implication in the FTC's brief, this Court never made any factual findings regarding the disputed documents, nor did it find that they were not opinion work product. Resp. Br. at 28 (arguing that in *Boehringer I* the Court "concluded that [the disputed documents] do not reveal protected mental impressions"). In fact, the *Boehringer I* panel expressly left to the district court the determination of whether the analyses were opinion work product. *See Boehringer I*, 778 F.3d at 158 ("We therefore will remand to the District Court to revisit the financial documents in light of the" work product standards articulated in the opinion). And, of course, the *Boehringer I* panel never purported to make any factual findings regarding the documents at issue. It would have been improper to do so. *United States v. Garrett*, 720 F.2d 705, 710 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1037 (1984) ("[T]he appellate court cannot take the place of the factfinder.").[1] The *Boehringer I* panel did suggest—in *dicta*—that some of the

[1] The FTC claims that Boehringer's description of the district court's work-product ruling is misleading. Resp. Br. at 29, n.13. The only example it can offer is that Boehringer quoted a sentence from the district court's opinion without including all of the introductory language indicating that the district court was characterizing Boehringer's view of the facts, not making its own factual findings. *Id.* (citing Boehringer Br. at 27). But Boehringer's brief never says that the district

factual information at issue might be mundane or business-oriented, *see* 778 F.3d at 153 (some of the factual information at issue is "obvious or non-legal in nature"). But it did not (and could not) deny that the information was created at the direction of the company's General Counsel as she evaluated settlement options, a quintessentially legal undertaking. And it specifically left to the district court to determine whether the non-legal factual information might reveal the attorney's mental impressions about settlement. *Id.* at 157.

In sum, all of the evidence compels the conclusion that the work-product financial analyses at issue were created as an important part of Ms. Persky's legal analysis of various settlement options and consist of the data that she thought necessary to reach those legal conclusions. Notably, she evaluated those settlement options, in part, to assess the antitrust risk associated with them—an undisputedly and exclusively legal function. JA___, Dkt. 91-2 at ¶ 6. Nothing in *Boehringer I* requires the Court to disregard that evidence, and it should not do so.

(continued…)

court made a factual finding that "it was Persky, not any business executive, who initially determined which factors were important to her in rendering legal advice to her client about economic desirability and antitrust exposure of settlement." JA___, Dkt. 101 at 33. Instead, Boehringer's brief correctly states that the district court "accurately noted" Ms. Persky's testimony to that effect, and "did not question" the testimony. Boehringer Br. at 27. Boehringer's description is accurate.

B. The District Court Misapplied the *Boehringer I* Opinion

With the actual facts in mind, the district court's analytical errors are clear. The district court ordered produced specific analyses that a general counsel, because of and in anticipation of litigation, asked her client's businesspeople to produce so that she could advise her client regarding the feasibility and legal risks of settlement. The court reasoned that the analyses themselves did not state "which scenarios [Ms. Persky deemed] legally defensible or desirable," and did not state on their face that they were prepared for the purpose of rendering antitrust compliance advice. *See* JA___, Dkt. 101 at 34, 38.

But that is not the standard for opinion work product under *Boehringer I* or otherwise, and the FTC does not seriously argue that it is. The correct standard is whether the document shows "mental impressions . . . of a party's attorney . . . concerning" litigation or settlement, Fed. R. Civ. P. 26(b)(3)(B), including the attorney's process of sifting through factual information to develop settlement advice and strategy, regardless of whether the document says on its face that is its purpose. *See* Resp. Br. at 30 (conceding that a "lawyer's interim legal impressions surely should be protected as opinion work product"). A document can easily satisfy that standard without reflecting the legal advice given to the client. *See* Fed. R. Civ. P. 26(b)(3)(B) (protected attorney "mental impressions" are distinct from the "conclusions" or "legal theories" of a party's attorney); *Beloit Liquidating*

Tr. v. Century Indem. Co., No. 02 C 50037, 2003 WL 355743, at *13 (N.D. Ill. Feb. 13, 2003) (accepting argument that "documents prepared by Beloit's lawyers evaluating settlement options" were "core work product" that "would . . . disclos[e the attorney's] strategy").

The documents at issue here fall into that category. They show Ms. Persky's mental impressions as she evaluated settlement options. For example, the district court ordered Boehringer to produce Document 901. JA___, Dkt. 101 at 51. Ms. Persky requested the analysis in Document 901 to assess the likely impact of various outcomes of the Aggrenox litigation—including settlement and alternatives to settlement—on Boehringer. JA___, Dkt. 91-2 at ¶ 12. The analysis "show[s Ms. Persky's] mental impressions regarding what factors were significant in determining whether settling litigation was in the best interest of" Boehringer. *Id.* It reveals Ms. Persky's mental impressions about the exposure generated by that litigation, ways to mitigate that exposure, and her views on the desirability of settlement. *Id.*; SA___, Dkt. 91-1 ¶ 12 (setting forth specific mental impressions revealed). Document 2333 contains similar mental impressions. JA___, *Id.* at ¶ 22; SA___, 91-1 ¶ 22 (setting forth specific mental impressions revealed). Although the documents might not reveal whether she recommended to her client the options analyzed, they nevertheless reveal important (and legal-in-nature) attorney mental impressions.

Unable to defend the district court's reasoning, the FTC argues alternate grounds to affirm the ruling below. Primarily, the FTC argues that the analyses at issue cannot be opinion work product because a businessperson might have been concerned with similar variables if, for example, the co-promotion agreement had been a standalone agreement as opposed to part of a settlement. But that analysis asks the wrong question. The question is not whether a similar analysis might have been created by a non-lawyer in a different situation; it is whether the analyses at issue reveal the attorney's mental impressions about the case. Those mental impressions include the attorney's selection of the facts that she believes will be most helpful to her in creating her final theories and conclusions. *See Boehringer I*, 778 F.3d at 151 ("When a factual document selected or requested by counsel exposes the attorney's thought processes and theories, it may be appropriate to treat the document as opinion work product.") (*citing Dir., Office of Thrift Supervision v. Vinson & Elkins, LLP*, 124 F.3d 1304, 1308 (D.C. Cir. 1997)). *See also Upjohn Co. v. United States*, 449 U.S. 383, 390-91 (1981) (the "first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant.").

Here, Ms. Persky asked for certain, specific data to help her evaluate from both a feasibility and legal risk perspective various potential methods of settling of complex patent litigation. JA___, Dkt. 91-2 at ¶ 5. By nature, the analyses that she

requested reveal her mental impressions regarding what aspects of the settlement she believed should most concern her client, what settlement options she was considering, what facts were most important to her settlement analysis, and some of the ways she believed the proposed settlement options might affect her client. In other words, they show her culling and weeding through the company's financial data to determine which settlement options she might recommend to her client given the legal risk (including FTC compliance) that might be associated with each scenario. These are exactly the sort of mental impressions the work-product privilege was designed to protect. *See Hickman v. Taylor*, 329 U.S. 495, 511 (1947) ("Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts . . . without undue and needless interference").

A simple example reveals what kind of mental impressions the FTC could glean from the analyses at issue. Imagine that settlement negotiations had stalled and Boehringer's litigation opponent, Barr Pharmaceuticals, had requested the analyses the FTC now seeks. Of course Barr would have a keen interest in which settlement options Ms. Persky considered, how she believed those options would affect Boehringer's business, how she conceptualized the company's alternatives to settlement, and the attendant antitrust risk from different settlement options. When viewed through that lens, it is easy to see why Boehringer has been

consistently adamant that the financial analyses at issue here contain Ms. Persky's mental impressions.[2]

The FTC does not cite any precedent that would justify forced disclosure of such mental impressions. That is because, like the facts, the law is not in the FTC's favor. The FTC invites the Court to reject language from the Supreme Court's *Hickman* and *Upjohn* decisions, as well as the other authority cited in Boehringer's brief, on the ground that those cases did not specifically address the distinction between fact and opinion work product. Resp. Br. at 30, n.14, 31. But that argument completely misses the point Boehringer cited these cases to establish.

Hickman and *Upjohn* are cited because they make clear that the process of sifting through information to come to an attorney's final legal advice or strategy—and not just the final legal advice or strategy—are the sort of mental impressions work product privilege protects. *Hickman* state that "[p]roper preparation of a client's case demands that [an attorney] . . . sift what he considers the relevant from the irrelevant facts," and that an attorney must be able to do so "without undue and needless interference" from other parties. *Hickman*, 329 U.S.

---

[2] Boehringer seeks to protect the analyses at issue as opinion work product because they contain such mental impressions. Its challenge is not, as the FTC repeatedly asserts, based solely on the fact that a lawyer requested them. Resp. Br. at 30.

at 511. The Court reiterated the concept in *Upjohn*, noting that the "first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant." *Upjohn*, 449 U.S. at 390-91. Supreme Court guidance, particularly on an issue as sensitive as privilege, should always be heeded and respected to the best of the Court's ability.

As to the other authority, Boehringer cited the cases it did because they demonstrate that documents analogous to the financial analyses in this case contain protectable attorney mental impressions. *See, e.g.*, *Willingham v. Ashcroft*, No. 02-1972, 2005 U.S. Dist. LEXIS 22258 at *10-12 (D.D.C. Oct. 4, 2005) (DEA attorneys' "thoughts regarding possible settlement" were opinion work product); *Concord Boat Corp. v. Brunswick Corp*., No. LR-C-95-781, 1997 WL 34854479, at *2 (E.D. Ark. June 13, 1997) (white paper containing counsel's "selection of facts to use in support of" its argument that the client did not violate antitrust laws was "opinion work product in the classic sense"). Those cases are relevant regardless of whether they specifically discuss the differences between fact and opinion work product because the courts in those cases found the documents at issue to be opinion work product based on their content and particularly in the context in which they were created.

Both the facts and the law compel the same conclusion: the financial analyses at issue reveal key attorney mental impressions about possibly settling

litigation without assuming legal risk and specifically antitrust risk before the FTC. Accordingly, they should be protected from disclosure.

C. The District Court Erred By Refusing to Consider Ms. Persky's Supplemental *Ex Parte* Declaration

To the extent the district court was at all confused about what mental impressions were contained in the work-product financial analyses, it should have resolved that confusion through Ms. Persky's proposed *ex parte* supplemental declaration. JA___, 91-1.

The *ex parte* declaration was offered for the express purpose of helping the Court to understand the mental impressions revealed by the documents at issue. Courts have an obligation to protect both the work product privilege and parties' right to assert it. *See* Fed. R. Civ. P. 26(b)(3)(B); *In re Miller*, 438 F.3d 1141, 1151 (D.C. Cir. 2006). Moreover, protecting privilege is an important societal interest. *See Upjohn*, 449 U.S. at 392. Accordingly, in this case, the district court had an obligation to consult the declarations if that would aid its understanding of the nature of Boehringer's privilege claim.

Boehringer is not arguing, as FTC contends, that each and every privilege dispute warrants an *ex parte* affidavit procedure. *See* Resp. Br. at 37. However, in situations such as this, where a court has been asked to review *in camera* documents whose provenance and significance might not be apparent by reviewing the document in isolation, *ex parte* affidavits are an appropriate way to give

proponents of privilege the best opportunity to defend their privilege claim, while protecting the privileged material itself. *See, e.g.*, *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953) (encouraging procedures for evaluating privilege that do not "forc[e] a disclosure of the very thing the privilege is designed to protect"); *FPL Grp., Inc. v. IRS*, 698 F. Supp. 2d 66, 84 (D.D.C. 2010) (ordering party claiming privilege to submit "an affidavit . . . in camera" explaining its privilege claims).

The FTC's own response brief illustrates exactly why an *ex parte* submission was necessary in this case. The FTC spends pages and pages claiming that Boehringer had not adequately defended its claims of privilege and pointing out that the *Boehringer I* made it "incumbent" on Boehringer "to explain specifically how disclosure [of the documents at issue] would reveal the attorney's legal impressions and thought processes." Resp. Br. at 27 (*quoting Boehringer I*, 778 F.3d at 153). Then, the FTC claims that the portions of the declaration that do not directly reveal Ms. Persky's mental impressions are off-point. At the same time, the FTC argues that the filing of a declaration that directly discusses the mental impressions contained in the documents somehow proves that there is no danger that mental impressions could be revealed by looking at the documents themselves. Resp. Br. at 36. The FTC has attempted to create an untenable Catch-22 for Boehringer. The best way to resolve those conflicting arguments was for the district court to have as much information as possible to aid it in exercising its

discretion. It should have accepted the proposed *ex parte* declaration, which leaves no doubt that the documents at issue reveal attorney mental impressions and should be protected as opinion work product.

The FTC unjustifiably maintains that the district court's judgment was nevertheless sound because *in camera* procedures are appropriate only in cases involving national security or grand jury proceedings. But the agency does not even attempt to distinguish the *FPL Group* or *Alexander* cases, both cited in Boehringer's opening brief for the proposition that *ex parte* affidavits can be appropriate in the privilege context, other than to say that the Court should disregard them as nonprecedential. Resp. Br. at 37, n.16.

The FTC does attempt to distinguish *In re Miller* and *American Immigration Council v. U.S. Department of Homeland Security*, which it concedes are binding precedent, on the ground that they involved grand jury or national security interests respectively. Resp. Br. at 37. But the *American Immigration Council* case stated that *in camera* review could be appropriate for any case in which an "in-depth description of a withholding would risk disclosure of sensitive information, and particularly where a confidential source might be compromised, the government may supplement its explanations [for withholding documents] with non-public affidavits and other documents for *in camera* review by the court." 950 F. Supp. 2d 221, 235 (D.D.C. 2013) (citing *Simon v. Dep't of Justice*, 980 F.2d 782, 784 (D.C.

Cir. 1992)). Notably, in that case, the court considered *in camera* affidavits on a variety of agency privilege claims—including work product claims. *Id.* at 241-43. The words "national security" are mentioned in only one paragraph, on page nineteen of a twenty-one page opinion. *Id.* at 246. National security concerns are not, as the FTC claims, central to the Court's observation about *in camera* affidavits.

The FTC is right about one thing: *In re Miller* concerned a grand jury subpoena requiring reporters to testify regarding their confidential sources. 438 F.3d 1141 (D.C. Cir. 2006). The Court rejected the reporters' argument that they should be entitled to the prosecutor's evidentiary submissions to the Court in support of the grand jury subpoenas. It wrote: "Assuming for the sake of this case that the general rule of grand jury secrecy is not sufficient to justify the District Court's use of *in camera* and *ex parte* proceedings [with respect to the evidentiary submission], we further note that we have approved the use of such a procedure in other cases raising privilege claims." *Id.* at 1151. Thus, in addition to being inequitable, the district court's decision to reject Boehringer's proposed *ex parte* affidavit was legally unfounded.

This error is not justified, as the FTC argues, by the district court's statement that the "context Persky provides [in her supplemental *ex parte* declaration] actually undermines rather than strengthens the argument." JA___, Dkt. 101 at 35.

Indeed, that statement is merely an extension of the underlying error in the district court's analysis. The district court acknowledged that Ms. Persky's sworn testimony was that she "chose certain financial variables over others" for Boehringer employees to analyze. The district court somehow concluded from that fact that Ms. Persky's involvement was "merely directory," and that she had not "cull[ed] the data she received." *Id.* But the premise drawn from the declaration—that *Ms. Persky* chose what variables to analyze—shows that Ms. Persky *was* culling data. The reason the district court went astray is clear from the next sentence: it believed that "culled" data included only documents that substantively "analyzed the data [ ] requested" or showed "what data or scenarios she presented to her client." JA___, *Id.* at 36. But, as set forth above, that is not the standard. Ms. Persky's affidavit supports Ms. Persky's argument when the correct standards are applied and the process of sifting and culling factual information is respected and protected.

In sum, the undisputed record establishes that Ms. Persky requested financial analyses as she evaluated settlement options from both a feasibility and legal risk perspective. They thus reveal her mental impressions about what settlement options were under consideration and what facts Ms. Persky was focused on to develop her antitrust risk analysis. To the extent the district court was at all confused about the mental impressions revealed by the documents, it needed only

to review Ms. Persky's supplemental *ex parte* declaration, which laid them out in detail. Because the documents reveal attorney mental impressions as she sifted through facts and advised her client regarding potential settlement, they are opinion work product, even under the standards articulated in *Boehringer I*. They should have been protected as such. The fact that the analyses do not reflect Ms. Persky's final advice is irrelevant, and the district court erred by ruling otherwise.

II. *BOEHRINGER I* WAS WRONGLY DECIDED

A. *Boehringer I* Wrongly Ruled That Attorney Mental Impressions Regarding A Settlement's Commercial Feasibility And Expected Costs Are Mere Fact Work Product

As Boehringer showed in its opening brief, *Boehringer I* wrongly held that "the lawyer's thoughts relating to financial and business decisions," should not be treated as "opinion work product." *Boehringer I*, 778 F.3d at 153. This holding was in conflict with the better-reasoned Second Circuit opinion in *United States v. Adlman*, 134 F.3d 1194 (2d Cir. 1998). The *Adlman* court was specific that protected mental impressions include the attorney's analyses of "the feasibility of reasonable settlement" terms. *Id.* at 1200. The court expressly rejected the idea that "documents assessing . . . the likelihood of settlement and its expected cost" should not be protected if "prepared for a business purpose rather than to assist in litigation," finding such result completely "unwarranted." *Id.* at 1202. Indeed, it went so far as to state that "[t]he fact that a document's purpose is business-related

appears irrelevant to the question [of] whether it should be protected under Rule 26(b)(3)." *Id*. at 1200.

The FTC argues that *Boehringer I* is somehow fully consistent with *Adlman* merely because *Adlman* did not address "the distinction between fact work product and opinion work product." It is irrelevant whether *Adlman* specifically addressed the distinction between fact and opinion work product because it directly addressed how the opinion work product doctrine should apply to analyses such as those at issue here. More to the point, if *Boehringer I* has the full reach that the FTC contends, it would necessarily hold that "the feasibility of reasonable settlement terms" are not protected as attorney mental impressions (i.e. attorney opinion work product). And, under the FTC's reading of *Boehringer I*, it is not only *relevant* but potentially *issue-dispositive* whether settlement analyses consider the business impact of a potential settlement. *See* 778 F.3d at 152-53 (settlement analyses that show counsel's "general interest in the financials of the deal" are not protected). So interpreted, the cases are irreconcilable.

Moreover, the *Adlman* court's analysis is the better one. Attorneys must be able to evaluate settlement offers without fearing that those evaluations will be turned over to their adversaries if settlement talks fail. The *Boehringer I* court felt that such analyses do not reveal useful legal thoughts because "anyone familiar with such settlements would expect a competent negotiator to request financial

analyses like those performed here." *Boehringer I*, 778 F.3d at 152. But the fact that someone in a different context might consider similar factors important when reaching a non-legal conclusion should not much matter. For example, an internal investigation memo is still work product even though an insurance adjuster assessing fault might have been interested in similar issues.

Adlman thus correctly focused less on whether a lawyer's mental impressions might be similar to a businessperson's, and more on whether the document revealed any mental impressions of a lawyer doing legal work. This Court should do the same. In this case, all of the analyses at issue plainly reflect Ms. Persky's thought process regarding the potential risks and benefits of a settlement she analyzed in her capacity as an attorney. Under *Adlman*, they should therefore be protected as opinion work product.

B. *Boehringer I* Wrongly Ruled That A Party Can Demonstrate "Substantial Need" Merely By Showing That A Document Is Relevant

The FTC does not and cannot deny that it cannot recover fact work product under Rule 26 unless it has a "need" that is "substantial." Nor does it even attempt to substantively grapple with the Advisory Committee note to the rule stating that requiring more than mere relevance to meet that standard is "clearly commanded by *Hickman*." Fed. R. Civ. P. 26, 1970 advisory committee note to subdivision (b)(3); *see* Resp. Br. at 43, n.20. Yet, the FTC argues that it can show

"substantial" need through (1) its own bald assertion that the information is "relevant" in some undefined manner to its investigation; and (2) the fact that the document was created contemporaneously with the investigated events. *See* Resp. Br. at 40.

No other court has ever adopted that standard. Indeed, numerous courts have ruled to the contrary. The FTC's protestations that all of those cases are somehow consistent with *Boehringer I*'s lax substantial need standard fall flat.

For example, the FTC characterizes as "baseless" Boehringer's argument that *Boehringer I* conflicts with the Seventh Circuit's *Logan* decision and the Tenth Circuit's *J-M Manufacturing* decision. Resp. at 41. But even the *Boehringer I* panel admitted to the conflict. *Boehringer I*, 778 F.3d at 154 ("[A]lthough some courts have demanded a heightened showing of a document's relevance or probative value of discovery for fact work product, *see Logan v. Comm'l Union Ins. Co*., 96 F.3d 971, 977 (7th Cir. 1996), we have never characterized Rule 26(b)(3)'s substantial need requirement in this manner."); *id*. at 156 n.4 (acknowledging a "ratcheting up of the 'substantial need' standard in recent years by some courts," including the Tenth Circuit in *Nevada v. J-M Mfg. Co.*, 555 F. App'x 782, 785 (10th Cir. 2014)).

Although the *Boehringer I* court did not expressly acknowledge a split with the Eleventh, Fourth, and Sixth Circuits, the FTC's attempt to harmonize those

circuits' precedent with *Boehringer I* falls just as flat. *See* Resp. Br. at 41-42. *United Kingdom v. United States*, 238 F.3d 1312, 1322 (11th Cir. 2001), *Belcher v. Bassett Furniture Indus., Inc*., 588 F.2d 904, 908 (4th Cir. 1978), and *Stampley v. State Farm Fire & Cas. Co*., 23 F. App'x 467, 471 (6th Cir. 2001) (per curiam), all expressly reject a mere relevance standard for substantial need.

The FTC does not deny that, but implies that they are nevertheless consistent with *Boehringer I* because *Boehringer I* requires *both* relevance and a showing that there is a reason that the requesting party cannot exactly recreate the document (including the fact that the document was created contemporaneously with the conduct at issue in the case). Resp. Br. at 41-42. But the cases cannot be harmonized so easily.

For example, the Eleventh Circuit stated in *United Kingdom* that the investigative agency seeking to compel work product must show that the documents are not only relevant, but necessary. 238 F.3d at 1322. Similarly, the *Stampley* court denied production of certain documents contemporaneously created by the insurance company defendant as it determined whether to deny benefits to plaintiff, ruling that plaintiff could obtain the same information through an after-the-fact deposition. 23 F. App'x at 469, 471. Finally, in *Belcher*, the Fourth Circuit was clear that "substantial need" required more than mere relevance, and *separately* discussed the "undue hardship" of not being able to obtain the

information by alternate means. The FTC's attempt to harmonize these cases is illusory.

In a last ditch attempt to defend *Boehringer I's* incorrect holding, the FTC attempts to foist its burden of showing substantial need (which it has woefully failed to meet) onto Boehringer. Resp. Br. at 43 ("Boehringer fails to explain how the financial analyses sought by the FTC would not meet the J-M standard of having 'great probative value.'"). That burden is the FTC's, not Boehringer's, and the FTC has failed to carry it.

Finally, the FTC argues that the *Boehringer I* court allowing an investigative agency to itself determine what is "relevant" (and, by extension, "substantially needed") will have no negative practical effects because "'relevance' is necessarily assessed with reference to the scope of the government investigation[.]" Resp. Br. at 43. Of course, the FTC fails to explain how that is any safeguard at all, when the investigating agency has complete discretion to define the scope of its investigation, not to mention complete discretion on defining what falls into that scope. *See Boehringer I*, 778 F.3d at 157 ("the district court is not free to speculate about the possible charges that might be included in a future complaint, and then to determine the relevance of the subpoena requests by reference ot those hypothetical charges") (quoting *FTC v. Texaco, Inc.*, 555 F.2d 862, 847 (D.C. Cir.

1977)). Boehringer's warnings of the deleterious consequences that will ensue from that holding are not hyperbole; they are reality.

CONCLUSION

The Court should reverse the district court's work product ruling.

Dated: July 31, 2017

Respectfully submitted,

/s/ Lawrence D. Rosenberg
Lawrence D. Rosenberg
JONES DAY
51 Louisiana Ave., N.W.
Washington, D.C. 20001
Telephone: (202) 879-3939
ldrosenberg@jonesday.com

Michael Sennett
Pamela L. Taylor
Erin L. Shencopp
Nicole C. Henning
JONES DAY
77 W Wacker Drive, Suite 3500
Chicago, Illinois 60601-1692
Telephone: (312) 782-3939
Fax: (312) 782-8585

Counsel for Boehringer Ingelheim Pharmaceuticals, Inc.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the word limit set forth in Fed. R. App. P. 32(a)(7)(B), because it contains 5,852 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Cir. R. 32(a)(1), as counted using the word-count function on Microsoft Word 2007 software.

Dated: July 31, 2017

/s/ Lawrence D. Rosenberg
Lawrence D. Rosenberg

Counsel for Boehringer Ingelheim Pharmaceuticals, Inc.

CERTIFICATE OF SERVICE

I hereby certify that, on this 31st day of July, 2017, I electronically filed the foregoing document with the Clerk of this Court, which will notify the following at their e-mail address on file with the Court:

David C. Shonka
John F. Daly
Leslie Rice Melman
Mark S. Hegedus
Office of the General Counsel, Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580

Dated: July 31, 2017

/s/ Lawrence D. Rosenberg
Lawrence D. Rosenberg

Counsel for Boehringer Ingelheim Pharmaceuticals, Inc.