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 PHARMACEUTICALS, INC.,
Respondent/Appellee/Cross-Appellant.

On Appeal from the United States District Court
for the District of Columbia
No. 1:09-mc-564
Hon. G. Michael Harvey

REPLY AND RESPONSE BRIEF OF THE FEDERAL TRADE COMMISSION

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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 capacities, this Court established long ago that a party claiming privilege for communications with them must make a "clear showing" that the communications were made in the lawyer's legal capacity for the purpose of providing legal advice. *In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir. 1984) ("*Sealed Case*") (citation omitted). When it comes to company lawyers,

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.

Boehringer's inability to satisfy the elements of a valid privilege claim is unsurprising given Persky's own testimony, which highlighted her business responsibilities. Indeed, after previously reviewing the documents in dispute, this Court found that they showed Persky's role in the deal to be providing "business judgment, not legal counsel." *FTC v. Boehringer Ingelheim Pharms., Inc.*, 778 F.3d 142, 152 (D.C. Cir. 2015) ("*Boehringer I*"). That record does not support a

"clear showing" that, with respect to the documents in dispute, Persky was acting in a legal capacity and providing legal advice.

Instead of engaging with these facts, Boehringer's brief (amici's brief, too) argues largely against a caricature of the FTC's argument. As Boehringer puts it, the FTC's position is that otherwise privileged documents lose their privilege if they also have a business purpose. In fact, our position is that Boehringer bears a burden to make a clear showing that a corporate lawyer who also serves a business function acted in her role as a lawyer with respect to a given communication made for the purpose of legal advice—and that Boehringer did not meet that burden.

As we detailed in our opening brief, Boehringer failed to prove that for each communication Persky acted in her legal capacity to provide legal advice. 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 *ex parte* 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, *In re*

Kellogg Brown & Root, Inc., 756 F.3d 754 (D.C. Cir. 2014), plays no part in the analysis. In-house counsel in *Kellogg* were undisputedly acting as lawyers and the withheld documents undisputedly involved legal advice. This case, by contrast, presents the antecedent questions of whether Persky was acting in her legal or business role and whether or not the communications were made for the purpose of legal advice. *Kellogg* does not address those questions. *Sealed Case* and *Lindsey* do—and they establish that Boehringer has the burden to show clearly that Persky was acting as lawyer and providing legal advice. Boehringer did not do so.

Boehringer's contention that 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 burden to show they are not. That is not the law.

Contrary to the "sky-is-falling" hyperbole offered by Boehringer and its amici, application of this Court's precedent will not impair the ability of in-house counsel to provide legal advice. An in-house lawyer's communications that are shown to have been made in the lawyer's legal capacity for the purpose of rendering legal advice remain fully protected. Indeed, the FTC has not challenged

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 (citation omitted). Documents that contain only factual information can be deemed opinion work product only if disclosure would (1) meaningfully reveal the attorney's focus; and (2) reveal more than is already known about the attorney's thoughts, which must be non-obvious and legal in nature. *Id.*at 151-153.

The district court faithfully applied those standards, finding that the documents reflect Persky's thoughts not as a legal advisor but a businessperson. Dkt. 101 at 35 [JA–___]. Boehringer's challenge is feeble. It continues to assert the proposition—already rejected by this Court—that Persky's choices of information necessarily revealed her mental impressions. For the reasons stated in *Boehringer*

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

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

ARGUMENT

I. REPLY IN NO. 16-5356: THIS COURT SHOULD REVERSE THE DISTRICT COURT

A. Boehringer Did Not Clearly Show That Its General Counsel Always Acted as a Lawyer Providing Legal Advice

Boehringer's position boils down to the notion that by virtue of Persky's role as general counsel, any document created at her direction or sent to her necessarily reflects her capacity as a lawyer rendering legal advice. On that theory, Boehringer claims that the clear-showing test of *Sealed Case* does not apply because, under

Kellogg, business purposes also associated with those communications do not strip them of attorney-client privilege. Boehringer's argument is wrong and would flip the burden to show privilege, requiring the FTC to disprove that privilege applies rather than Boehringer to prove that communications are privileged. The argument also rests on a fundamental misreading of *Kellogg* that would dramatically alter this Court's longstanding precedent about attorneys with multiple roles.

1. ***Kellogg* applies only after a clear showing that an attorney was acting as lawyer and that a significant purpose of the communication was legal advice**

As shown in our opening brief (FTC Br. 24-29), the district court committed legal error when it concluded that *Kellogg* governed this case before it determined whether Persky acted as a lawyer advising on legal matters or a businessperson advising on business matters. Under this Court's precedents, where corporate counsel also acted in a non-legal capacity, it was Boehringer's burden to clearly show (and the district court to find) that the disputed communications sought Persky's legal advice in her legal role, and not business advice in her business role. *Sealed Case*, 737 F.2d at 99 (citing *SEC v. Gulf & W. Indus., Inc.*, 518 F.Supp. 675, 683 (D.D.C. 1981)). The district court failed to require this showing. The case therefore should at least be remanded. But because Boehringer did not meet its burden of clearly showing Persky's role, the Court should rule on the existing record that Boehringer has not substantiated its claim of privilege. The latter course

is the better one, given that this investigative subpoena dispute has been pending for eight years and counting.

Boehringer's defense of the district court's decision rests on two mistaken premises. First, it caricatures the FTC's argument as a claim "that attorney-client communications with a 'business' purpose cannot also have a significant 'legal' purpose." Boehringer Br. 36. Untrue. The FTC's position is that a party claiming privilege for communications created at the direction of or by an in-house lawyer-businessperson must show that the person was acting as a lawyer and not a businessperson when she made 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 most of Boehringer's privilege claims. But because Boehringer did not make that showing for the specific documents now at issue, it did not substantiate its claim of privilege, and the district court improperly applied *Kellogg*.

Second, Boehringer asserts that the district court committed no error because *Kellogg* "rejected the tortured separation . . . between 'business' and 'legal' communications." Boehringer Br. 38 (citing *Kellogg*, 756 F.3d at 759). Boehringer argues in effect that *Kellogg* implicitly overruled *Sealed Case*, eliminated the clear

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 there had been a "clear showing" that in-house counsel were acting "in a professional legal capacity" for the purpose of legal advice, as required by *Sealed Case*, 737 F.2d at 99. Nor did it *sub silentio* eliminate those requirements.

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

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

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

According to Boehringer, the district court could know that Persky functioned as a lawyer providing legal advice with respect to the disputed communications simply because she was the company's general counsel. "Common sense," it argues, "would dictate that a company's general counsel . . . would not suddenly abdicate all of her legal skills and training and consider

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 advisor, 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 the 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. (Proposed Final Draft No. 1, 1996)). The Second Circuit has similarly recognized that "in the private sector … 'in-house attorneys are more likely to mix legal and business functions.'" *Cty. of Erie*, 473 F.3d at 421 (quoting *Bank Brussels Lambert v. Credit Lyonnais (Suisse)*, 220 F. Supp. 2d 283, 286 (S.D.N.Y. 2002)).[2]

Because the privilege "has the effect of withholding relevant information from the fact-finder, it applies only where necessary to achieve its purpose." *Fisher v. United States*, 425 U.S. 391, 403 (1976). Fundamental principles underpinning the attorney-client privilege thus demand that companies seeking its protection for communications with in-house counsel make a "clear showing" that each communication at issue involves the lawyer's role as a lawyer. That showing helps a court to "strictly confine" the privilege "within the narrowest possible limits consistent with the logic of its principle." *In re Lindsey*, 158 F.3d at 1272 (citations and internal quotation marks omitted).

Moreover, the clear showing must be made for "each communication for which it is asserted." *United States v. Legal Servs. for N.Y. City,* 249 F.3d 1077,

[2] Amici's discussion of *County of Erie* falsely gives the impression that in-house counsel's communications involving business and financial matters always involve the lawyer in her legal capacity. Amici Br. 6-7. In fact, the case recognized that "a lawyer not acting in her capacity as a lawyer is not a lawyer for the purpose of the attorney-client privilege." *Cty. of Erie,* 473 F.3d at 421 n.9.

1082 (D.C. Cir. 2001) (citation omitted). Blanket or categorical assertions—such as Boehringer's position that all of Persky's communications are privileged because she was general counsel—do not suffice. *See Lindsey*, 158 F.3d at 1270; *cf. Boehringer I*, 778 F.3d at 153 (rejecting categorical conclusion that all work product was opinion work product because in-house counsel requested it in the context of litigation).[3] Although a party need not "detail the contents of each communication," it "must supply the court with sufficient information from which it could reasonably conclude that the communications: (1) concerned the seeking of legal advice; (2) was between a client and an attorney acting in his professional capacity; (3) was related to legal matters; and (4) is at the client's insistence permanently protected." *Gulf & W. Indus.*, 518 F.Supp. at 682 (quoting *FTC v. Shaffner*, 626 F.2d 32, 37 (7th Cir. 1980)).

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

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

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

because it would permit the FTC to "lob[] vague and unparticularized challenges at hundreds of documents at a time." Boehringer Br. 51. Amici assert that a communication-by-communication examination of privilege claims is inconsistent with *Kellogg*, Amici Br. 9. Both complaints are misplaced.

Boehringer's complaint of undue burden is misplaced because it ignores that the proponent of *any* privilege must show that it applies to each communication at issue. *See Legal Servs. of N.Y. City*, 249 F.3d at 1082; *FTC v. TRW, Inc.*, 628 F.2d 207, 213 (D.C. Cir. 1980). (It also ignores Boehringer's decided information advantage over the FTC.) Under the Commission's rules for investigations, for example, Boehringer's withholding of documents had to be accompanied by a privilege log containing "information … of sufficient detail to enable the Commission staff to assess the validity of the [privilege] claim for each document, including attachments, without disclosing the protected information." 16 C.F.R. § 2.11(a)(1) (2017). Federal discovery rules similarly require that when a party asserts a privilege it must "(i) expressly make the claim; and (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." Fed. R. Civ. P. 26(b)(5). Preparation of document-by-document privilege logs is commonplace in modern litigation; there is simply no way around it.

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

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[4] For example, Boehringer claims attorney-client privilege for document entry no. 617, which it describes as "Analysis of '577 Patent Litigation and potential settlement prepared at the direction of counsel and as a result of litigation (email attachment)." Dkt. 32, Ex. B. Decl. Ex. 11 at 44 [JA-331]. The description does not mention legal advice and no lawyer is listed as author or recipient. *Id.* By contrast, Boehringer claims privilege for document entry no. 1542, which it describes as "Request for legal advice from counsel regarding Aggrenox co-promotion, supply and license agreements and Mirapex license agreement relating to '555 and '086/'812 Patent Litigation settlements." Dkt. 32, Ex. B. Decl. Ex. 12 at 2 [JA-406]. Persky is the author of the document and several lawyers are listed as recipients. *Id.* The FTC has not challenged this claim.

[5] Contrary to Boehringer's contention, Boehringer Br. 49-51, the FTC did not argue that Boehringer waived its privilege claims. We argue that it failed to support them.

In contrast to Boehringer's general claims of privilege, the FTC identified specific documents (Dkt. 32, Ex. A [JA–218-20]), including ones in the *in camera* sample, and noted recurring deficiencies associated with Boehringer's claims for those documents. Relying on the material provided to the FTC by Boehringer to support its attorney-client privilege claims—the privilege log, correspondence with the FTC, and briefs submitted to the district court—we demonstrated that Boehringer had provided no concrete evidence that proved that any of the disputed communications in the *in camera* sample involved Persky in her legal capacity providing legal advice. FTC Br. 32-33. The FTC supported its challenges with extensive testimonial evidence, largely ignored (or avoided) by Boehringer, gathered through investigative hearings. Boehringer did not need to guess about the grounds for the FTC's challenges.

Although Boehringer complains that it had to justify the privilege for many documents, Boehringer Br. 50, the FTC challenged only a small subset of the over 3,500 documents on Boehringer's privilege log (Dkt. 32, Ex. B Decl. Exs. 11-16 [JA–288-560]). Moreover, a party's decision to withhold a large number of documents responsive to a valid subpoena supplies no reason to water down the legal standard for assessing whether a privilege applies. Often, a common set of facts may support the privilege claims made for multiple documents. The proponent's task in that case is simply to tie the facts laying the foundation for a

privilege to each communication. Despite controlling much of the relevant facts, Boehringer completely failed to do so. There is no reason to believe that it could not have supported each privilege claim, if a factual foundation truly existed.

For their part, amici mischaracterize *Kellogg* when they assert that a communication-by-communication review of privilege claims is inconsistent with that case. Amici Br. 9. As described at pages 13-14 above, *Kellogg* did not modify this Court's requirement (*see Legal Servs. of N.Y. City*, 249 F.3d at 1082) that the privilege proponent carry its burden of proof with respect to each communication. *Kellogg* merely held that, to establish that a primary purpose of a communication to an attorney acting in her role as a lawyer was legal advice, the proponent need not prove that legal advice is the *predominant* purpose of a communication. 756 F.3d at 760.[6]

Amici's position is inconsistent with decades of precedent. The Court recognized in *Legal Services of New York City*, 249 F.3d at 1082, that courts routinely examine each allegedly privileged communication to determine if the

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[6] Amici also misrepresent the FTC's position: "According to the government, if a particular communication concerns a 'non-legal' subject to advance a business purpose, it cannot *also* be in furtherance of the provision of legal service, because the choices are (like the choice of which 'hat' to wear) mutually exclusive." Amici Br. 9. The FTC said no such thing. We said that if a communication is not clearly shown to be made to a lawyer acting her capacity as a lawyer providing legal advice, it cannot be privileged. *E.g.* FTC Br. 34. *See Lindsey*, 158 F.3d at 1270; *see also Kellogg*, 756 F.3d at 760 ("Was obtaining or providing legal advice *a* primary purpose of the communication … ?").

privilege claim is valid. For example, in *Sealed Case*, the Court examined the content of specific conversations between a corporate president and the general counsel to determine whether they discussed antitrust compliance. 737 F.2d at 101. In *Lindsey*, the Court considered the content of several specific conversations involving White House counsel, noting that "[a] blanket assertion of the privilege will not suffice." 158 F.3d at 1270. In *Gulf & Western Industries*, the court examined an attorney's "many roles" and the content of his communications when concluding that "it cannot be assumed that all of his discussions with corporate officials involved legal advice." 518 F.Supp. at 683. Describing the inquiry in *County of Erie*, the Second Circuit said that "it should be assessed dynamically and in light of the advice being sought or rendered, as well as the relationship between the advice that can be rendered only by consulting with the legal authorities and advice that can be given by a non-lawyer." 473 F.3d at 420-21. It continued, "an attorney's dual legal and non-legal responsibilities may bear on whether a *particular communication* was generated for the purpose of soliciting or rendering legal advice." *Id.* at 421 (emphasis added).

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

The disputed communications, as described by this Court and the district court, strongly suggest that, with respect to the challenged documents, Persky was not called upon to use her legal training, skills, and expertise to advise on legal

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

Significantly, neither Magistrate Judge Facciola nor Magistrate Judge Harvey relied on the *ex parte* affidavits to rule on Boehringer's attorney-client privilege claims. Judge Facciola ruled principally on the work-product claims and did not address the attorney-client privilege claims for the documents at issue now. *Boehringer I*, 778 F.3d at 158. To the extent Judge Facciola relied on the *ex parte* affidavits, his conclusions were largely reversed by this Court in the earlier appeal.

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[7] Boehringer accuses the FTC of "a surprising lack of candor to the Court" for not addressing the supposed support the affidavits provide. Boehringer. Br. 43-44. The accusation is ridiculous. The FTC has never seen two of the affidavits, and Boehringer redacted the third to conceal the parts it thought meaningful. Without knowledge of the affidavits' content, the FTC obviously could not address them.

[8] Although this Court concluded that the FTC had waived its challenge to the district court's accepting and relying on the two *ex parte* affidavits submitted during the initial proceedings before the district court, *Boehringer I*, 778 F.3d at 158 n.5, the FTC may still challenge the conclusions to be drawn from those earlier affidavits.

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 [JA–76]. As far as the publicly available evidence reveals, she simply was not involved in the disputed communications and thus could have no direct knowledge of the circumstances surrounding them. *Id.*

No other materials support Boehringer's position with respect to the disputed communications. Boehringer relies on several investigational hearing excerpts, Boehringer Br. 44 (citing citing Dkt. 37, Ex. 4 at 113:11-116:1, 118:8-23, 120:6-12, 127:2-15 [JA–772-77, 781]), but Persky's testimony in those excerpts and throughout the hearing attests to her business responsibilities. Persky testified

that she was the "lead negotiator" on "business terms" of the various agreements associated with the settlement. Dkt. 37, Ex. 4 at 70:2-12; 71:10-12 [JA–755-56]. Regarding her responsibilities in the negotiations, the FTC asked her directly whether she was providing "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 [JA–990]. 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 their purpose was "to help me assess litigation strategy." Dkt. 37, Ex. 4 at 121:1-8 [JA–778]. The FTC does not challenge application of the privilege to those documents.

Boehringer's later prepared, *ex parte* affidavits do not rebut Persky's earlier, unvarnished testimony. As Boehringer's general counsel, Persky certainly had the experience and knowledge to make clear whether or not she was carrying out her legal responsibilities. Her testimony convincingly shows that when she requested the analyses to support business decisions, she said so, and when she requested analyses to support legal decisions, she also said so. [9]

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[9] As for testimony that Persky directed the creation of some documents, Boehringer Br. 45, this Court has held that such direction by itself is an insufficient basis to conclude that the communications reflected legal matters. *Boehringer I*, 778 F.3d at 152.

Nor is Boehringer helped by prior judicial descriptions of the documents. This Court's finding that financial analyses were created "because of" litigation (and thus qualified as work product) does not prove that Persky acted as a lawyer with respect to them. Boehringer Br. at 43 (citing *Boehringer I*, 778 F.3d at 150). Work product does not necessarily constitute attorney-client communications. *Boehringer I*, 778 F.3d at 149. The conclusions of Judges Facciola and Harvey are equally unprobative. Boehringer Br. at 44. This Court reversed Judge Facciola's conclusions. *Boehringer I*, 778 F.3d at 153, 158. And as the FTC is demonstrating in this appeal, Judge Harvey's conclusions regarding Boehringer's attorney-client privilege claims are flawed.

4. The clear showing requirement does not threaten the work of in-house counsel

Boehringer and its amici proffer a parade of horribles that they contend will transpire if the Court enforces its "clear showing" requirement for attorney-client privilege claims involving in-house lawyer-executives. Boehringer Br. 37 ("Lawyers—and particularly in-house counsel—cannot render effective legal advice without considering the business aspects of any variety of situations, including proposed mergers or acquisitions, contract negotiations, internal investigations of potential wrongdoing, or, as in this case, complex patent settlement agreements with potential antitrust implications."); Amici Br. 14-21 ("FTC's approach would upend settled law and undermine the ability of in-house

counsel to function.").[10] Their doomsaying is unwarranted, particularly in light of the fact that the FTC's position has been the settled law of this Circuit (and others) for decades.

Boehringer's and its amici's own examples show why. In each example, the lawyer is clearly acting in her legal capacity providing legal services to the corporation. Boehringer Br. 37; Amici Br. 14-21. In that situation, confidential communications with the lawyer for the purpose of obtaining legal assistance remain privileged, even if the communications also concern business or other non-legal matters. Thus, for example, where a communication about an accounting entry arises in the context of an internal investigation, a tax matter, or an acquisition, a lawyer relying on it to provide legal advice has no need for concern that her company cannot claim the privilege simply because an accounting entry is not generally a legal matter. That is why the FTC did not challenge most of Boehringer's claims of privilege. Where, however, the lawyer is serving in a non-legal capacity, such as advising her company on the business case for an acquisition rather than whether the acquisition will survive antitrust review, the communication about the accounting entry should not be privileged—just as it would not be if it were made by any other person acting in a business role.

[10] Amici mistakenly ascribe the requirement to the FTC. Amici Br. 14.

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 683. 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 individual communications to determine whether counsel acted as a lawyer or a business advisor. Not unlike some of the documents in

[11] Boehringer unsuccessfully attempts to distinguish *Lindsey* as dealing with "various governmental privileges not at issue here" and the "intermediary doctrine." Boehringer Br. 42. The fact that *Lindsey* involved the attorney-client privilege in the government context did not affect the Court's underlying privilege analysis. *Lindsey*, 158 F.3d at 1270-71 (citing a variety of authorities on the issue of the attorney-client privilege). The discussion in *Lindsey* of the "intermediary doctrine" is entirely separate from the discussion of the attorney-client privilege, *compare id.* at 1270-71 *with id.* at 1278-79, and does not make the case inapplicable here.

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.

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[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.

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

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

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

1. *Boehringer I* established the applicable standards

In its earlier decision, this Court made clear that, for a document to qualify as opinion work product, its disclosure must actually reveal an attorney's mental impressions. Where the document consists only of factual information requested or selected by an attorney, "[o]pinion work product protection is warranted only if the selection or request reflects the attorney's focus in a meaningful way." *Boehringer*

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 its 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 those 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 non-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 the documents, the Court determined that many were "obvious or non-legal in nature" and "have no legal significance." *Id.* at 153. "For example, in several documents, the 'frameworks' provided by counsel are simply time frames for requested financial data[.]" *Id.* Finally, the court indicated that many documents related primarily to business—rather than legal—concerns. *Id.* at 152 ("[A]s 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.").

2. The district court correctly applied the standards established in *Boehringer I*

On remand, the district court correctly applied the foregoing standards. It concluded that most of the business and financial analyses were fact, not opinion, work product. The court found that Persky's involvement, if any, in these analyses was akin to what "any reasonable businessperson in her position would analyze in

this situation." Dkt. 101 at 34 [JA–___].[13] "Persky's mental impressions, if any, in these analyses were no more than a layman would have in the circumstances and do not reveal 'something of legal significance.'" *Id.* at 35 (quoting *Boehringer I*, 778 F.3d at 152-53) [JA–___]. It did not matter whether Persky or businesspeople selected variables reflected in the documents. "Persky's due diligence as a data analyst for her client does not mean that every piece of data she touched becomes opinion work product." *Id.* at 35 [JA–___]. The documents did "not reflect Persky's impressions as a legal advisor." *Id.* Indeed, the court concluded that "Boehringer's documents themselves give no indication that there were prepared for use in a discussion of antitrust liability." *Id.* at 38 [JA–___]. The court thus held that all but three of Boehringer's documents qualify as fact work product only. Dkt. 101 at 39 [JA–___].

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

Boehringer attacks the district court's decision on several grounds, but the arguments are unavailing. First, Boehringer proposes that to qualify as opinion work product "[a] document need not express an attorney's final, legal advice," but will be protected if it reveals "[t]he process of getting to the final advice," especially when the advice concerns compliance. Boehringer Br. 53. But while a lawyer's interim legal impressions surely should be protected as opinion work product, the documents here contained no such impressions and the district court did not violate that precept. To the contrary, after reviewing the documents, it concluded that they "give no indication that they were prepared for use in a discussion of antitrust liability." Dkt. 101 at 38 [JA–___]. 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

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[14] The cases cited by Boehringer (Boehringer Br. 53-54) 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. OR-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]'

the facts contained in these documents such that revealing these facts would reveal her legal impressions of the case." Dkt. 101 at 36 [JA–___].

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

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

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

Boehringer also claims that Persky "considered whether potential settlement options … were justified in light of the litigation uncertainties that they would eliminate." Boehringer Br. 55. Assuming for the sake of argument that Boehringer has correctly described Persky's analysis, the documents themselves do not reveal Perksy's legal impressions. Persky testified that she did not give the business people legal assumptions to use in their analyses. When asked whether she provided the business staff "with any sort of assumption about Boehringer's odds of success in the patent litigation," she answered "no." Dkt. 32, Ex. B Decl. Ex. 19 at 117:2-7 [JA–593]. When asked whether she provided them "with any other sort of legal assumption, a figure of some kind to use in their analysis," she testified that she "did not provide them with figures. I asked them to provide me with figures." Dkt. 37, Ex. 4 at 118:3-7 [JA–776].

Persky also claims that she "asked the businesspeople at Boehringer to gather information regarding those economic parameters," *id.*, Dkt. 91-2 at 3, ¶ 5 [JA–___], and that she requested financial valuations of the co-promotion agreement in order to assess the "commercial feasibility" of the settlement. Dkt. 91-2 at 3, ¶¶ 5-6 [JA–___]. These matters plainly involve business, not legal, judgment, as Persky confirmed in her testimony: "Whether [the agreements with

Barr] make sense from a financial business perspective is business." Dkt. 32, Ex. B Decl. Ex. 19 at 68:19-24 [JA–596]. It is hardly surprising that this Court held in *Boehringer I* that "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: Persky asked business people and the board to provide her with the parameters needed to negotiate an acceptable settlement from a business perspective. Dkt. 32, Ex. B Decl. Ex. 19 at 68:6-24 [JA–590]. The forecasts and assumptions reflected in those analyses came from Boehringer's marketing team, not Persky. Dkt. 32, Ex. B Decl. Ex. 20 at 109:1-16 [JA–601]. These assumptions related to business (not legal) matters; specifically, the financial impact of early generic entry on the sales of Boehringer's products and the financial viability of the co-promotion agreement. Dkt. 32, Ex. B Decl. Ex. 20 at 48:3-21 [JA–599].

The testimony from Boehringer's business executives is clear and consistent on the business focus of these materials. For example, one Boehringer executive testified that she "looked at what were the potential scenarios when a generic

would come to market and how would that impact our sales and profitability." Dkt. 33, Ex. 5 at 60:5-19 [JA–1026]. Another testified that in analyzing the impact of generic entry on Mirapex, he had done "quite a bit of scenario planning around different timing of [generic] entry" to "understand the impact of different scenarios in the marketplace on the business. From a sales and investment standpoint." Dkt. 33, Ex. 4 at 28:16-24 [JA–1014]. And Boehringer's financial executives in charge of the co-promotion analyses characterized these analyses as "quantif[ying] the Duramed copromotion and the impact to the business" and "taking a look at the parameters of the copromotion and what that would mean to our P&L." Dkt. 33, Ex. 3 at 21-22 [JA–1005].[15]

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

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

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

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

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

Whether or not to accept an *ex parte* affidavit is a matter of the district court's discretion. *Labow v. United States Dep't of Justice*, 831 F.3d 523, 533 (D.C. Cir. 2016). The district court properly exercised that discretion here. It explained that it rejected the *ex parte* affidavit because Boehringer did not meet "its high burden to show that the affidavit is necessary or appropriate in these circumstances." Dkt. 101 at 28 [JA–___]. 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–___], and this Court's "reservations" about *ex parte* proceedings outside the realm of national

security, *id*. (citing *Lykins v. U.S. Dep't of Justice*, 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 societal interest that itself justified admitting an in camera declaration." Boehringer Br. 57. In support of this proposition, Boehringer cites this Court's decisions in *In re Miller*, 438 F.3d 1141, 1151 (D.C. Cir. 2006), and *American Immigration Council v. U.S. Department of Homeland Security*, 950 F. Supp. 2d 221, 224 (D.D.C. 2013),[16] but it does not even acknowledge that those precedents involved the very "limited circumstances" where *ex parte* affidavits may be appropriate, namely, national security and grand jury secrecy. Boehringer has not shown that the societal interest in the attorney-client privilege rises to that level. Discovery disputes involving the attorney-client privilege are common, and a rule that

[16] Boehringer also cites some district court decisions that do not address this Court's precedents on the topic, are non-binding, and are unpersuasive. Boehringer Br. 58 (citing *FPL Group, Inc. v. IRS*, 698 F. Supp. 2d 66, 84 (D.D.C. 2010); *Alexander v. FBI*, 192 F.R.D. 12, 16 n.3 (D.D.C. 2000)).

permitted *ex parte* affidavits every time would violate the "strong public interest in open, adversarial proceedings," Dkt. 101 at 29 (citing *Armstrong*, 97 F.3d at 580) [JA–___].

B. Boehringer May Not Relitigate *Boehringer I*

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

The doctrines of law-of-the-case and law-of-the-circuit both make it inappropriate for a panel of this Court to reconsider the earlier decision. *See LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996). The law-of-the-case doctrine provides that "the same issue presented a second time in the same case in the same court should lead to the same result." *Id.* at 1393. That rule flatly precludes Boehringer from relitigating the Court's earlier decision, which now binds the remainder of this case, as Boehringer recognizes. Boehringer Br. 59 n.7.

The law-of-the-circuit doctrine is based in legislation and the structure of the federal courts of appeals and means that a decision of a panel is a decision of the court. *Barry*, 87 F.3d at 1395. Accordingly, "[o]ne three-judge panel … does not have the authority to overrule another three-judge panel of the court"; only the *en banc* court may do so. *Id.* (citations omitted). Were it otherwise, "the finality of … appellate decision would yield to constant conflicts within the circuit." *Id.* (citation omitted).Thus, even if the panel that hears this case disagrees with the holding *Boehringer I*, the decision nevertheless remains binding.

2. *Boehringer I* does not conflict with the decisions of any other court

Even if Boehringer could challenge the Court's first decision, its challenge would fail. This is the fourth time Boehringer has tried to convince an appellate court that *Boehringer I* conflicts with decisions of other courts. This Court twice rejected Boehringer's arguments: when it denied Boehringer's request to stay the mandate in *Boehringer I*[17] and its petition for rehearing[18] of that decision. Boehringer's arguments were rejected a third time when the Supreme Court denied Boehringer's petition for certiorari.[19] The fourth go-round fares no better.

There is no split between *Boehringer I* and *United States v. Adlman*, 134 F.3d 1194 (2d Cir. 1998). *See* Boehringer Br. 59-61. *Boehringer I* addressed the distinction between fact work product and opinion work product. *Adlman* did not address that issue at all. It considered whether a document is work product in the

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[17] *See* Motion to Stay Issuance of the Mandate in No. 12-5393 (Jun. 11, 2015); Reply in Support of Motion to Stay Issuance of Mandate, No. 12-5393 (Jun. 29, 2015); Order Denying Motion to Stay Issuance of Mandate, No. 12-5393 (Jul. 2, 2015).

[18] *See* Petition for Panel Rehearing or Rehearing En Banc at 9, No. 12-5393 (Apr. 6, 2015); Order Denying Panel Rehearing and Order Denying Rehearing En Banc, No. 12-5393 (Jun. 4, 2015).

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

first place. *See* 134 F.3d at 1195-1203; *see id.* at 1197 ("This case involves [the] question … *whether Rule 26(b)(3) is inapplicable* to a litigation analysis prepared by a party or its representative … .") (emphasis added).

Boehringer's claimed split is especially hollow because it seriously misstates the Court's earlier opinion. It claims that the Court held that "lawyer's thoughts relating to financial and business decisions" are not opinion work product, whereas *Adlman* held that a "business-related" purpose did not negate work product status. Boehringer Br. 59. Boehringer is once again quoting selectively from prior rulings. In fact, *Boehringer I* held that "the lawyer's thoughts relating to financial and business decisions are not opinion work product *when she is simply parroting the thoughts of the business managers*." 778 F.3d at 153 (emphasis added). Thus, even if *Adlman* had addressed fact vs. opinion work product, there still would not be conflict.

There likewise is no split between this Court and other circuits regarding the "substantial need" standard. *See* Boehringer Br. 61-64. *Boehringer I* held that the "substantial need" and "undue hardship" requirements in Rule 26(b)(3) together require a party seeking discovery of fact work product to show both that the materials "are relevant to the case," and that "the materials have a unique value apart from those already in the movant's possession, and special circumstances excuse the movant's failure to obtain the requested materials itself." 778 F.3d at

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

Logan v. Commercial Union Insurance Co., 96 F.3d 971 (7th Cir. 1996), did not impose a higher standard. The court found that insurance company claim-processing documents to be protected work product even though they were the only available evidence of bad faith, an essential element of the plaintiff's claim. *Id.* at 977. The court held that "a mere allegation of bad faith is insufficient to overcome the work product privilege," and that a plaintiff must demonstrate "some likelihood or probability that the documents sought may contain evidence of bad faith." *Id.* But those determinations pose no conflict because the court explained it meant only that a plaintiff "need only show the possibility, not the certainty, that the claim documents contain evidence of bad faith." *Id.* The court did not adopt any "heightened standard" for discoverability.

Same with *United Kingdom v. United States*, 238 F.3d 1312 (11th Cir. 2001). The court concluded that the finding of a British court that the documents were relevant to the dispute did not, without more, satisfy the requirements of Rule 26(b)(3). *Id.* at 1322. That holding is fully consistent with *Boehringer I*.

In *Belcher v. Bassett Furniture Indus., Inc.*, 588 F.2d 904 (4th Cir. 1978), the court looked to Rule 26(b)(3) to assess a plaintiff 's request to inspect premises under Federal Rule of Civil Procedure 34. *Id.* at 908. It explained that discovery is permitted upon a "simpl[e] showing [of] … relevancy," but that when the materials qualify as work product, the moving party must also show substantial need and undue hardship. *Id.* The holding is consistent with *Boehringer I*. Likewise, in its unpublished decision in *Stampley v. State Farm Fire & Casualty Co.*, 23 Fed. App'x. 467 (6th Cir. 2001) (per curiam), the Sixth Circuit concluded that a plaintiff had not satisfied the Rule 26(b)(3) standard where relevant information contained in work-product materials could have been discovered in other ways, including through depositions. *Id.* at 471. That decision too is consistent with *Boehringer I*.

Finally, in an unpublished decision in *Nevada v. J-M Manufacturing Co.*, 555 Fed. App'x. 782 (10th Cir. 2014) ("*J-M*"), the Tenth Circuit stated that "[a] substantial need exists where 'the information sought is essential to the party's defense, is crucial to the determination of whether the defendant could be held liable for the acts alleged, or carries great probative value on contested issues.' " *Id.* at 785 (citation omitted). This Court has already explained that its decision is consistent with the Tenth Circuit's because that court conflated "what is sufficient and what is necessary to demonstrate need." *Boehringer I*, 778 F.3d at 156 n.4. Substantial need for discovery certainly justifies discovery, but that does not mean

it is required. And in any event, Boehringer fails to explain how the financial analyses sought by the FTC would not meet the *J-M* standard of having "great probative value." At bottom, Boehringer has shown only that different courts have used slightly different verbal formulations to describe the showing required to obtain fact work product under Rule 26(b)(3). It has shown no substantive conflict.[20]

Boehringer also states that the "Court compounded the negative practical effects of its error by ruling that when the government conducts investigations, it can determine for itself what documents are 'relevant,' and thus for which documents its 'need' is 'substantial.'" Boehringer Br. 64. Again, Boehringer is wrong. The Court explained that in the absence of a district court complaint, "relevance" is necessarily assessed with reference to the scope of the government investigation and that need may be shown even to establish the absence of a violation of the law. *Boehringer I*, 778 F.3d at 157 (citing *FTC v. Texaco, Inc.*, 555 F.2d 862, 874 (D.C. Cir. 1977) (*en banc*)). The Court's explanation simply does not "virtually eliminate the substantial need requirement in the investigative context." Boehringer Br. 65.

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[20] Boehringer also claims support for its position in the Advisory Committee Notes to Rule 26(b)(3), Boehringer Br. 64, but this Court examined those Notes and concluded that its understanding of the Rule 26(b)(3) standard was consistent with both the Notes and *Hickman*. *Boehringer I*, 778 F.3d at 156.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

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