

documents responsive to the subpoena, and the district court denied the Commission's petition for enforcement, in part, on the grounds that the work product doctrine shielded the documents from disclosure. *See* Memorandum Opinion (docket #69), issued September 27, 2012.

The Commission intends to present the following issues in this appeal:

1. Whether the district court improperly sustained Boehringer's claim to work product protection for financial analyses concerning a joint marketing (or "co-promotion") agreement due to its relationship to an agreement to settle patent litigation, despite Boehringer's persistent assertions that the co-promotion agreement was free-standing and independent of the litigation settlement.

2. Whether the district court erred in deeming as "work product" documents consisting of financial analyses, business assessments, or market data that, although relevant to the co-promotion agreement or to the patent litigation settlement, would have been generated in the ordinary course of business irrespective of the patent litigation or the settlement.

3. Whether the district court erred in categorically treating documents containing financial analyses, business assessments, or market data as "opinion work product" in their entirety, on the grounds that Boehringer's general counsel had requested them, even though record evidence demonstrates that such analyses were sought to assess the financial and business implications of the co-promotion

agreement or the patent litigation settlement, and did not contain or reflect the legal opinions or judgments of counsel.

4. Whether the Commission met its burden of showing the necessity for the information in the documents to carry out its law enforcement investigation and the unavailability of such information by any other means, so as to overcome any work product protection that might have attached to the documents.

5. Whether the district court, in addressing the Commission's need for the information in the documents and opining that such information would not significantly add to the Commission's knowledge about issues relevant to the investigation, improperly blocked legitimate avenues of the Commission's inquiry in a manner that transgressed the established limits of a court asked to enforce an investigative subpoena.

Respectfully submitted,

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Certificate of Service

I hereby certify that copies of the foregoing Statement of Issues to be Raised on Appeal were served upon the following counsel of record, via the Court's CM/ECF system, this 14th day of January, 2013.

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