No. 12-5393

In the United States Court of Appeals for the District of Columbia Circuit

FEDERAL TRADE COMMISSION,
Appellant,

v.

BOEHRINGER INGELHEIM PHARMACEUTICALS, INC.,
Appellee.

RESPONSE OF FEDERAL TRADE COMMISSION TO PETITION FOR REHEARING *EN BANC*

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INTRODUCTION

Boehringer petitions for rehearing *en banc* of an agency subpoena enforcement case involving an unexceptional application of the work product doctrine. The petition should be denied because the unanimous panel opinion correctly applied that doctrine to the facts of this case in compliance with all relevant precedent in this and other circuits; the matter presents no "question of exceptional importance." Fed. R. App. P. 35(a). Boehringer's contrary arguments distort the panel's holding and the underlying facts, and they warrant no further review. As the FTC's investigation enters its seventh year, the agency should finally have access to the documents at the heart of this antitrust inquiry—financial spreadsheets and similar materials that were prepared by non-lawyer businesspeople and that cast no light on any lawyer's legal judgments.

BACKGROUND

1. Boehringer manufactures the highly profitable, patented brand-name drug Aggrenox. One of its competitors, Barr Pharmaceuticals, took steps to introduce a generic substitute for the drug, and Boehringer sued Barr for patent infringement. Boehringer and Barr later settled the lawsuit and simultaneously entered into two agreements. In one, Barr agreed to drop its challenges to Boehringer's patent and delay its competitive entry into the market, thereby preserving Boehringer's

monopoly profits. In the other, Boehringer agreed to pay Barr more than $100 million, ostensibly to help promote Aggrenox.

The Supreme Court recently held that such "reverse payment" settlement agreements (so-called because the patent holder compensates the alleged infringer) can harm competition and violate the antitrust laws. *See FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013). Such agreements are assessed under the traditional antitrust "rule of reason." *Id.* at 2237-38. Whether the agreements between Boehringer and Barr are lawful turns on whether Boehringer's $100 million payment is in fact justified as compensation for the co-promotion agreement or whether it was instead designed to induce Barr to defer its competitive challenge.

In January 2009, the FTC began to investigate the matter. The agency issued a subpoena requiring Boehringer to produce documents including its "financial analyses of [the Aggrenox] co-promotion agreement," its "forecasting analyses of possible time lines for the generic drug to enter the market," and "financial analyses of the business terms of the settlement agreement," prepared at the time it was negotiating the agreements with Barr. Dist. Ct. Op., 286 F.R.D. 101, 108 (D.D.C. 2012). Such analyses will provide important contemporaneous evidence concerning whether Boehringer used the co-promotion agreement as an unlawful mechanism to keep competitors out of the market. *See Actavis*, 133 S. Ct. at 2236. Despite Boehringer's contrary suggestion (Pet. 9, 15), the FTC has *not* "received

contemporaneous financial analyses from the businesspeople" concerning the agreements at issue here: the Aggrenox settlement agreement or the Aggrenox co-promotion agreement. *See* FTC Opening Br. 49-53. Boehringer refused to produce all such financial analyses on grounds of attorney work product.

2. The FTC sued to compel production. Boehringer argued that, because its general counsel (Marla Persky) had requested the financial and business analyses for litigation settlement negotiations, producing them would reveal "the mental thought processes of [its] attorneys," and they thus constituted virtually undiscoverable "opinion work product" rather than fact work product. *See* Dist. Ct. Op., 286 F.R.D. at 108-09 .

The district court agreed that these financial and business documents constituted opinion work product because Persky had requested them from non-lawyer business staff and because, in some vague sense, they would reveal "frameworks" she had provided for preparing them. *Id.* at 108-09. The district court also concluded that the FTC had no "overriding and compelling need" for the documents. *Id.* at 109-10. It believed that they contained "no smoking guns" providing definitive "evidence of any conspiratorial intent to violate the law," *id.* at 110, even though the FTC sought such documents to understand the business rationales for the relevant agreements, not as explicit admissions of illegality. The district court characterized the documents as mere "arithmetical calculations of

various potential scenarios" that, in the court's view, did "not cast any light on the fundamental legal issue of whether the deal was or was not anti-competitive in intendment or result." *Id*. But the district court gave no indication that it had considered any economic analysis relevant to determining whether Boehringer's $100 million payment to Barr was in fact compensation for the Aggrenox co-promotion deal or, instead, a way "to maintain and to share patent-generated monopoly profits." *Actavis*, 133 S. Ct. at 2237.

3. The panel unanimously reversed and remanded in relevant part. After *in camera* review of the same documents examined by the district court, the panel concluded that "much of what the FTC seeks is factual information produced by non-lawyers" that "does not reveal any insight into counsel's legal impressions or their views of the case." Panel Op. 15. The district court erred, the panel held, when it concluded categorically that "an attorney's mere request for a document was sufficient" to convert the facts into opinion work product. *Id*. To the contrary, opinion work product protection is warranted "only if the selection or request reflects the attorney's focus in a meaningful way" and "reveal[s] … counsel's legal impressions or views of the case," rather than just "thoughts relating to financial and business decisions." *Id.* at 14, 15, 16.

Here, the panel observed, "the financial parameters of an acceptable settlement were provided by [the company's] business managers," not by Persky or

other attorneys, and "questions about whether the agreements made business sense were a matter of business judgment, not legal counsel." *Id.* at 16 (citing Persky's testimony). Thus, "the only mental impression that can be discerned" from the documents "is counsel's general interest in the financials of the deal." *Id*. at 15. That interest "reveals nothing at all" of attorney opinions or theories because "anyone … would expect a competent negotiator to request [such] financial analyses," *id*., particularly for a $100 million deal. The panel further ruled that the district court, having incorrectly treated all the materials at issue as opinion work product, had improperly scrutinized whether the FTC had an "overriding and compelling need" for them. *Id.* at 18. Instead, the panel found, the relevant standard is the less demanding standard applicable to fact work product: whether the requesting party has a "substantial need for the materials" and "cannot, without undue hardship, obtain their substantial equivalent by other means." *Id.* at 17-18 (citing Fed. R. Civ. P. 26(b)(3)(A)(ii)).

On that issue, the panel rejected Boehringer's contention that the FTC bore the burden of showing the materials were "essential to [a] claim," "probative of a critical element," or "critical to, or dispositive of, the issues to be litigated." *Id.* at 18-19, 22-23. Instead, the FTC was required to show that the materials are "relevant to the case," that they "have a unique value apart from those already in the [FTC's] possession," and that "special circumstances" preclude the FTC from

obtaining the materials through other means. *Id.* at 21. The panel further found that the "smoking gun" standard urged by Boehringer and adopted by the district court is particularly inappropriate in the context of an agency investigatory subpoena. Unlike civil litigation, where "the scope of the charges [is] clear," a law enforcement investigation might or might not culminate in litigation, and any relevant facts—not just "smoking guns"—may enable the agency to decide what, if any, enforcement action would be needed. *Id*. at 24-25.

The panel vacated the district court's judgment and remanded so that the district court could "determine in light of the correct legal standards" which of the documents "may be produced, in full or redacted form, as factual work product." *Id.* at 26. The panel found it unnecessary, however, to remand for further proceedings on whether the FTC had shown substantial need and undue hardship because the district court had already effectively found that the FTC satisfied those standards. *Id.* at 25-26.

ARGUMENT

I. THE PANEL CORRECTLY RULED THAT THESE ROUTINE BUSINESS ANALYSES ARE NOT OPINION WORK PRODUCT

It is well established in this Circuit and others that documents are not transformed into opinion work product simply because they are prepared by an attorney; *a fortiori*, they are not opinion work product simply because, as here, they are prepared by *non*-lawyers at an attorney's request. *In re Sealed Case*, 124

F.3d 230, 236-37 (D.C. Cir. 1997), *rev'd on other grounds*, *Swidler & Berlin v. United States*, 524 U.S. 399 (1998); *Dir., Office of Thrift Supervision v. Vinson & Elkins, LLP*, 124 F.3d 1304, 1308 (D.C. Cir. 1997); *In re San Juan Dupont Plaza Hotel Fire Litig.*, 859 F.2d 1007, 1015 (1st Cir. 1988). The key issue is whether the lawyer's selection of or request for a document "reveals [the lawyer's] view of the case" in "a meaningful way." Panel Op. 14 (citing *Vinson & Elkins*, 124 F.3d at 1308; *San Juan Dupont*, 859 F.2d at 1015). Here, the panel reviewed documents *in camera* and held that the district court had misapplied the standard for determining whether the documents were opinion or fact work product. The panel's determination was correct and warrants no further review.

Boehringer contends that the panel improperly "narrowed the scope" of opinion work product by holding that "documents containing facts are entitled to [opinion work product] protection only if an attorney has 'sharply focused or weeded' those facts." Pet. 1 (quoting *Sealed Case*, 124 F.3d at 236). This is incorrect. The panel's opinion did not alter the scope of the work product doctrine, but simply applied the existing precedent to the facts of this dispute.

Although the panel quoted the "sharply focused or weeded" language when summarizing *Sealed Case* (*see* Panel Op. 14),[1] its analysis did not turn on

[1] Boehringer insinuates that *Sealed Case*, 124 F.3d 320, is no longer good law on any point because the Supreme Court reversed a different part of the decision. Pet. 6, 8. But the relevant holding in *Sealed Case* was unaffected by that Supreme

application of that standard because these documents are not opinion work under any plausible standard. In particular, after examining the documents *in camera*, the panel concluded that "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 15 (emphasis added). Rather, "the only mental impression that can be discerned is counsel's general interest in the financials of the deal." *Id*. That interest "reveals nothing at all," the panel determined, because "anyone familiar with such settlements would expect a competent negotiator to request" similar studies. *Id*.

The panel further observed that Persky was exercising "business judgment," not legal judgment, when she requested preparation of the documents. *Id.* at 16. Boehringer's business managers ultimately set the company's terms for a settlement of the lawsuit. That the company chose a lawyer to negotiate such business terms "does not mean that the lawyer's thoughts relating to financial and business decisions are opinion work product when she is simply parroting the thoughts of the business managers." *Id.* In short, the documents are not opinion work product because they pose "no 'real, nonspeculative danger of revealing the lawyer's thoughts.'" *Id*. (quoting *San Juan Dupont*, 859 F.2d at 1015). In its

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Court decision and remains valid Circuit precedent. *See In re HealthSouth Corp. Sec. Litig.*, 250 F.R.D. 8, 12 (D.D.C. 2008).

rehearing petition, Boehringer does not respond to those determinations; it simply ignores them.

In sum, the panel had no need to apply a "heightened" (Pet. 1, 8) standard of lawyer involvement because the documents at issue here do not constitute opinion work product under *any* reasonable standard. Indeed, the panel acknowledged that "[w]hen 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." Panel Op. 13-14 (citing *Vinson & Elkins*, 124 F.3d at 1308). Consistent with precedent from this Circuit and others, however, such treatment is warranted "*only* if the selection or request reflects the attorney's focus in a meaningful way." Panel Op. 14 (emphasis added) (citing *Vinson & Elkins*, 124 F.3d at 1308, *San Juan Dupont*, 859 F.2d at 1015).

Because the panel relied on a traditional understanding of opinion work product, Boehringer is simply wrong to assert that the opinion conflicts with four specific prior decisions. Pet. 1-2, 8-9. Two of the cases—*Republic of Ecuador v. Mackay*, 742 F.3d 860, 869 n.3 (9th Cir. 2014); and *Menasha Corp. v. U.S. Dep't. of Justice*, 707 F.3d 846, 847 (7th Cir. 2013)—merely recite the definition of opinion work product set forth in Fed. R. Civ. P. 26(b)(3)(B). The panel's disposition of the matter comported with that definition. And the other two cases—*United States v. Deloitte LLP*, 610 F.3d 129, 138 (D.C. Cir. 2010), and

United States v. Adlman, 134 F.3d 1194, 1199-1200 (2d Cir. 1998)—considered whether documents were work product of *any* kind, not whether they were fact or opinion work product in particular.

Moreover, the court in *Adlman* concluded that the document was work product because it contained "detailed legal analysis of likely IRS challenges," "discussion of statutory provisions, IRS regulations, legislative history, and prior judicial and IRS rulings," and "possible legal theories or strategies … recommended preferred methods of structuring the transaction, and … predictions about the likely outcome of litigation." *Id*. at 1195. That document bears no resemblance to the non-legal business information at issue here, as the panel's *in camera* review confirmed. *See* Panel Op. 15.

II. THE PANEL PROPERLY ARTICULATED AND APPLIED THE STANDARD FOR REQUIRING DISCLOSURE OF FACT WORK PRODUCT

Boehringer challenges both the panel's articulation of the substantial need standard and its interpretation of the district court's opinion, Pet. 10-15, which the panel read as having found that the FTC had met that standard. Panel Op. 25-26. Neither claim has merit.

The Federal Rules allow discovery of fact work product when the requesting party "shows that it has a substantial need for the materials … and cannot, without undue hardship, obtain their substantial equivalent by other means." Fed. R. Civ. P.

26(b)(3)(A)(ii). Boehringer argues the panel found that the "substantial need" test was met upon a showing of "mere relevance," an "overly lax" standard that, it alleges, conflicts with decisions of this Circuit and others. Pet. 2, 11-12.[2]

Boehringer grossly mischaracterizes the panel's opinion. The panel held that substantial need requires *three* separate showings: not only (1) that "the materials are relevant to the case," but also (2) that "the materials have a unique value apart from those already in the movant's possession" and (3) that "'special circumstances' excuse the movant's failure to obtain the requested materials itself." Panel Op. 21. Those criteria reflect the Advisory Committee's notes on the 1970 amendments to Rule 26, which in turn are based on longstanding precedent. Panel Op. 19-23.[3]

The panel assessed the FTC's substantial need against all three criteria and found they were met. *Id*. at 25-26. As to the first prong, the panel found that "a mere relevance standard is consonant" with the federal discovery rules. *Id.* at 23. Thus, as to that first prong, it rejected Boehringer's claim that the substantial need

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[2] Boehringer does not deny that the FTC showed undue hardship. Panel Op. 25-26.

[3] *See Advisory Committee Explanatory Statement Concerning Amendments of Discovery Rules*, 48 F.R.D. 487, 500-01 (1970) (citing *Guilford Nat'l Bank v. S. Ry. Co.*, 297 F.2d 921, 923-27 (4th Cir. 1962); *Mitchell v. Bass*, 252 F.2d 513, 518-19 (8th Cir. 1958); *Hauger v. Chicago, Rock Island & Pac. R.R. Co.*, 216 F.2d 501, 505-06 (7th Cir. 1954); *Burke v. United States*, 32 F.R.D. 213, 215 (E.D.N.Y. 1963); and *S. Ry. Co. v. Lanham*, 403 F.2d 119, 128-31 (5th Cir. 1968)).

test could be met only in the case of a "smoking gun" document that is "essential to the claim or probative of a critical element." *Id*. at 22.[4]

Boehringer caricatures the panel decision by citing this passage in isolation. Pet. 12. But the panel did not end its analysis with that first prong; it next turned to the second and third prongs, found that they were satisfied as well, and on *that* basis concluded that the FTC is entitled to discovery. In particular, the panel rejected Boehringer's contention that the FTC "possesses equivalent documents or could reproduce similar analyses on its own" and determined instead that "contemporaneous financial evaluations provide unique information about Boehringer's reasons for settling in the manner that it did." Panel Op. at 26.[5] Indeed, the panel found that the analyses "are the only documents that could demonstrate whether or not [Boehringer] was using the co-promotion agreement to pay Barr not to compete." *Id.* at 25 (quoting Dist. Ct. Op., 286 F.R.D. at 110). Boehringer ignores these elements of the panel's holding when it claims,

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[4] Application of Boehringer's proposed "smoking gun" standard would be particularly inappropriate in this context, given the complexity of the rule-of-reason issues presented in reverse-payment investigations. For example, the most relevant documents may be those that shed light on esoteric but critical financial considerations. The district court simply overlooked that point in assuming that these documents cannot be relevant unless they contain a blatant admission of "conspiratorial intent." Dist. Ct. Op., 286 F.R.D. at 110.

[5] As noted, the FTC has *not* received contemporaneous financial analyses of the settlement agreements or the Aggrenox co-promotion agreement. *See* FTC Opening Br. at 49-53. Boehringer's factbound suggestions to the contrary (Pet. 9, 15) are simply wrong and, in any event, unworthy of *en banc* review.

inaccurately, that the panel adopted a lenient new standard of discoverability in this context.

Moreover, even if the documents here provided no evidence of Boehringer's intent to violate the law, "the materials nevertheless may be helpful to the FTC in determining whether to issue a complaint in the first place." *Id*. As the panel held, that is an independent basis for compelling production of these documents because, unlike private litigants, governmental agencies are broadly charged with undertaking investigations to determine whether or not the law has been violated. *Id.* at 24-25 (citing *FTC v. Texaco, Inc.*, 555 F.2d 862, 874 (D.C. Cir. 1977) (*en banc*); *Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corp.*, 5 F.3d 1508, 1512 (D.C. Cir. 1993)).

Finally, the panel properly interpreted the district court's implicit finding of substantial need. It determined that "the District Court found that the FTC had shown a substantial need and undue hardship for materials relating to financial analyses and forecasts." Panel Op. 25-26. Boehringer claims, however, that the panel misread the district court's opinion and gave it inadequate deference. Pet. 14-15.

As an initial matter, that argument is factbound and presents no question that warrants *en banc* review. Whether or not a panel has properly read or given deference to a particular lower court opinion presents no "question of exceptional

importance" or no need to "maintain uniformity of the court's decisions." Fed. R. App. P. 35(a).

In any event, the panel's reading of the district court's opinion was correct. As the panel pointed out, the district court ordered Boehringer to produce "factual work product that can be reasonably excised from any indication of opinion work product." Panel Op. 25 (quoting 286 F.R.D. at 110). The district court also recognized that "Boehringer's contemporaneous financial evaluations provide unique information about [its] reasons for settling in the manner that it did." Panel Op. 26 (citing 286 F.R.D. at 110). As the panel rightly concluded, those determinations necessarily presuppose that the FTC had shown substantial need for the work product. Because the panel accepted the district court's findings on this issue, there can have been no absence of deference.

CONCLUSION

The petition for rehearing and rehearing *en banc* should be denied.

Respectfully submitted,

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May 19, 2015

Certificate of Service

I hereby certify that copies of the foregoing Response of the Federal Trade Commission to Petition for Rehearing *En Banc* were served upon the following counsel of record, via the Court's CM/ECF system, this 19th day of May, 2015.

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