No. 15-560

IN THE

Supreme Court of the United States

BOEHRINGER INGELHEIM PHARMACEUTICALS, INC.

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

In its petition, Boehringer showed that (1) the decision below creates a circuit split on the question whether an attorney's mental impressions regarding the expected cost and value of proposed settlement terms are protected opinion work product if they were created in part to evaluate a business decision, but also to assist the attorney in providing legal advice; (2) as the D.C. Circuit itself acknowledged, the decision below creates a circuit split regarding what constitutes "substantial need" for fact work product under Rule 26, particularly in the context of a government investigation; and (3) the questions presented in this matter are important and recurring such that they warrant this Court's intervention.

The FTC does not dispute that the issues here are important and recurring. It does not deny that the decision below created a circuit split, as the D.C. Circuit acknowledged. And it largely ignores the American Bar Association's supporting amicus brief that emphasizes the importance of the questions presented, the circuit splits caused by the ruling below, the severe deleterious consequences of allowing that ruling to stand, and the need to review that ruling now.

Instead, the FTC urges that it somehow promotes judicial efficiency for this Court to review these important and recurring questions only after the D.C. Circuit has had a chance to re-review the *exact same privilege standards it has already ruled upon* and, presumably, after Boehringer has been forced to produce privileged documents to the FTC for use in its investigation. This self-serving argument is

incorrect. The ruling is not interlocutory with respect to the controlling legal standards or the application of the "substantial need" standard in conflict with several other circuits. Indeed, this Court can and does review appellate court opinions that involve a remand, particularly where, as here, the issues on review are fundamental to the further conduct of the case and involve clear-cut issues of law.

The FTC also attempts to elide the circuit splits created by the ruling below. But, in doing so, it misstates the D.C. Circuit's holding and Boehringer's arguments. Most notably, it claims that the D.C. Circuit's holding goes no further than the uncontroversial proposition that if work product does not contain mental impressions, it is fact work product and not opinion work product. Resp. 15, 19. However, the D.C. Circuit actually held that *some* attorney mental impressions (those regarding purely legal matters) are protected while other attorney mental impressions (those recorded for both a business and legal purposes) are not.[1] Similarly, to

[1] The FTC's Response misstates numerous aspects of the record. The FTC complains about *in camera* affidavits Boehringer filed in the district court (which were actually filed weeks before the hearing, contrary to the FTC's assertion). Resp. 6-7. However, the FTC raised no objection in the district court and the D.C. Circuit held that its complaints were waived. Pet. App. 29a n.5. The FTC also discusses several privilege log entries and suggests that the documents in question do not divulge any mental impressions of counsel. Resp. 8-9. But both the district court and the D.C. Circuit held otherwise; the dispute is whether those impressions are protected.

avoid the acknowledged circuit split regarding the "substantial need" standard, the FTC argues that allowing a discovery of fact work product that is only broadly "relevant" to the matter is consistent with other circuits' case law. Resp. 24-26. But the D.C. Circuit's standard for "substantial need" is—by design—different from and less exacting than that required by other circuits.

This Court's immediate intervention is necessary to prevent the erosion of the work product doctrine.

ARGUMENT

I. IT DOES NOT PROMOTE JUDICIAL EFFICIENCY TO REQUIRE ANOTHER APPEAL ON THE SAME ISSUE BEFORE HEARING THIS CASE

The D.C. Circuit remanded this case for the district court to determine whether a handful of sample documents containing fact work product should be produced. Pet. App. 29a. The FTC therefore argues that the court should wait to review the (admittedly) important and recurring privilege issues in this case until the district court's decision is appealed, the D.C. Circuit has had a second chance to rule on the same privilege issues, and then Boehringer appeals *that* decision to this Court. The FTC claims that forcing additional proceedings in three courts (all of which would be rendered useless if this Court reverses the judgment below) somehow promotes "judicial efficiency." Resp. 17. It fails to explain how.

Notwithstanding the remand, the D.C. Circuit's ruling is not interlocutory with respect to either the controlling legal standards that the Petition challenges or the application of the "substantial need"

standard to the documents in question. The ABA urges that the Court grant certiorari "now because the consequences" of the circuit splits created by the ruling below "are particularly grave and will be immediately and broadly felt if not addressed as soon as possible." Brief of American Bar Association as Amicus Curiae in Support of Petitioner at 4 (filed Dec. 2, 2015) (hereinafter "ABA Brief").

Indeed, this Court has repeatedly granted review of nonfinal cases where, as here, review was fundamental to the further conduct of the case and involved a clear-cut issue of law. Stephen M. Shapiro et al, *Supreme Court Practice* § 4.1.18 (10th ed. 2013); *accord Mazurek v. Armstrong*, 520 U.S. 968, 975 (1997); *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 153 (1964); *United States v. General Motors*, 323 U.S. 373, 377 (1945). The Court has been particularly willing to do so in privilege cases like this one. *See United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313 (2011) (certiorari granted while litigation still pending, and over tribe's objection that ruling was interlocutory, after denial of petition for writ of mandamus concerning ruling on attorney-client privilege); *Swidler & Berlin v. United States*, 524 U.S. 399 (1998) (certiorari granted, over government's objection that review of interlocutory ruling would delay investigation, on important issue of attorney-client privilege); *Upjohn Co. v. United States*, 449 U.S. 383 (1981) (granting certiorari on issue of attorney-client privilege where appellate court had remanded for additional proceedings). The Solicitor General's office has sought such review. Reply in Support of Certiorari at 5-6, *United States v. Jicarilla Apache Nation* (2010) (No. 10-382) (urging interlocutory

review of privilege issue that "presents an important issue of law with immediate consequences for the petitioner," because the practice of awaiting a final judgment is "by no means absolute"). So has the FTC. In *FTC v. Grolier, Inc.*, the Court granted certiorari at the FTC's request after the D.C. Circuit announced a new standard for work product protection under FOIA exemption 5 and remanded for reconsideration in light of the new standard. 462 U.S. 19 (1983).

Delay of review could result in the FTC receiving the privileged documents at issue here. While perhaps the FTC would one day be required to return certain documents to Boehringer, by then, the proverbial horse will have left the barn, and the FTC's investigation will have proceeded on the basis of Boehringer's privileged information. A party should not be forced to reveal its privileged information lightly, particularly where, as here, there are no broader policy reasons for requiring it to do so. *Cf. United States v. Zolin*, 491 U.S. 554, 571 (1989) (examination of privileged documents by a judge *in camera* "might in some cases 'jeopardize the security which the privilege is meant to protect.'" (quoting *United States v. Reynolds*, 345 U.S. 1 (1953)).

II. THE DECISION BELOW CREATES CIRCUIT SPLITS AND ERRONEOUSLY NARROWS THE SCOPE OF OPINION WORK PRODUCT PROTECTION

1. The FTC does not dispute that under the Second Circuit's *Adlman* decision, any work product containing an attorney's mental impressions should be treated as opinion work product, even if they were recorded for a business purpose. However, it argues

that the opinion below merely holds that work product containing no attorney mental impressions can be treated as fact, not opinion, work product. Resp. 19. Thus, the FTC argues, there is not really a circuit split. Resp. 19-21.

The D.C. Circuit's holding is much broader than the FTC suggests. The crux of the holding below was that only *certain* lawyer mental impressions—those that constitute "legal theory"—would be protected opinion work product, while impressions that reflect a lawyer's "business judgment" would be treated as fact work product only. Pet. App. 17a-18a. The D.C. Circuit held that if a document revealed an attorney's "general interest in the financials of the deal," or a matter that "anyone familiar with such settlements would expect a competent negotiator to request," the attorney's thoughts are already "well-known" and therefore the mental impressions contained within the document should not receive heightened protection. Pet. App. 17a. For example, attorney mental impressions regarding "whether the [settlement] agreements made financial sense" or "the sort of financial analyses one would expect a company exercising due diligence to prepare when contemplating settlement options" would not receive "opinion work product" protection. *Id.* Thus, the D.C. Circuit held that certain mental impressions are not "legal" enough to warrant opinion work product protection, even where they are part of counsel's process for rendering legal advice.

That holding conflicts with the Second Circuit's *Adlman* opinion, where the Second Circuit ruled that documents that "directly or indirectly" reveal *any* "mental impressions or opinions of the attorney who

prepared them" should remain protected even if those "materials serve other functions apart from litigation," such as business functions. 134 F.3d 1194, 1202 (1998). The court was specific that protected mental impressions included the attorney's analyses of "the feasibility of reasonable settlement" terms, and expressly rejected the idea that it should not protect documents with common and expected business purposes. *Adlman,* 134 F.3d at 1200, 1202.

Accordingly, contrary to the FTC's claim, there is a sharp conflict between the D.C. Circuit and the Second Circuit regarding whether an attorney's analyses of potential settlement terms should be considered "opinion work product" if the analysis contains mental impressions concerning a litigation-related business decision, such as, in this case, whether to settle litigation in the first instance.

The FTC does not dispute that when characterized correctly, the D.C. Circuit's decision will have severe deleterious consequences, Resp. 19, nor that attorney analysis, advocacy and relationships with clients will be degraded as the ABA warns. ABA Brief 10-12.

III. THE DECISION BELOW CONFLICTS WITH SEVERAL OTHER CIRCUITS AND ERRONEOUSLY HOLDS THAT NO HEIGHTENED RELEVANCE IS REQUIRED TO SHOW "SUBSTANTIAL NEED"

As the D.C. Circuit acknowledged, it intentionally lowered the requirements for substantial need, in conflict with other circuits and district courts, to stem the tide of what it viewed as an inappropriate "ratcheting up" of the standard. Pet. App. 20a, 26a n.4. The FTC attempts to sidestep that

acknowledged split by distorting the proceedings below or attempting to limit the conflicting cases to their facts. Neither tactic is persuasive.

1. The FTC first attempts to distort the record to imply that this case is not a good vehicle for review of the issues presented in Boehringer's petition. The FTC is incorrect.

First, the FTC erroneously claims that "both the court of appeals and the district court concluded that the withheld materials" are particularly relevant to the FTC's investigation. Resp. 22. The opposite is true. The district court found that the documents contained "no smoking guns," that they "are not in any way evidence of any conspiratorial intent to violate the law," and "do not cast any light on the fundamental legal issue of whether the deal was or was not anticompetitive in intendment or result." Pet. App. 44a. Similarly, the D.C. Circuit wrote that in its view, at least some of the documents at issue revealed only "general and routine" requests that "one would expect a company exercising due diligence to prepare when contemplating settlement options." *Id.* at 17a. Thus, by all accounts, the FTC's "need" for the documents at issue is not "substantial."

Moreover, Boehringer never conceded that the district court's opinion could establish the government's substantial need for any of the work product at issue. Boehringer quoted the district court's observations that there are "no smoking guns[2] contained in [Boehringer's privileged] documents"

[2] Boehringer has never argued that substantial need can only be shown if the withheld evidence amounts to a "smoking gun." *See* Resp. 23-24; Pet. App. 20a.

and those documents "are not in any way evidence of any conspiratorial intent to violate the law," to argue that the district court found *no* substantial need. *See* Pet. App. 44a. Boehringer has never agreed or conceded that the district court's opinion can be construed as a finding in favor of substantial need. *See* Resp. 23-24; Pet. App. 20a.

2. Moreover, as the D.C. Circuit acknowledged, the opinion below creates a circuit split regarding the appropriate standard for "substantial need." Pet. App. 20a, 26a. It is true, as the FTC argues, that the D.C. Circuit would not allow discovery of fact work product unless the work product is "unique" and created under "special circumstances" that explain why the requesting party is not able to re-create the requested document itself. Pet. App. 23a. But, as the FTC admits, those requirements are best read as the D.C. Circuit's way of addressing the "undue hardship" prong of Rule 26(b)(3). *See* Resp. 21 ("The court of appeals concluded 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 relevance, unique value, and special circumstances) (emphasis added).

Accordingly, under the D.C. Circuit's holding, "substantial need," as distinct from "undue hardship," is shown if fact work product meets the broad relevance standards of Rule 26(a)(1), not some heightened showing of relevance or probative value. Pet. App. 25a. But as the D.C. Circuit acknowledged, Pet. App. 20a-26a, that is in stark contrast to the holdings of other circuits. *See* Pet. App. 20a ("[A]lthough some courts have demanded a heightened showing of a document's relevance or

probative value for discovery of fact work product, *see Logan v. Commercial Union Ins. Co.*, 96 F.3d 971, 977 (7th Cir. 1996), we have never characterized Rule 26(b)(3)'s 'substantial need' requirement in this manner.").

Many other circuits hold that to show "substantial need" the requesting party must show that the fact work product has heightened relevance to the matters in dispute. Pet. 24-29; *Logan*, 96 F.3d at 977 (because relevant documents had no heightened probative value, substantial need was not shown); *Nevada v. J-M Mfg. Co.*, 555 F. App'x. 782, 785 (10th Cir. 2014) (substantial need can only be shown 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"); *United Kingdom v. United States*, 238 F.3d 1312, 1322 (11th Cir. 2001) (substantial need shown only where "production of the material is not merely relevant, but also necessary"); *Belcher v. Bassett Furniture Indus.*, 588 F.2d 904, 908 (4th Cir. 1978) (substantial need requires more than "general policy" of "simply showing the relevancy of the desired discovery"); *Stampley v. State Farm Fire & Cas. Co.*, 23 F. App'x 467, 471 (6th Cir. 2001) (parties seeking fact work product must show substantial need in addition to relevance).

Even the FTC seems to acknowledge that the D.C. Circuit's opinion directly conflicts with the Tenth Circuit's *J-M Manufacturing* opinion, but argues that the Tenth Circuit's holding was wrong, or, contrary to the findings of both courts to review the documents at issue, those documents meet the heightened standard

set forth by the Tenth Circuit. Resp. 25-26. The FTC also argues—without any real explanation—that the Eleventh Circuit's holding in *United Kingdom* that mere relevance was not sufficient to establish "substantial need" is somehow consistent with the D.C. Circuit's opposite holding. Resp. 24-25. Far from undermining Boehringer's argument that there is a circuit split on the substantial need issue, the FTC's response regarding these two cases proves it.

The FTC attempts to sidestep the other conflicting authority by focusing on aspects of the cases that make no difference to their holdings. It makes no difference that the *Logan* court was evaluating the plaintiff's "substantial need" for evidence of bad faith, or that the *Stampley* court found that the information requested could also have been discovered through depositions such that there was no "undue hardship" in obtaining the evidence by other means. *See* Resp. 24-25. Nor should it matter that the *Belcher* court was primarily addressing a request for discovery under Rule 34 when it stated that more than mere relevance is required to discover fact work product. Resp. 25. There is a conflict as to the governing legal rule, and this Court's intervention is needed to resolve it.

3. Finally, the FTC is wrong when it suggests that the holding below did not "relax the showing required by Rule 26(b)(3)" in the investigative context, and that it will not have deleterious effects on compliance counseling throughout the nation. Resp. 22-23.[3] The opinion below holds that establishing

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[3] The FTC also contradicts itself by simultaneously arguing that this case presents a poor vehicle to review

relevance is sufficient to establish substantial need, and further that in the investigatory subpoena context, a district court is "not free to . . . determine the relevance of the subpoena requests by reference to" the charges it believes the government might bring. Pet. App. 27a. As the ABA recognizes, that logic would permit the "government" (however that term is defined) to decide for itself which documents it "needs" for its investigations, thus seriously endangering compliance counseling. ABA Brief 15-16 (under the opinion below, "lawyers will think twice about conducting the analysis and research needed to provide competent, complete, and well-informed advice to a client").

Thus, the government investigatory context of this case makes it a perfect vehicle for this Court to correct a particularly far-reaching erosion of work product protection in the federal courts. *See id.*

CONCLUSION

The petition for certiorari should be granted.

(continued…)

this issue because of the "special considerations raised by government investigations." Resp. 23.

Respectfully submitted,

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