UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

In the Matter of	
Schering-Plough Corporation, a corporation,	
Upsher-Smith Laboratories, Inc., a corporation,	**Docket No. 9297**
	PUBLIC VERSION
and	
American Home Products Corporation, a corporation.	

RESPONDENTS' JOINT MOTION IN LIMINE TO EXCLUDE CERTAIN TESTIMONY OF TIMOTHY F. BRESNAHAN

Upsher-Smith and Schering-Plough jointly move for an order excluding certain portions of Timothy F. Bresnahan's Expert Report, Rebuttal Report, and anticipated trial testimony as to (1) The "Bresnahan Rule" for determining which patent infringement settlement agreements are "anticompetitive;" (2) the conclusion that the June 17, 1997 agreement was "anticompetitive" by applying the "Bresnahan Rule" in pages 23-40 of his Expert Report and appendices thereto; (3) whether or not the June 17, 1997 settlement agreement was an overpayment for six drugs amounting to a "payment for delay;" (4) portions of Bresnahan's Rebuttal Report on the question of the value of the K-Dur '743 patent in "late years," and (5) Bresnahan's calculations of delay.

The bases of this motion are contained in the accompanying Memorandum in Support of Joint Motion In Limine to Exclude Certain Testimony of Timothy F. Bresnahan.

Dated: January 3, 2002

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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

In the Matter of Schering-Plough Corporation, a corporation, Upsher-Smith Laboratories, Inc., a corporation, and American Home Products Corporation, a corporation.	Docket No. 9297 PUBLIC

RESPONDENTS' MEMORANDUM IN SUPPORT OF JOINT MOTION IN LIMINE TO EXCLUDE CERTAIN TESTIMONY OF [ ]

Through their expert witness [ ], Complaint Counsel offer the "[ ] Rule" for determining whether certain patent infringement settlement agreements are anticompetitive. The "[ ] Rule," created specifically for this proceeding and based exclusively upon the supposed facts of this proceeding, is completely untested and has not been subject to peer review in the economics community. For these reasons, the "[ ]Rule" does not constitute reliable expert opinion. Courtrooms are not laboratories for untested and unproven theories that have yet to be accepted in the expert's field.

Complaint Counsel also intend to call [ ] to testify about the valuation of the six pharmaceutical licenses and manufacturing rights that Upsher-Smith granted Schering-Plough on June 17, 1997 — despite [ ] admitted lack of experience in pharmaceutical valuation and despite [ ] admitted failure to conduct any valuation analysis at all. Under the circumstances, [ ] cannot offer reliable expert opinion in this area either.

Rule 702 of the Federal Rules of Evidence and the Supreme Court's holdings in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999), bar unreliable expert testimony. So does Rule 3.43 of the Commission's Rules of Practice for Adjudicative Proceedings. Because of the unreliability of [ ] opinions, substantial portions of his testimony must be excluded.

I. AN EXPERT'S OPINION MUST BE RELIABLE AND SATISFY THE ELEMENTS OF RULE 702 OF THE FEDERAL RULES OF EVIDENCE AND RELATED DECISIONAL LAW

In deciding whether to admit expert testimony, courts have a "gatekeeping obligation" to ensure expert testimony is reliable. *Kumho*, 526 U.S. at 141. Rule 702 was amended effective December 1, 2000, expressly ***requiring*** that such testimony satisfy three separate relevance and reliability criteria: "(1) the testimony [must be] based upon ***sufficient facts or data***, (2) the testimony [must be] the product of ***reliable principles and methods***, and (3) the witness [must have] ***applied the principles and methods reliably to the facts*** of the case." Fed. R. Evid. 702 (emphases supplied).

In amending Rule 702, Congress sought to complement the Supreme Court's decisions in *Daubert*, 509 U.S. at 593-95 (setting forth relevance and reliability factors for permitting expert testimony) and *Kumho Tire*, 526 U.S. 137 (extending *Daubert* to all experts—whether or not scientists). *See* Fed. R. Evid. 702 Advisory Committee Notes. In revising Rule 702, Congress endorsed these *Daubert* factors:

> *Daubert* set forth a non-exclusive checklist for trial courts to use in assessing the reliability of scientific expert testimony. The specific factors explicated by the *Daubert* Court are (1) whether the expert's technique or theory can be or has been tested—that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the

> technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community.

Fed. R. Evid. 702 Advisory Committee Notes. *See, e.g., Craig v. Orkin Exterminating Co.*, 2000 U.S. Dist. LEXIS 19240 at *6-*7 (S.D. Fla. November 21, 2000) (excluding expert testimony for failing to satisfy the *Daubert* checklist factors).

In addition to the *Daubert* checklist factors, Congress recognized additional factors that may bear on the reliability and admissibility of expert testimony, including:

- Whether the expert's testimony grew "naturally and directly out of research" that the expert "conducted independent of the litigation, or whether [he has] developed [his] opinions expressly for purposes of testifying," (Fed. R. Evid. 702 Advisory Committee Notes (quoting *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995));
- "Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion," (*id.* citing *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997); and
- "Whether the expert has adequately accounted for obvious alternative explanations," (*id.* citing *Claar v. Burlington N.R.R.*, 29 F.3d 499 (9th Cir. 1994)).

Fed. R. Evid. 702 Advisory Committee Notes. These *Daubert* considerations are not limited by Rule 702 or the case law to jury trials; these standards for expert testimony are just as important in bench trials. *See, e.g., Bradley v. Brown*, 852 F. Supp. 690, 700 (N.D. Ind. 1994) ("The court has found no authority that suggests this gate-keeping function [under Daubert] is inapposite at a bench-trial and, indeed, the requirement that a scientific expert base his or her testimony upon scientific knowledge is equally *apropos* regardless of the identity of the fact-finder").[1]

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[1] *See also In re Unisys Savings Plan Litig.*, 173 F.3d 145, 155-58 (3rd Cir. 1999) (appropriate to exclude plaintiff's expert under Rule 702 and *Daubert* in bench trial, in part, due to proffered expert's lack of specific expertise and credentials in the field of property casualty

(continued...)

II. [ ] CONCLUSIONS FAIL TO SATISFY THE RELIABILITY REQUIREMENTS OF RULE 702 AND DECISIONAL LAW

A. The "[ ] Rule" is Untested and Has Not Been the Subject of Peer Review or Publication

1. The [ ] Rule Was Created for This Litigation and Has Not Been Accepted by the Economics Profession

Complaint Counsel offer through [ ] report, the "[ ] [

] [

] [ ]. During [ ] deposition, however, it quickly became apparent that his rule fails to satisfy the most basic requirements of Rule 702 and related case law.

First, the "[ ] Rule" is not based on "sufficient facts or data." Fed. R. Evid. 702. While the "[ ] Rule" purports to set forth a general test for evaluating whether patent settlement agreements between branded and generic pharmaceutical companies are

(...continued)

insurance, "the Court's emphasis on reliability as well as on relevancy embraces within its standard the credibility of the witness proffering expert opinion. This is particularly true where, as here, it is the district court judge sitting as a finder of fact who must rule on issues of evidence. *See Goodman v. Highlands Ins. Co.*, 607 F.2d 665, 668 (5th Cir. 1979) ("[A] trial judge sitting without a jury is entitled to even greater latitude concerning the admission or exclusion of evidence").").

[

]

anticompetitive, [

] Thus, while Complaint Counsel offer the "[ ] Rule" as an ostensibly objective theory to predict the competitiveness of patent settlement agreements among pharmaceutical companies, [ ] considered no agreements in devising his rule other than the two agreements in this litigation.[3]

Courts routinely reject experts whose opinions are based on insufficient information or experience. *See, e.g., Wilson v. Woods,* 163 F.3d 935, 937-38 (5th Cir. 1999) (upholding district court's rejection of expert testimony under *Daubert, inter alia,* because proffered expert had never conducted studies or experiments in the specific subject area); *City of Hobbs v. Hartford Fire Ins. Co.*, 162 F.3d 576, 586-87 (10th Cir. 1998) (expert properly rejected in insurance

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3 [

(continued...)

liability case because, although expert had experience in bad faith cases, expert "lacked specialized knowledge" relating to such cases in New Mexico or in "third party insurance disputes"); *McCullock v. H.B. Fuller Co.*, 981 F.2d 656, 657-58 (2nd Cir. 1992) (expert properly excluded where, although witness had training as an electrical and industrial engineer, he lacked specific "training or experience in chemical engineering, toxicology, environmental engineering, or the design of warning labels"). [

], coupled with his lack of knowledge or experience in evaluating such settlement agreements condemns the "[ ] Rule" under Rule 702's first requirement that expert testimony be based on "sufficient facts or data."

More fundamentally, the "[ ] Rule" fails Rule 702's second requirement that expert opinion "be the product of reliable principles and methods," and *Daubert*'s related factors that expert opinion have been tested, been subject to peer review and be generally accepted in the expert's field. Fed. R. Evid. 702; *Daubert*, 509 U.S. at 593-95. As [ ] made clear during his deposition, the "[ ] Rule" has never been tested by economists and has not been subject to peer review. As [ ] admitted: [

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(...continued)

]

Nor does [ ] plan to publish his opinion regarding reverse payments, even though no economics papers on the subject have been published. [

] Expert opinion is routinely excluded when — as here — the methods applied have not been adopted and tested by others in the relevant field of expertise. *See Blue Dane Simmental Corp. v. Am. Simmental Ass'n*, 178 F.3d 1035, 1041 (8th Cir. 1999) (economist's expert testimony properly excluded when there was no evidence "that other economists use before-and-after modeling" to support conclusions of causation of market fluctuation); *In re Indep. Serv. Orgs. Antitrust Litig.*, 114 F. Supp. 2d 1070, 1101 (D. Kan. 2000) (excluding expert in part because he did "not claim that his proposed sampling technique . . . has been tested or subject to peer review, or that it alone is generally accepted in the relevant scientific community" and without which testimony was "unsubstantiated personal opinion").

Besides falling short of the plain requirements of Rule 702, the "[ ] Rule" fails every *Daubert* factor for establishing the reliability of expert opinion. First, [ ] theory has never been tested. [ ] invented the test for this litigation by considering only two settlement agreements — the agreements in this case.] Second, the "[ ] Rule" has never been subject to peer review or publication — nor does [ ] intend to expose his rule to such scrutiny. Third, there is no indication anywhere that the "[ ] Rule" has any potential error rate — nor can any such error rate be deciphered because [ ] only considered two agreements in creating his rule. Fourth, there is no indication of what standards or controls apply to the "[ ] Rule." Finally, the "[ ] Rule" is not generally

accepted among economists because [ ] never published it or disseminated it among economists for their consideration. Rather, [ ] tailored the rule to this case. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995) (rejecting expert testimony that expert developed "expressly for purposes of testifying"). In short, nothing about the "[ ] Rule," from its creation to its application, bears any of the necessary hallmarks of reliability.

The purpose of Rule 702 and the *Daubert* factors is to ensure that only reliable expert testimony is admitted at trial. Perhaps some of the best evidence that the "[ ] Rule" is unreliable comes from [ ] himself. [ ] could not even testify that he would invite this Court to rely on the "[ ] Rule": [

] Nor could [ ] testify that his rule would be appropriate for use by the [

.]

Before adopting his rule as policy, [

]

[

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Moreover, while *Daubert* indicates that the "general acceptability" of a theory can bear on the reliability and hence admissibility of expert opinion, (*Daubert*, 509 U.S. at 594), [ ] admits that other economists *disagree* with the "[ ] Rule":

[

conceded at his deposition that the four eminent economists who have disagreed with the "[ ] Rule" are "reputable,"—[

[[4]] *Id.* at 183-85. Moreover, FTC-retained rebuttal expert [ ] has only read the "[ ] Rule" for the first time in the context of this case, ([ ]), and testified: [

]. By contrast, [ ] cites no other sources for the "[ ] Rule" and does not suggest any other economists that supported his rule in published articles. Thus, because the "[ ] Rule" has clearly not "been generally accepted in the scientific community," (Rule 702 Advisory Committee Notes)—indeed it has not been offered or accepted at all in the scientific community—this provides yet another reason to reject the "[ ] Rule" under *Daubert*.

Finally, [ ] admits that he failed to consider several key issues in creating his "[ ] Rule." [ ] admits that prior to his deposition, [

] While [ ] agreed that such a threshold would be [

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[4] Richard Gilbert—recognized by [ ] as an expert ([ ] at 185)—a former DOJ Antitrust Division Chief Economist, led a group that developed the Antitrust Guidelines for the licensing of intellectual property (*id.* at 185) and has not been retained by any party in this case. Dr. Gilbert wrote recently in the prestigious *Antitrust Law Journal* about patent settlements generally and the Schering-Upsher settlement in particular:

> What can be done to distinguish potentially procompetitive settlements from those that are likely to be anticompetitive? The fact that the settlement involves a payment from the patentee to the challenger is not sufficient to determine that the settlement is anticompetitive.

Richard Gilbert and Williard Tom, "*Is Innovation King at the Antitrust Agencies? The Antitrust Guidelines Five Years Later*," 69 Antitrust L.J. 43, 78 (2001). Dr. Gilbert's recently published article is completely at odds with the "[ ] Rule."

] [

] Rule 702 and *Daubert*, however, require that [ ] work out these issues outside the courtroom and obtain peer review before presenting them in this action. *See, e.g., Craig*, 2000 U.S. Dist. LEXIS 19240 at *6-7 (excluding expert testimony). Consequently, those portions of the [ ] Report that apply the "[ ] Rule" should be excluded. *See* [ ] Report at 23-40.[5]

2. The "[ ] Rule" Depends on Unproven Assumptions

The [ ] Rule depends critically on several key assumptions that are without support. First, [ ] [

] Thus, he states at page 12 of his Report: [

] He then cites two sources for this proposition at note 22. But neither of the sources cited in the note justify the [ ] leap from parties' ***expectations*** to the ***actual*** competitiveness of the settlement.]

[

] [ ] cites no such studies. Moreover, if [ ]

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[5] This would not be the first time that [ ] is disqualified by a court for offering an untested and unproven theory. [

]

were to underake such a study, it would not have a promising start, as [ ] concedes all through his report that parties can be too optimistic or too pessimistic about the outcome. [

] He also concedes in his deposition that it is [ ] Dep. at 216), and thus wrong about the outcome.] He further concedes that the [ ] leap from expectations to competitive reality] does not satisfy any of the *Daubert* criteria.[6]

Second, [ ] makes the unfounded assumption that brand name firms in patent litigation are not risk averse. This is a key assumption because, a risk averse patent holder would be willing to settle for an entry date by the generic that is earlier than the expected date under litigation, and this is better for consumers than litigation. [ ] Dep. at 211-212. The [ ] assumption that business entities are not risk averse violates the fifth condition of *Daubert*. His theory that business entities are not risk averse, *i.e.*, that they are risk neutral, is clearly not generally accepted in the economics community.]

Economists have long known that attitudes towards risk affect decisions made by firms,

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6 [

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even by firms with market power.[7] In the bargaining and litigation settlement arena, Richard Posner described twenty-six years ago how risk aversion on the part of a litigant alters the litigation settlement bargaining outcome. A risk-averse litigant may accept a negotiated outcome that is less favorable than the one the litigant *expects* the litigation to produce. As Posner notes: "If one or both parties are risk averse, the range within which settlement will be preferred to litigation will be greater than if they were risk neutral ...."[8]

In short, Dr. [ ] report does not adequately support the simplistic assumption that parties in litigation are not risk averse. [ ] does not have either record support or empirical support to take on the view of mainstream economists that managers and firms often are risk averse, particularly in litigation contexts.

B. [ ] Is Unqualified To Offer An Opinion Regarding Whether [ ]

[ ] devotes the first 26 pages of his report to his effort to justify the "[ ] Rule" and to addressing the question of monopoly power. Although these opinions fail the *Daubert* standard because they are unproven and untested, they at least deal with issues within the normal domain of an economist. However, at pages 27-31 of his report, [ ] abandons his role as an economist and offers an opinion that [

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[7] For example, thirty-two years ago Prof. John Lintner described how risk aversion alters a firm's choice of price and output compared to the choice made by risk-neutral management. John Lintner, "The impact of uncertainty on the 'traditional' theory of the firm: Price-setting and tax shifting," in J.W. Markham and G. Papanek, eds., *Industrial Organization & Economic Development: In Honor of E.S. Mason* (Houghton-Mifflin, 1970): 238-265.

[8] *See, e.g.*, R. Posner, *Economic Analysis of Law* (Little, Brown and Company, 1973): 337-340, 338.

]

[ ], however, is not a pharmaceutical licensing or valuation expert. He conceded this in his deposition. *See* [ ] Dep. at 92 [

] He is simply not qualified to render any expert opinion either as to whether [

]

In fact, throughout this section of his report, [ ] brings no special expertise to the table; he merely speculates regarding the parties' incentives and intent and makes arguments about the meaning and weight of fact witness testimony. In other words, with his conclusory opinion that [ ] is functioning not as an expert in valuation, but simply as an advocate. It is black-letter law that courts should "insist that a proferred expert bring to the [fact-finder] more than the lawyers can offer in argument." *Salas v. Carpenter*, 980 F.2d 299, 305 (5th Cir. 1992); *In re Air Crash Disaster*, 795 F.2d 1230, 1233 (5th Cir. 1986) (same). Thus, [ ] should not be permitted to argue, based on his review of the deposition testimony, that [

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The portion of [ ] report devoted to the question of whether the [

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9 [

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] at 27-31) is subdivided into three discrete sections.] Within each subsection, [ ] renders opinions wholly outside the scope of his expertise and simply argues the evidence as would a lawyer.

1. [ ] Report at 27).] In a single short paragraph in his expert report and without a single record citation, [ ] opines that [

] *See* [ ] Report at 27. [ ] seems to think that a financial incentive to violate the law is evidence that the law was, in fact, violated. This is a startling evidentiary rule, which, if it were true, would essentially do away with the presentation and consideration of the facts of the case. In any event, this conclusory opinion is certainly not proper testimony for an economic expert.

2. [ ] Report at 27). [

] Lacking expertise in pharmaceutical licensing or valuation, he admits that he performed no independent analysis [

] simply not competent to opine on whether [

]

But [ ], undeterred by his admitted lack of expertise in pharmaceutical

licensing, offers several bases that allegedly support his opinion that [

] attempts to rely on the

[

] states that, after interviewing [

] Rep. at 27. But [ ], who lacks the expertise or ability to evaluate [ ], really can only assume that [ ] opinion is valid. Courts have excluded the testimony of an expert who relies blindly on the opinion of another expert. See *TK-7 Corp. v. Estate of Barbouti*, 993 F.2d 722, 732-33 (10th Cir. 1993) (proper to exclude expert testimony of Boswell, who based his opinion in part on testimony of another expert, Werber, because, "[ ] failed to demonstrate any basis for concluding that another individual's opinion . . . was reliable, other than the fact that it was the opinion of someone he believed to be an expert who had a financial interest in making an accurate prediction"); *In re: Polypropelyne Carpet Antitrust Litig.*, 93 F. Supp. 2d 1348, 1357 (N.D. Ga. 2000) (an expert "may not simply repeat or adopt the findings of another expert without attempting to assess the validity of the opinions relied upon"). Thus, [ ] reliance on [ ] evaluation does not legitimize [ ] own opinion [

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Next, Dr. [ ] claims to find support for his opinion that the [

] Rep. at 28.] Niaspan, a sustained-released niacin product manufactured by Kos Pharmaceuticals, is similar to [

]

.] Once again, [ ] simply lacks any pharmaceutical industry or medical background to render this opinion competently.

[

] *See* *United States v. Benson*, 941 F.2d 598, 604 (7th Cir. 1991) (excluding proferred expert opinion of Internal Revenue Service agent which consisted of "nothing more than drawing inferences from the evidence that he was no more qualified than the [fact-finder] to draw"); *Dana Corp. v. American Standard, Inc.*, 866 F. Supp. 1481, 1501 (N.D. Ind. 1994) ("[t]o the extent that [expert's] opinion draws exclusively on inferences from the record rather than expertise, [expert's] opinion is inadmissible").[10]

Finally, [ ] relies on what he terms the [ ] as his third basis for his opinion that the [ ] Report at 28.] Specifically, he argues that [

[10] [

]

] Second, once again, this opinion is far outside the realm of [ ] knowledge or expertise. Prior to his work on this case, [ ] had never reviewed any other campaign to out-license a pharmaceutical product. [ ] Dep. at 98-99. He does not know whether companies normally are aware of other bidders for products during licensing negotiations, or whether such other bids normally affect the amount a particular company such as Schering-Plough would be willing to pay.][11]

This lack of expertise as to marketing and valuation practices within the pharmaceutical industry disqualifies [ ] from offering a competent opinion about the value that either Schering-Plough or other companies should have assigned to [ ] *Ballard v. Buckley Powder Co.*, 60 F. Supp. 2d 1180, 1182 (D. Kan. 1999) (excluding expert "not qualified to offer any opinions relating to the standard of care of licensed, professional blasters, or whether any such standard was breached in this case" where "[n]o testimony has been cited to show that [the expert] is familiar with how the duty of reasonable care applies to blasting operations, or that he is otherwise qualified to express an opinion as to what the defendant did or failed to do to violate that duty"); *Navarro v. Fuji Heavy Indus.*, 925 F. Supp. 1323, 1329-30 (N.D. Ill. 1996) (excluding expert's affidavit because, it "includes nothing defining the 'reasonable standard of care' in the industry, much less any information showing that Fuji failed to conform to such a standard"). Under the *Daubert* standards, [ ] cannot properly evaluate Upsher-Smith's

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[11] In fact, as the evidence at trial will show, Schering-Plough rarely knows what other companies have bid or would bid for a given in-licensing opportunity. Schering-Plough makes its bids, as it did here, based on its own evaluation of each licensing opportunity. Schering-Plough has made significant up-front payments in the past knowing that there were no other bidders.

marketing efforts relating to [ ] or the value that companies are likely to pay for that product in the market when he is completely unfamiliar with marketing and valuation practices within the pharmaceutical industry. *See In re International Rectifier Securities Litig.*, 1997 U.S. Dist. LEXIS 23966, *22 (C.D. Cal. Apr. 2, 1997) (financial expert who lacks first-hand knowledge or background regarding securities law or industry custom and practice pertaining to underwriters' due diligence is not qualified under Rule 702 to render opinion that underwriters' due diligence was inadequate).

3. [ ] Finally, [ ]

] This section of his report, however, is entirely comprised of a series of fact witness deposition quotes evaluated by [ ]. [ ] proceeds to opine on the content of certain witness statements, even going as far as to assess two witnesses' recollections of an event. [

] goes on to weigh the substance of the witnesses' testimony and incredibly draws a conclusion as to what the testimony meant. [

] characterization of this testimony is absurdly inaccurate. He claims that

Significantly, no expert witness is permitted to render opinions that comment on the credibility of fact witnesses or otherwise assess or weigh fact witness testimony in the record. Yet, that is exactly what [ ] is attempting to do here — in order to support his theory that [

] It is well established that "Experts may not opine on issues that are committed exclusively to the finder of fact." WEINSTEIN'S FEDERAL EVIDENCE § 702.03[3]. "The credibility of witnesses is normally an issue left exclusively to the finder of fact, and is an improper subject for expert testimony." WEINSTEIN'S FEDERAL EVIDENCE § 702.06[1][a]; *citing United States v. Harris*, 995 F.2d 532, 535 (4th Cir. 1993) (trial court properly excluded expert testimony concerning reliability of eyewitness testimony because "jurors . . . can judge the credibility of eyewitness identification, especially since deficiencies can be brought out with skillful cross-examination); *see also Goodwin v. MTD Prods., Inc.*, 232 F.3d 600, 609 (7th Cir. 2000) (expert witnesses may not testify to witness credibility issues, because these issues are within finder of facts' province); *United States v. Whitted*, 11 F.3d 782, 785-6 (8th Cir. 1993) (doctor "cannot pass judgment on the alleged victim's truthfulness in the guise of a medical opinion, because it is the jury's function to decide credibility").

In *Primavera Familienstifung v. Askin*, the court threw out the testimony of a distinguished financial markets expert because his report was simply an interpretation of fact

witness testimony, rather than proper expert testimony: "As support for these opinions, Malkiel relies almost exclusively ***on his interpretation of deposition testimony by witnesses*** in this case. In so doing, he does not serve as an expert but, rather seeks to supplant the role of counsel in making argument at trial, and the role of the jury interpreting the evidence." 130 F. Supp. 2d 450, 529 (S.D.N.Y. 2001) (emphasis supplied); *see also Bailey v. Allgas, Inc.*, 148 F. Supp. 2d 1222, 1238 (N.D. Ala., 2000) (granting motion to strike expert's testimony because he did not review all facts, because "[e]xpert testimony is useful as a guide to interpreting market facts, but is not a substitute for them." [citations omitted]).

Ultimately, the question of whether Schering-Plough paid Upsher-Smith for delay turns on the parties' intent when negotiating the licensing deal and on whether witnesses were truthful in their testimony that the payments were *bona fide* payments for the licensed products. [

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Yet even if [ ] were to concede that his testimony regarding the value of license transaction is based on nothing more than his opinion regarding the parties' intent, such an

opinion must be excluded, as it would impermissibly invade the province of the trier of fact. *See, e.g., Aerotech Resources, Inc. v. Dodson Aviation, Inc.*, 2001 U.S. Dist. LEXIS 5646, *6-*7 (D. Kan. Apr. 4, 2001). In *Aerotech*, an aviation consulting expert proposed to testify that the parties' contract negotiations demonstrated an intent to establish an exclusive brokerage agreement rather than the sale of an aircraft. The district court excluded this testimony, on the ground that it "would speak to the effect that the parties intended their agreement to have. This is a task more properly performed by a fact-finder." *Id.*; *see also Salas*, 980 F.2d at 305 ("conclusory assertions regarding [a defendant's] state of mind would not be helpful to a [fact-finder, and are] not admissible."); *Media Sport & Arts v. Kinney Shoe Corp.*, 1999 U.S. Dist. LEXIS 16035, *11 (S.D.N.Y. Oct. 19, 1999) (expert's testimony concerning meaning of contract terms and his interpretation of contract negotiations between two parties excluded because expert's testimony based on review of documents and deposition testimony "may not take the place of the that of the individuals who actually negotiated the deal"). [

]

C. [ ] Rebuttal Report's Opinion About the Future Value of the Schering-Plough '743 Patent is not Admissible

In [ ] Rebuttal report, [

]

This opinion (it is decidedly not a "fact") is completely unsupported by the work [ ] has done. No attempt is made to compute any valuation of the '743 patent, and [ ]

admits that he is not a pharmaceutical valuation expert, *see infra*. Nor has he even read the '743 patent. [ ] Dep. at 14 [ ] Instead, [ ] basis his opinion because "new and better products" may eclipse Schering-Plough's K-Dur product — although [ ] can point to no such product to support his assumption. [

] By contrast, [

]

D. [ ] are Not Supported by the Facts or by An Accepted Methodology

[

] "[ ][

]

[ ] did not review the negotiations in this case in great detail, [ ] Dep. at 79

(has not studied the actions of the Schering-Plough or Upsher-Smith Boards of Directors, or even the composition of the Upsher-Smith Board); [ ] Dep. at 110-11 (has not studied drafting history of June 1997 Agreement), and has no evidence that Schering ever offered an entry date earlier than September 1, 2001 to Upsher-Smith. [ ] Dep. at 121; *id.* at 143 (has not analyzed Schering-Plough's walk away entry date in the negotiations). He also conceded he has not used complete profit data for Schering-Plough in making these calculations. [ ] Dep. at 133. [ ] offers no empirical work to support this methodology or any support that this model is accepted within the economic or industrial organization community. In short, these calculations are inherently speculative and without factual support and are not sufficiently reliable for use by Your Honor.[12] *See, e.g., Barrett v. Atlantic Richfield Co.*, 95 F.3d 375, 382 (5th Cir. 1996) (rejecting expert opinion based on "unsupported speculation") (quoting *Daubert*, 509 U.S. at 590); *Joy v. Bell Helicopter Textron*, 999 F.2d 549, 570 (D.C. Cir. 1993) (rejecting expert opinion pursuant to Rule 702 and *Daubert* because "the word 'knowledge' connotes more than subjective belief or unsupported speculation") (quoting *Daubert*, 509 U.S. at 590).

CONCLUSION

For the foregoing reasons, the Court should grant Upsher-Smith's motion in limine to [

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Dated: January 3, 2002

Respectfully submitted,

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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

In the Matter of Schering-Plough Corporation, a corporation, Upsher-Smith Laboratories, Inc., a corporation, and American Home Products Corporation, a corporation.	)	Docket No. 9297

ORDER GRANTING RESPONDENTS' JOINT MOTION IN LIMINE TO EXCLUDE CERTAIN TESTIMONY OF TIMOTHY F. BRESNAHAN

Upon consideration of Respondents' Joint Motion In Limine to Exclude Certain Testimony of Timothy F. Bresnahan, any opposition thereto and the entire record herein, it is hereby ORDERED that Upsher-Smith and Schering-Plough's Joint Motion is GRANTED; and that the testimony so designated and the material within be excluded in this proceeding.

Dated: January ____, 2002

D. Michael Chappel
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of January 2002, I caused copies of the public version of Respondents' Joint Motion to Exclude Certain Testimony of Timothy F. Bresnahan to be filed with the Secretary of the Commission, and that two paper copies were served by hand upon:

Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
Room 104
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

and one paper copy was hand delivered upon:

David R. Pender
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