UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

RESPONDENTS' JOINT MOTION TO LIMIT THE TESTIMONY OF MAX H. BAZERMAN

Respondents Schering-Plough Corporation ("Schering") and Upsher-Smith Laboratories, Inc. ("Upsher") respectfully submit this motion to limit the testimony of Professor Max H. Bazerman. Complaint counsel designated Professor Bazerman as an expert witness in rebuttal to the testimony of Robert H. Mnookin and James P. O'Shaughnessy, Schering's experts regarding the settlement of complex litigation. In fact, however, complaint counsel would like Professor Bazerman to testify to much more than simply a rebuttal of Dr. Mnookin and Mr. O'Shaughnessy. Complaint counsel would like Professor Bazerman to opine as to the legal conclusion the Court should render in this case, and to the rule of antitrust law that should be applied in this case and in the future. Complaint counsel also propose to have Professor Bazerman opine on the persuasiveness of the varying economists proffered by the parties, and give his opinion regarding the license for Niacor, the product licensed by Schering from Upsher. These

areas of proposed testimony are far beyond Professor Bazerman's expertise, and in fact, are far beyond the permissible scope of expert testimony. Accordingly, Schering and Upsher request that this Court limit Professor Bazerman's testimony to proper and permissible rebuttal of Dr. Mnookin and Mr. O'Shaughnessy.

Respectfully submitted,

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Dated: January 3, 2002

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

RESPONDENTS' JOINT MEMORANDUM IN SUPPORT OF THEIR MOTION TO LIMIT THE TESTIMONY OF MAX H. BAZERMAN

Respondents Schering-Plough Corporation ("Schering") and Upsher-Smith Laboratories, Inc. ("Upsher-Smith") respectfully submit this memorandum in support of their motion to limit the testimony of Professor Max H. Bazerman. Complaint counsel has put forth Professor Bazerman as an expert witness in rebuttal to the testimony of Robert H. Mnookin and James P. O'Shaughnessy, Schering's experts regarding the settlement of complex litigation. Although Professor Bazerman's qualifications may allow him to offer *some* testimony about negotiations and bargaining, complaint counsel seeks to have Professor Bazerman testify in areas far beyond his expertise and in areas where expert testimony is not permitted. Accordingly, Schering and Upsher-Smith request that this Court limit Professor Bazerman's testimony to proper and permissible rebuttal of Professor Mnookin and Mr. O'Shaughnessy.

I. BACKGROUND

Complaint counsel designated Professor Bazerman as a proposed expert witness in rebuttal to two of Schering's witnesses, Professor Robert H. Mnookin and Mr. James P. O'Shaughnessy. Professor Mnookin is a law professor and the Director of the Negotiation Research Project at Harvard University. He has written and taught extensively on the topic of the settlement of litigation, and will testify in this case that an effective way to achieve settlements is to search for transactions outside the dispute that create value for both sides in the litigation. Because a settlement that includes an unrelated, value-creating deal makes both parties better off, settlement is more likely to be achieved. Professor Mnookin will offer his expert opinion that a rule or presumption against such settlements would chill settlements in general.

Mr. O'Shaughnessy is Vice President and Chief Intellectual Property Counsel for Rockwell International Corporation and has served extensively as a third party arbitrator and mediator in intellectual property disputes. Mr. O'Shaughnessy will offer his expert opinion that settlements of patent litigation and other disputes are commonly reached by allowing negotiators to explore opportunities or values outside the scope of the central dispute, and that a government position that would interfere with this approach would chill settlements.

As noted, complaint counsel proposes to put forth Professor Max H. Bazerman as a rebuttal witness to the testimony of Professor Mnookin and Mr. O'Shaughnessy. Professor Bazerman serves under Professor Mnookin as the head of the "psychological perspectives in negotiations" unit of the Negotiation Research Project at Harvard University. Bazerman Tr. at 19. In general, Professor Bazerman agrees with the conclusions of Professor Mnookin and Mr. O'Shaughnessy that allowing litigants to create mutual gain can facilitate settlements, making both the parties and society better off. *See* Bazerman Rpt. at 5-6 ("I concur with the essence of Professor Mnookin's

analyses of the benefits to society of allowing parties to create mutual gain through negotiation and to reduce the costs of litigation through settlement."). Thus, Professor Bazerman testified:

> A. I agree that settlement is promoted when parties can find value-creating trades outside the immediate scope of the original dispute.
>
> Q. Okay. Do you understand Mr. Mnookin to be talking about trades that create value for both parties?
>
> A. I do.
>
> Q. And how will such trades promote settlements?
>
> A. To the extent that you can add issues to the table that allow both sides to be better off than what the deal would look like without that issue added to the table, there's more value to be gained; therefore, the parties are likely to be happier with the settlement and an agreement is more likely to occur.
>
> Q. At page 9 of his report, Professor Mnookin says, at the top of the first full paragraph on that page, "To avoid settlement failures and facilitate settlement, I teach lawyers and mediators to search for value-creating trades that may well be unrelated to the subject matter of the dispute."
>
> In your judgment, is this good advice by Professor Mnookin to lawyers and mediators?
>
> A. It's generally good advice to create joint gains by creative trades, including those unrelated to the subject matter of the dispute.

Bazerman Tr. at 33-34.

While Professor Bazerman may be qualified to offer this opinion,[1] complaint counsel would like to have Professor Bazerman testify to much more. Complaint counsel would like Professor Bazerman to testify as to the legal conclusion the Court should render in this case, and to the rule of antitrust law that should be applied in this case and in the future. Complaint counsel also would have Professor Bazerman opine on the persuasiveness of the varying economists proffered by the parties, and give his opinion of the due diligence done on Niacor-SR, and the terms of the Niacor-SR license. These

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[1] Schering and Upsher-Smith do not concede that Professor Bazerman is so qualified, but is not seeking to exclude his testimony as a negotiations expert.

areas of proposed testimony are far beyond Professor Bazerman's expertise, and in fact, are far beyond the permissible scope of expert testimony. As such, his testimony should be limited to the rebuttal testimony described above.

II. ARGUMENT

Expert testimony in this case must comply with Rule 702 of the Federal Rules of Evidence. *See* December 20, 2001 Hearing Tr. at 16 (this case governed by federal rules and case law when no governing FTC rules).[2] Rule 702 requires, among other things, that:

1) a proposed expert have "scientific, technical, or other specialized knowledge [that] will assist the trier of fact to understand the evidence or to determine a fact in issue;" and

2) a witness be qualified as an expert "by knowledge, skill, experience, training, or education."

See Fed. R. Evid. 702. Thus, the court must "ensur[e] that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999) (quoting *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)). Here, complaint counsel has ignored these principles, asking Professor Bazerman to testify to matters for which expert testimony is simply not allowed by Rule 702, and to matters beyond his expertise.

First, complaint counsel would have Professor Bazerman testify as an expert in public policy and antitrust law, to advise this Court as to "what should and should not be allowed" in this case as a matter of antitrust policy. Determining public policy is a matter for the court, however, and may not be the subject of expert testimony. Second, complaint counsel would have Professor Bazerman weigh the testimony of the expert economists in this case and advise the Court as to which is more "persuasive." Again, such testimony is not allowed. Third, complaint counsel would have Professor Bazerman

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[2] FTC Rule 3.43(b) similarly requires evidence to be "reliable" before being admitted. 16 C.F.R. §3.43(b). Presumably, this requirement incorporates the "reliability" standards of Rule 702. *See* Dec. 20, 2001 Hearing at 16-17 (FTC rules encompass federal rules).

testify to a legal conclusion, *i.e.*, that the settlements in this case are "anticompetitive." But such testimony is impermissible, and in any event, Professor Bazerman is neither an economist nor an antitrust expert, and is not qualified to give such testimony. Fourth, and finally, complaint counsel intend to have Professor Bazerman testify that the due diligence done on Niacor-SR, and the terms of the Niacor-SR license, suggest that the settlement delayed generic entry. Professor Bazerman is not an expert in pharmaceutical licensing—nor is he an economist—however, and is not qualified to provide such testimony. Accordingly, Professor Bazerman's expert testimony should be limited to the rebuttal of Professor Mnookin and Mr. O'Shaughnessy.

A. Complaint Counsel Improperly Seeks To Have Professor Bazerman Testify As A Public Policy Expert

Among many other things, Professor Bazerman purports to be an expert in public policy. Bazerman Tr. at 57 ("Q. Are you an expert in public policy? A. I believe I am."). And complaint counsel intends to use Professor Bazerman in this manner, asking him to advise this Court regarding "what should and should not be allowed" as a matter of antitrust policy. Bazerman Rpt. at 8. Thus, complaint counsel would have Professor Bazerman opine that this Court should issue a bright-line, *per se* ban on any patent settlement between a branded and generic firm that includes a license or other transaction outside the subject matter of the dispute. *Id.* at 9; Bazerman Tr. at 116. Professor Bazerman acknowledges that his proposed rule would prohibit a number of reasonable settlements, but argues that, on balance, a rule of antitrust law prohibiting such settlements is justified because "society does need a clear test." Bazerman Tr. at 144. Any other policy, complaint counsel will have Professor Bazerman explain, "is a recipe for antitrust abuse." Bazerman Rpt. at 9.

There are a number of things wrong with Professor Bazerman's proposed policy advice to this Court, but for purposes of this motion, the main problem is that such testimony is not allowed. There is simply no such thing as a "public policy expert" or an

expert on what the rule of law should be. Expert testimony is allowed only when such testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. Professor Bazerman's proposed testimony regarding future antitrust policy, however, will not help this Court "understand the evidence" or "determine a fact in issue." Instead, Professor Bazerman simply proposes to advise the Court as to the correct rule of law it should impose. Determining the public policies inherent in the law and, if necessary, balancing those policies, however, is the province of the court.[3] *See Air Crash Disaster*, 795 F.2d at 1233 (court must not let expert become advocate of public policy); *Rogers v. AK Steel Corp.*, No. C-1-96-987, 1998 U.S. Dist. LEXIS 22450, at *20 (S.D. Ohio Apr. 16, 1998) (determining public policy is question of law for court, not expert). Expert testimony on such areas is therefore not permitted. *See, e.g., In re Initial Public Offering Securities Litigation*, No. 21 MC 92 (SAS), 2001 U.S. Dist. LEXIS 18116, at *7-8 (S.D.N.Y. Nov. 7, 2001) ("[E]very circuit has explicitly held that experts may not invade the court's province by testifying on issues of law."). Indeed, as explained by the Fifth Circuit, "the trial judge ought to insist that a proffered expert bring to the [fact-finder] more than the lawyers can offer in argument." *In re Air Crash Disaster at New Orleans*, 795 F.2d 1230, 1233 (5th Cir. 1986). Professor Bazerman's proposed testimony is simply that, however: legal argument by complaint counsel offered as an opinion by an unqualified expert. Accordingly, Professor Bazerman's proposed testimony as a "public policy" expert should be excluded.[4]

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[3] This is not to say, of course, that an expert qualified on a substantive topic cannot provide testimony in his or her area of expertise that may be helpful to the Court in fashioning a rule of law.

[4] Even if such testimony was permissible, Professor Bazerman is not qualified to offer this policy assessment. Professor Bazerman has no expertise in the Hatch-Waxman Act or its policies. Bazerman Tr. at 172. Professor Bazerman is not an antitrust expert, and has never advised any antitrust official with respect to the types of cases that should or should not be brought. *Id.* at 10, 169-72. Indeed, it appears that Professor Bazerman's "public policy" expertise is simply based on what he views as his "parallel" testimony before the United States Securities and Exchange Commission on auditor independence issues. *Id.* at 57, 277. In his deposition, Professor Bazerman explained that he argued before the SEC that public accounting firms should be banned from providing consulting services to companies for whom they also provided auditing services. *Id.* at 210. The SEC rejected what Professor Bazerman himself described as his "extreme" view. *Id.* at 210, 212.

B. Complaint Counsel Improperly Seeks To Have Professor Bazerman Weigh The "Persuasiveness" Of The Parties' Economists

Complaint counsel also propose to have Professor Bazerman advise the Court as to the weight it should give to the testimony of the different economists who will testify in this matter. Not surprisingly, complaint counsel would like Professor Bazerman to testify that complaint counsel's economist, Professor Bresnahan, provides "a thorough assessment of many of the key issues in this case." Bazerman Rpt. at 4. In fact, complaint counsel would even have Professor Bazerman testify that Professor Bresnahan is correct that "excessive payments by Schering-Plough to Upsher-Smith and [ESI] delayed generic entry into the market place." *Id.* at 4. By contrast, of course, complaint counsel would have Professor Bazerman testify that he did not find the economists presented by Schering and Upsher-Smith to be persuasive. Thus, although Professor Bazerman admitted that the analyses presented by the defendants' economists "have technical merit," *see* Bazerman Rpt. at 4, complaint counsel would have him testify that he was "underwhelmed" by them. Bazerman Tr. at 197.

Professor Bazerman's proposed testimony on this point is, of course, improper. Determining the credibility and persuasiveness of witnesses, including experts, is solely the province of the court. *See, e.g., United States v. Benson*, 941 F.2d 598, 604 (7th Cir. 1991) ("Credibility is not a proper subject for expert testimony; the [fact-finder] does not need an expert to tell it whom to believe."); 29 C. Wright & V. Gold, *Federal Practice & Procedure*, § 6262 at 178 (1997) (Rule 702 "seeks to preserve the trier of fact's traditional powers to decide the meaning of evidence and the credibility of witnesses."). Accordingly, Professor Bazerman may not advise the court as to which economic experts the court should find more persuasive--especially when neither economics nor antitrust law is within Professor Bazerman's area of expertise.[5] *See infra* at 9-10. Professor Bazerman's proposed testimony in this regard should be excluded.

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[5] In his deposition, for example, Professor Bazerman admitted that he was not qualified to "endorse [Professor Bresnahan's] three-part test as the appropriate end result that the FTC should end up with."

C. Complaint Counsel Improperly Seeks To Have Professor Bazerman Testify to A Legal Conclusion Regarding Antitrust Law

Complaint counsel proposes to have Professor Bazerman testify as to whether or not the settlements in this case are "anticompetitive." For example, complaint counsel would have Professor Bazerman opine that:

- "The key features of the agreement between Schering-Plough, Upsher-Smith, and [ESI] that make them anticompetitive are the excess payments for the licenses and the resulting delay in bringing the generics to market." Bazerman Rpt. at 7.
- "[T]he details of this case make it overwhelmingly clear that an anti-competitive settlement process took place." *Id.* at 5.[6]
- "If the $60 million payment from Schering-Plough to Upsher-Smith was excessive, mutual gains, in the current action, come from reducing competition at the expense of customer." *Id.* at 8.

Thus, complaint counsel proposes to have Professor Bazerman testify to the ultimate legal issue in this case, *i.e.*, whether or not the settlements at issue in this case are anticompetitive. But expert testimony as to an ultimate legal issue is not allowed. *See Andrews v. Metro North Commuter R. Co.*, 882 F.2d 705, 709-10 (2d. Cir. 1989) (engineer could not testify that defendant was negligent because not clear what legal standards expert applied); *Initial Public Offering Securities Litigation*, 2001 U.S. Dist. LEXIS 18116, at *7 (expert may not testify that court must recuse itself because expert may not testify to ultimate legal conclusion). Indeed, as a number of courts have explained, every courtroom already has an expert on the law: the judge. *See, e.g.*, *Burkhart v. Washington Metro. Area Transit Auth.*, 112 F.3d 1207, 1213 (D.C. Cir. 1997). Expert testimony as to legal conclusions is therefore not allowed, and Professor

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Bazerman Tr at 125. Professor Bazerman acknowledged that much of Professor Bresnahan's proposed test "lies outside of what I'm claiming as my expertise." Bazerman Dep. at 125-26

[6] Professor Bazerman's proposed testimony regarding the "details" of this case is particularly remarkable, given that he has not seen *any* documents in this case, has not read the testimony of *any* fact witnesses, and has not seen the reports or testimony of the Schering and Upsher-Smith experts on pharmaceutical licensing. Bazerman Tr. at 21-26, 105-06, 284-85. Complaint counsel did not provide him with any of those materials, and he did not ask for them. *Id.* at 106, 286. Of course, Professor Bazerman has been given the report of complaint counsel's purported licensing expert, Nelson Levy. *Id.* at 25.

Bazerman's proposed testimony regarding whether or not the settlements in this case were "anticompetitive" must be excluded.

Moreover, even if testimony of this sort was allowed, Professor Bazerman is not qualified to give it. Rule 702 of the Federal Rules of Evidence requires that a proposed expert may testify only if qualified "by knowledge, skill, experience, training, or education." *See* Fed. R. Evid. 702. More specifically, a purported expert witness must have expertise on the *particular* matter upon which he intends to render an opinion:

> Even where a witness has special knowledge or experience, qualification to testify as an expert also requires that the area of the witness's competence matches the subject matter of the witness's testimony. Thus, the courts have frequently precluded a witness from testifying as an expert where the witness has specialized knowledge on one subject but offers to testify on a different subject.

Wright & Gold, § 6265 at 255-56. *See also Kumho Tire Co.*, 526 U.S. at 156 (1999) ("The trial court had to decide whether this particular expert had sufficient specialized knowledge to assist the jurors 'in deciding the particular issues in the case.").

Here, Professor Bazerman broadly professes to be an expert in public policy, negotiation, decision-making, dispute resolution, and how decision-making, negotiation and dispute resolution interact with government laws and regulations. *See* Bazerman Tr. at 8, 57. One thing Professor Bazerman does not claim an expertise in, however, is antitrust law. *Id.* at 10, 169-172. Professor Bazerman has never before testified in an antitrust case, *id.* at 17, and he affirmed that he is "not claiming to be an expert on the Sherman Act." *Id.* at 283. Professor Bazerman similarly admitted that he has no expertise in other aspects of antitrust law, including monopolization, or in differentiating between the rule of reason or the *per se* rule for evaluating agreements. *Id.* at 170-72, 227, 125. Moreover, Professor Bazerman is not a lawyer, *id.* at 116, and has never studied jurisprudence. *Id.* at 167.

Nor does Professor Bazerman have any expertise in industrial organization economics, *id.* at 10, and he has not been put forth as an economic expert by complaint

counsel. In fact, although Professor Bazerman was retained to opine as to whether the Upsher-Smith/Schering settlement agreement was "anticompetitive," he cannot recall ever even using the words "anticompetitive," "competitive" or "procompetitive," in any of his scholarly writings. *See id.* at 199-201.

Despite Professor Bazerman's clear lack of qualifications regarding competition issues, complaint counsel plans to have Professor Bazerman testify that the settlements at issue in this case are anticompetitive. But Professor Bazerman's background in negotiations research does not qualify him to testify regarding the competitive effects of the settlements in this case. *See* Wright & Gold, § 6265 at 255-56 (proposed witness must be qualified by education, training, experience in the specific area of the proposed testimony); *see also, e.g., Virginia Vermiculite, Ltd. v. W.R. Grace & Co.-Conn. & Historic Green Springs, Inc.*, 98 F.Supp.2d 729, 732-33 (W.D. Va. 2000) (excluding testimony of purported antitrust expert with a background in geological engineering for lack of requisite educational background, training, experience and skill); *Wilson v. Woods*, 163 F.3d 935, 937 (5th Cir. 1999) (mechanical engineer with expertise in fire reconstruction not qualified as expert in automobile accident reconstruction because had never taught on automobile reconstruction, was not certified in such reconstruction, had done no studies of such reconstruction, and had never been qualified as such an expert). Because Professor Bazerman's qualifications with regard to negotiation research do not qualify him to testify regarding competition issues, his proposed testimony in this regard must be excluded.

D. Complaint Counsel Improperly Seeks To Have Professor Bazerman Testify As An Expert In Pharmaceutical Licensing

Finally, complaint counsel proposes to have Professor Bazerman testify that the "settlement processes" in this case suggest that the settlement reached with Upsher-Smith delayed generic entry. *See* Bazerman Rpt. at 3, 8. Professor Bazerman bases this conclusion on four factors: 1) an alleged "lack of due diligence" for the Niacor-SR

product, 2) the fact that the license involved mainly non-contingent payments, 3) the fact that the settlement and license were done as part of the same transaction, and 4) the allegedly "excessive" payment for the Niacor-SR license. *See* Bazerman Rpt. at 3. But complaint counsel would have him offer this opinion despite the fact that Professor Bazerman's has not seen *any* documents in this case, and has not read the testimony of *any* fact witnesses. Bazerman Tr. at 21-26, 105-06, 284-86. Complaint counsel did not provide him with any of those materials, and he did not ask for them. *Id.* at 106, 286. Of course, complaint counsel did provide Professor Bazerman with report of complaint counsel's purported licensing expert, Nelson Levy. *Id.* at 25. But complaint counsel did not give him the reports or depositions of any of Schering's or Upsher-Smith's experts on pharmaceutical licensing. *Id.*

Moreover, as noted above, to testify as an expert, a witness must have specialized knowledge in the specific subject of his or her proposed testimony. Expertise in some related area is not sufficient. *See Wilson*, 163 F.3d at 937 (fire reconstruction expert not qualified to opine on automobile accident reconstruction); *Jones v. Lincoln Elec. Co.*, 188 F.3d 709, 724 (7th Cir. 1999)(metallurgist not qualified to testify on health effects of manganese); *City of Hobbs v. Hartford Fire Ins. Co.*, 162 F.3d 576, 587 (10th Cir. 1998)(expert with 30 years experience in handling and adjusting third party claims not qualified to opine on first party claims); *Coal Resources, Inc. v. Gulf & Western Indus., Inc.*, 954 F.2d 1263, 1268 (6th Cir. 1992)(CEO of coal company with expertise on development of mining rights not qualified as expert on costs and appropriateness of coal preparation plants); *McCullock v. H.B. Fuller Co.*, 981 F.2d 656, 657 (2d Cir. 1992)(electrical and industrial engineer not qualified to opine on adequacy of warning label).

Professor Bazerman considers himself an expert in public policy, negotiation, decision-making, dispute resolution, and the interaction of decision-making, negotiation and dispute resolution with government laws and regulations. Bazerman Tr. at 57.

However, his "specific expertise, the research [he is] perhaps most well-known for, is understanding how individuals are systematically biased in the decisions that they make in the negotiation context." *Id.* at 16. It is this research into how psychological factors affect business negotiations that is the "core of [his] strongest expertise and the part of the literature that [he] is best known for." *Id.* at 47. Not surprisingly, the "vast majority" of his work is devoted to such research. *Id.* at 19. Professor Bazerman's proposed opinion as to whether or not the settlements in this case delayed generic entry does not grow "naturally and directly out of [this] research." Fed. R. Evid. 702 Advisory Committee's Notes (*quoting Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995). Thus, as described below, Professor Bazerman's expertise does not qualify him to offer *any* conclusion regarding the "settlement processes" in the Upsher-Smith and ESI cases. *See Hardin v. Ski Venture, Inc.*, 50 F.3d 1291, 1296 (5th Cir. 1995) (limiting expert testimony to that which "bore the most direct relationship to his education and background").

First, complaint counsel would like Professor Bazerman to opine that there was a "lack of due diligence" by Schering with respect to the Niacor-SR license. But Professor Bazerman is not qualified to testify on this point. As Professor Bazerman conceded at his deposition:

- He has *never conducted* due diligence on a pharmaceutical compound. Bazerman Tr. at 80.
- He has *never supervised* due diligence of a pharmaceutical compound. *Id.*
- He has *never been retained* to conduct due diligence on a pharmaceutical compound. *Id.*
- He has *never been retained* to value a pharmaceutical product. *Id.* at 80-81.
- He has *never studied* any specific due diligence standards. *Id.* at 83.
- He is *not familiar* with any specific steps necessary to conduct due diligence for in-licensing or out-licensing pharmaceutical products and was "uncomfortable" describing the process. *Id.* at 85-87.

- He does not have a "general understanding of what would formulate a set of common [due diligence] standards." *Id.* at 83.
- He does not know if there *are* any standard steps for conducting due diligence. *Id.* at 86.
- While he believes that the Schering/Upsher-Smith agreement should be evaluated based on the standards within the industry prevailing at the time of the agreement, *i.e.*, June 1997, *id.* at 94-95, Bazerman admitted he *never conducted a survey* of drug company due diligence standards prevalent in June 1997. *Id.* at 91.
- Professor Bazerman admits that he lacks "the ability to give you a set of the steps that should be followed" in evaluating pharmaceutical licensing due diligence for the European market in June 1997. *Id.* at 88.
- When asked if pharmaceutical license due diligence could be done quickly or in an expedited fashion, Professor Bazerman testified that "I don't claim the expertise to answer that question." *Id.* at 99.

Professor Bazerman's sole experience in the pharmaceutical industry is that he has been retained in the past to conduct classroom-like workshops for pharmaceutical business executives regarding "negotiation training." *Id.* at 85. And in the context of those workshops, he has sometimes heard some information about due diligence done on a specific product by a specific client. *Id.* at 83-85. But Professor Bazerman conceded that he does not know of any standard steps that should be taken to conduct due diligence with respect to a pharmaceutical product, or whether in fact there are any "standard" steps. *Id.* at 86-87, 91. Given his admitted lack of knowledge on this topic, Professor Bazerman is not qualified to testify as to whether Schering's due diligence on Niacor-SR was sufficient or not. *See, e.g., 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"). And his proposed testimony on this point therefore should be excluded.

Second, complaint counsel proposes to have Professor Bazerman testify that there is something "suspicious" about the fact that the Niacor-SR license involved mainly non-contingent payments, rather than primarily milestone payments. But Professor Bazerman is no more an expert on pharmaceutical licensing than he is on pharmaceutical due diligence. Professor Bazerman has never testified as an expert on the topic of pharmaceutical licensing, has never written on that topic, did not study pharmaceutical licensing as part of his education, and has never taught on the topic, other than in the context of teaching about negotiation and dispute resolution. Bazerman Tr. at 11. Professor Bazerman has never advised a pharmaceutical company on the value it should pay for a license. *Id.* at 78. He has never modeled or quantified the dollar value of any pharmaceutical license. *Id.* at 79. Professor Bazerman does not maintain a database of pharmaceutical licenses, nor has he undertaken any study of pharmaceutical licensing. *Id.* at 122. Indeed, Professor Bazerman could not recall whether he has ever seen a final pharmaceutical licensing agreement. *Id.* at 159.

Instead, Professor Bazerman's knowledge on the topic of pharmaceutical licensing comes, again, from the negotiation training seminars he has conducted in the past for pharmaceutical executives. *Id.* at 10-11, 85. But the limited, anecdotal information he may have gleaned from those workshops does not qualify Professor Bazerman as an expert to testify about pharmaceutical licensing. And therefore Professor Bazerman is not qualified to opine on the issue of whether the structure of the Niacor-SR license payments is unusual, anticompetitive, or anything else. *See, e.g., Wilson*, 163 F.3d at 937; *Thomas J. Kline, Inc. v. Lorillard, Inc.*, 878 F.2d 791, 799-80 (4th Cir. 1989) (excluding testimony of purported credit practices expert with a background in general business for lack of training, experience or skill). He is simply unqualified to speak to the issue at all.

Third, complaint counsel proposes to have Professor Bazerman testify that the fact that the Upsher-Smith settlement and license were done as part of the same

transaction is itself evidence that the settlement is anticompetitive. But Professor Bazerman testified in his deposition that it is "good advice" to have parties try to find unrelated transactions that create value for both sides, as a way of facilitating settlements:

> Q. And how will such trades promote settlements?
>
> A. To the extent that you can add issues to the table that allow both sides to be better off than what the deal would look like without that issue added to the table, there's more value to be gained; therefore, the parties are likely to be happier with the settlement and an agreement is more likely to occur.
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> Q. At page 9 of his report, Professor Mnookin says, at the top of the first full paragraph on that page, "To avoid settlement failures and facilitate settlement, I teach lawyers and mediators to search for value-creating trades that may well be unrelated to the subject matter of the dispute."
> In your judgment, is this good advice by Professor Mnookin to lawyers and mediators?
>
> A. It's generally good advice to create joint gains by creative trades, including those unrelated to the subject matter of the dispute.

Bazerman Tr. at 33-34. Despite Professor Bazerman's testimony that it is *precisely for the purpose of facilitating settlement* that parties should look for unrelated, mutually-beneficial transactions, complaint counsel nonetheless proposes to have Professor Bazerman testify that the Schering's and Upsher-Smith's "hostile" relationship makes it unlikely that the parties could have reached an unrelated licensing deal as part of the settlement. Bazerman Rpt. at 5; Bazerman Tr. at 228.

Professor Bazerman has no expertise in the settlement of litigation that allows him to give such an opinion, however. Professor Bazerman does not serve as a mediator or arbitrator. Bazerman Tr. at 275. Professor Bazerman is not a patent attorney, *id* at 50, and has never worked on an actual settlement in federal or state court. *Id.* at 220-21. None of Professor Bazerman's research on negotiations has been done in the context of patent settlements. *Id.* at 131. Nor has Professor Bazerman written specifically on the

subject of the settlement of litigation. *Id.* at 12-16.[7] In fact, other than the agreements at issue in this case, Professor Bazerman has never read a final settlement agreement between a branded pharmaceutical company and a generic company. *Id* at 156. And, of course, Professor Bazerman has not reviewed any of the documents or testimony related to the settlement negotiations in this case. *Id.* at 285. Thus, once again, his proposed testimony is simply based on the anecdotal information gleaned from certain discussions he has had in the context of negotiation workshops with pharmaceutical executives. *Id.* at 157.[8] And once again, Professor Bazerman's limited experience with respect to the settlement of litigation does not qualify him as an expert on that topic, and therefore precludes his proposed testimony. *See, e.g., Wilson*, 163 F.3d at 937; *Thomas J. Kline, Inc.*, 878 F.2d at 799-80.

Fourth, and finally, Professor Bazerman admits he is not qualified to testify regarding the value of the Niacor-SR license. *Id.* at 90. Professor Bazerman expressly relies on another of complaint counsel's experts, Nelson Levy, for the conclusion that Schering paid too much. Bazerman Rpt. at 5.

Professor Bazerman proposes to testify regarding the "settlement processes" in the Upsher-Smith and ESI cases, but he is not qualified to testify to any of the four factors upon which his ultimate conclusion depends. Because his conclusion is built on a faulty foundation, it cannot stand. Thus, Professor Bazerman's proposed testimony regarding the "settlement processes" in this case must be excluded.

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[7] It is possible that some of Professor Bazerman's articles may have used some generalized litigation examples in them. He could not specifically recall in his deposition, however. *Id.*

[8] Professor Bazerman also based his opinion on the expert reports of Professor Mnookin and Mr. O'Shaughnessy. *Id.* at 157. But, of course, both Professor Mnookin and Mr. O'Shaughnessy testified that it is *common and preferable* to try to settle litigation by adding in transactions outside the scope of the dispute.

III. CONCLUSION

For these reasons, Schering and Upsher-Smith respectfully requests that the Court limit the testimony of Professor Max H. Bazerman to proper rebuttal of the testimony of Professor Mnookin and Mr. O'Shaughnessy in which Professor Bazerman has expertise.

Respectfully submitted,

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Dated: January 3, 2002

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

ORDER GRANTING RESPONDENTS' JOINT MOTION TO LIMIT THE TESTIMONY OF PROFESSOR BAZERMAN

The proposed testimony of complaint counsel's rebuttal expert, Professor Max H. Bazerman goes far beyond Professor Bazerman's expertise and far beyond the permissible scope of expert testimony.

Accordingly, IT IS HEREBY ORDERED that Respondents' joint motion to limit the testimony of Professor Bazerman is hereby GRANTED, and Professor Bazerman's testimony shall be limited to proper and permissible rebuttal of Dr. Mnookin and Mr. O'Shaughnessy.

D. Michael Chappell
Administrative Law Judge

Dated: January _____, 2002

Exhibit Redacted

Subject to Confidential Protective Order

Exhibit Redacted

Subject to Confidential Protective Order

CERTIFICATE OF SERVICE

I hereby certify that this 3rd day of January, 2002, I caused an original, one paper copy and an electronic copy of the foregoing Respondents' Joint Motion to Limit the Testimony of Max H. Bazerman and accompanying memorandum, 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.
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and one paper copy was hand delivered upon:

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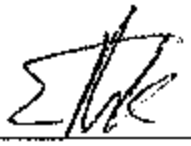

Erik T. Koons