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 VERSION**

MEMORANDUM IN SUPPORT OF COMPLAINT COUNSEL'S MOTION TO LIMIT OR EXCLUDE DUPLICATIVE AND IMPROPER EXPERT WITNESS TESTIMONY

The Commission's complaint charges that Schering-Plough Corporation entered into unlawful agreements with its only two potential competitors at the time – Upsher-Smith Laboratories and American Home Products Corporation – as part of Schering's strategy to delay entry of low-cost generic competition to Schering's highly profitable prescription drug K-Dur 20. At trial we will show that those agreements, in which Schering paid Upsher and AHP millions of dollars in return for the generic's deferred competition, certainly benefitted both Schering and its potential rivals, but only at a considerable cost to consumers. As part of our proof, we intend to call three testifying experts:

- Dr. Nelson Levy will explain why Schering's $60 million non-contingent payment to Upsher was not a license fee for the products held by Upsher, as respondents contend.

- Dr. Timothy Bresnahan will testify that, based on his economic analysis, Schering's agreements with Upsher and AHP are anticompetitive and harmed consumers by delaying expected generic entry; and

- Mr. Joel Hoffman will provide an overview of the relevant regulatory and statutory framework.

Respondents' primary defense to the Commission's charges is to offer up nineteen expert witnesses (twelve from Schering[1] and seven from Upsher) to support what they contend is the proper way to assess the legality of the challenged agreements. The testimony of many of these experts will be largely repetitive and unnecessarily cumulative. Specifically, the respondents have named the following experts:

- Six expert witnesses to explain why the Court should believe Schering's $60 million payment was a fair market price for the licenses held by Upsher, including:

  - [redacted]

  - [redacted]

- Ten expert witnesses to offer their analysis and proposed testimony on how the Court should assess whether a patent settlement agreement is anticompetitive, including:

  - [redacted]

  - [redacted]

  - [redacted]

[1] Respondent Schering has also named a thirteenth expert for sur-rebuttal.

Allowing each of these sixteen[2] overlapping experts to testify will "merely burden the record" with "unduly repetitious, cumulative, and marginally relevant" testimony and will thoroughly and unnecessarily delay these proceedings.[3]

Furthermore, two of Schering's experts will provide testimony that includes improper legal opinions on the disposition of the patent infringement litigation. These two experts also employ methods that are not sufficiently reliable to satisfy the requirements of Commission Rule 3.43(b).[4] This improper testimony will merely confuse the relevant issues and should therefore be excluded.

Accordingly, complaint counsel move that respondents' expert testimony be limited in conformance with the attached proposed orders.

ARGUMENT

This Court "has broad discretion in admitting and excluding expert testimony."[5] Even relevant evidence "may be excluded" under Commission Rule 3.43(b) for "considerations of

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[2] Complaint counsel do not challenge the testimony of respondents' other three experts on the specific basis that is the subject of this motion.

[3] Federal Trade Commission Rules of Practice Amendments, 61 Fed. Reg. 50,640 at 50,644 (1996).

[4] FTC Rules of Practice for Adjudicatory Proceedings, 16 C.F.R. § 3.43(b) (2001) (requiring that "unreliable evidence shall be excluded").

[5] *See Davis v. Mason County*, 927 F.2d 1473, 1484 (9th Cir. 1991) *vacated in part, on other grounds* 984 F.2d 345 (9th Cir. 1993).

undue delay, waste of time, or needless presentation of cumulative evidence."[6] And courts often exclude expert testimony for this reason.[7]

In determining whether expert testimony should be excluded as unduly cumulative this Court need not find that the proposed testimony will overlap in all respects.[8] Nor must it find that the experts rely on the same methodology or have the same background.[9] Rather, the test is whether the "small increment of probability it adds" to the truth or falsity of a material fact is

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[6] FTC Rules of Practice for Adjudicatory Proceedings, 16 C.F.R. § 3.43(b) (2001). According to the Commission, this "rule is intended to make clearer to litigants that the ALJ is empowered to exclude unduly repetitious, cumulative, and marginally relevant materials that merely burden the record and delay the trial. This clarification is intended to enhance the ALJ's ability to assemble a concise and manageable record." Federal Trade Commission Rules of Practice Amendments, 61 Fed. Reg. 50,639, 50,644 (1996).

[7] *See Davis*, 927 F.2d at 1484 (affirming trial court's exclusion of expert testimony as cumulative where excluded testimony would have been on the "same topic" as another expert's testimony); *Leefe v. Air Logistics, Inc.*, 876 F.2d 409, 411 (upholding district court's decision to exclude the testimony of an expert witness based on a comparison of the actual testimony of the expert allowed to testify and the testimony to be offered by the excluded expert witness); *Adalman v. Baker, Watts & Co.*, 807 F.2d 359, 370 (4th Cir. 1986) (excluding testimony of independent expert witness proper where testimony would have been cumulative of the testimony of a fact witness). *See also Aetna Cas. & Sur. Co. v. Guynes*, 713 F.2d 1187, 1193 (5th Cir. 1983) ("It is well within the discretion of a [court] to limit the number of expert witnesses who testify at trial."); *Upsher-Smith Labs., Inc. v. Mylan Labs., Inc.*, 944 F. Supp. 1411, 1440 (D. Minn. 1996) (stating that a court "may limit or exclude expert testimony which is cumulative"); *Rios v. Bigler*, 847 F. Supp. 1538, 1550 (D. Kan. 1994), *aff'd*, 67 F. 3d 1543 (10th Cir. 1995) (excluding an expert witness because the "court had no basis from which to conclude that the addition of this expert would significantly aid the plaintiff in the pursuit of her claim or that it would be anything but cumulative").

[8] *See Wetherill v. University of Chicago*, 565 F. Supp. 1553, 1565-66 (N.D. Ill 1983) (holding that expert medical testimony was unduly cumulative where it focused on the same general issues but used different methodologies).

[9] *In re Taxable Municipal Bond Sec. Litig.*, 1994 WL 594270 at *1-*2 (rejecting argument that differences between two experts' backgrounds prevented their testimony from being unduly cumulative).

outweighed by the time, cost and confusion caused by allowing it.[10] Following these principles, expert testimony may be subject to exclusion anytime multiple witnesses are expected to testify with respect to the same general issue and as to similar conclusions.[11] In these situations, the expert testimony – even where it differs in certain respects – relates to the same essential point and thus would play the same role in the disposition of the relevant issue.[12]

As demonstrated below, respondents' attempt to introduce multiple experts to testify on the same issue will not assist this Court in assessing factual issues, but will merely burden the record with duplicative testimony, delay and protract the trial, and obscure important aspects of the case. Reviewing the reports and depositions of respondents' named experts will clearly show

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[10] *Elwood v. Pina*, 815 F.2d 173, 178 (1st Cir. 1987).

[11] *See, e.g., Merrill Lynch Bus. Fin. Servs. v. Gray Supply Co.*, 1991 WL 278305 at *3 (N.D. Ill. Dec. 23, 1991) (defining relevant subject area as industry standards for loan workouts, loan management and liquidations and limiting party to one expert on this subject); *Harbor Ins. Co. v. Continental Bank Corp.*, 1991 WL 222260 at *7 (N.D. Ill. Oct. 25, 1991) (defining relevant subject area as the reasonableness of a particular settlement offer and granting motion *in limine* to limit parties to one expert for this issue).

[12] *See Harbor Ins.*, 1991 WL 222260 at *7 n.6 ("There is no authority permitting limitless expert testimony on the same subject on the grounds of diversity of perspective."); *In re Taxable Municipal Bond Sec. Litig.*, 1994 WL 594270 at *1-*2 (holding that experts with differing backgrounds could provide unduly cumulative testimony).

the repetitive and cumulative nature of the proposed testimony.[13] Consistent with the Fifth Circuit's rationale in *Leefe v. Air Logistics, Inc.*, this Court should exclude respondents' duplicative expert testimony to prevent respondents "from parading additional experts before this Court in the hope that the added testimony will improve on some element of the testimony by the principal expert."[14] Such a tactic only delays trial by leading to the presentation of unnecessary evidence.

I. Respondents' Six Named Experts will Provide Unduly Cumulative Evidence on the Value of the Niacor-SR License

Complaint counsel have proffered one expert, Dr. Nelson Levy, to provide testimony demonstrating that Schering's $60 million non-contingent payment was to delay Upsher's entry, not for the Niacor-SR license as respondents contend. In response, Schering and Upsher have collectively named six experts to testify on this topic. Four of the witnesses testify as to whether the amount paid by Schering for the Niacor-SR license was commercially reasonable. Two experts testify as to the clinical value of Niacor-SR. This proposed testimony is unnecessarily

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[13] The facts in this case are far different from the situation in *Natural Organics*, where ALJ Timony recently decided to deny complaint counsel's motion to strike expert witnesses because complaint counsel had not received the expert reports, had not deposed the potential expert witnesses, and did not possess "specific information" regarding each witness's prospective testimony. *In the matter of Natural Organics, Inc.*, 2001 WL 1478370 (F.T.C. April 5, 2001); *see also In the matter of R.J. Reynolds Tobacco Co.*, 1998 FTC LEXIS 182 (Oct. 16, 1998) (denying complaint counsel's motion to strike expert witnesses prior to depositions). By contrast, complaint counsel in this case have already received and thoroughly examined the expert reports of all the witnesses mentioned in this motion, and have deposed each of the proffered experts. Based on the expert reports and depositions, it is clear that the proposed expert testimony will overlap substantially and therefore should be excluded as unduly cumulative.

[14] *Leefe*, 876 F.2d at 411.

cumulative and should be limited.

A. Respondents' Four Proffered Licensing Experts Will Provide Unduly Cumulative Evidence

Respondents have named four witnesses to testify as to whether the amount paid by Schering for the Niacor-SR license was commercially reasonable:[15]

- [redacted]
- [redacted]
- [redacted]
- [redacted]

Schering's experts, Mr. McVey and Dr. Horovitz, not only reached functionally identical conclusions, but employed very similar methods:

- [redacted]
- [redacted]

[15] [redacted]

- [redacted]

Even Dr. Horovitz recognizes the repetition in his work with that of Mr. McVey's. He admitted during his deposition that his analysis largely overlapped Dr. McVey's work:

[redacted]

(Dep. at 229-30) (emphasis added).

Likewise, Upsher's experts, Mr. DiCicco and Mr. Bratic, employed very similar techniques – reaching nearly identical conclusions:

- [redacted]

- [redacted]

- [redacted]

- [redacted]

The testimony of these four expert witnesses will be unduly cumulative and will "merely burden the record and delay" the proceedings.[16] Accordingly, complaint counsel respectfully request that this Court, under Commission Rule 3.43(b), order Schering to strike either Mr. McVey or Dr. Horovitz and order Upsher to strike either Mr. DiCicco or Mr. Bratic.[17]

B. Upsher's Two Proffered Medical Experts Will Provide Unduly Cumulative Evidence

Presumably to support testimony of its four "licensing" experts, who are expected to opine as to the fair market value of the Niacor-SR license, Upsher has proffered two additional "medical" expert witnesses to provide testimony [redacted]

- [redacted]

Both experts employ substantially the same analysis to reach their conclusions:

- [redacted]

[16] Federal Trade Commission Rules of Practice Amendments, 61 Fed. Reg. 50,640 at 50,644 (1996).

[17] FTC Rules of Practice for Adjudicatory Proceedings, 16 C.F.R. § 3.43(b) (2001).

[redacted]

- [redacted]

- [redacted]

- [redacted]

The proposed testimony of the two medical experts is virtually redundant, even down to some of the smallest details. [redacted] [18] Allowing both of these "medical" experts to testify would "merely burden the record and delay" the proceedings.[19] Accordingly, complaint counsel respectfully request that the Court prevent this unduly cumulative testimony and order Upsher to strike either Dr. Keenan or Dr. Knopp under Commission Rule 3.43(b).[20]

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[18] [redacted]

[19] Federal Trade Commission Rules of Practice Amendments, 61 Fed. Reg. 50,640 at 50,644 (1996).

[20] FTC Rules of Practice for Adjudicatory Proceedings, 16 C.F.R. § 3.43(b) (2001).

II. Respondents' Named Experts will Provide Unduly Cumulative Evidence on the Competitive Effects of the Settlement Agreements

Complaint counsel have proffered the expert testimony of one witness, Dr. Bresnahan, to demonstrate that Schering's agreements with Upsher and AHP were anticompetitive and harmed consumers. In response, Schering and Upsher have collectively named ten potential testifying expert witnesses, including two Schering witnesses to testify about how cash payments can influence hypothetical settlement negotiations, four Schering witnesses to testify about the likely outcome of two hypothetical patent infringement cases, and two witnesses each from Schering and Upsher to testify about the economic impact of settlements between patent holders and possible infringers that include cash payments.

A. Schering's Proffered Negotiation Experts will Provide Unduly Cumulative Evidence

Schering has proffered two expert witnesses, Mr. Robert Mnookin and Mr. James O'Shaughnessy, to provide testimony about how a cash payment may influence a hypothetical settlement negotiation. Both experts selected by Schering are lawyers and both possess similar backgrounds in negotiation and dispute resolution.[21] Each of these experts is expected to testify about the same primary issues based on their review of nearly identical sources:[22]

- [redacted]

[21] Mr. O'Shaughnessy notes that his relevant experience is [redacted] Mr. Mnookin, a law professor and attorney, states that his experience has [redacted]

[22] Both experts consulted primarily the Upsher settlement agreement, Professor Breshanan's expert report, and litigation documents from this action. (Mnookin rep. at 3; O'Shaughnessy rep. at 3).

- [redacted][23]

- [redacted]

Equally important as to what both experts intent to testify about, is what both experts intentionally elect to avoid. While Schering's witnesses are supposedly experts in negotiation and dispute resolution, neither reviewed the history of the Schering patent settlement negotiations nor considered whether cash payments or value-creation was necessary to resolve those disputes. While both experts talk generally about the relevance of considering the merits of the underlying lawsuit in assessing a proposed settlement, neither attempts to do so in the context of the challenged settlements. Indeed, neither expert provides any opinion at all on the [redacted][24] Given what these experts intentionally do not address and what they will not say, it is questionable whether their proposed testimony meets even the basic requirement of "relevant evidence" – i.e., that it will make "the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[25]

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[23] [redacted]

[24] [redacted]

[25] Fed. R. Evid. 401.

Despite the limited relevance, if any, of this entire line of proposed expert testimony, Schering nonetheless offers two witnesses who are expected to say basically the same thing. Allowing both experts to testify on this topic would "merely burden the record and delay" the proceedings.[26] Accordingly, complaint counsel respectfully request that this Court order Schering to strike either Mr. Mnookin or Mr. O'Shaughnessy under Commission Rule 3.43(b).[27]

B. Respondents' Patent Experts will Provide Improper and Unreliable Legal Opinions, and Unduly Cumulative Evidence

1. The testimony of Charles Miller and Gerald Bjorge should be excluded as improper and unreliable legal opinions

The planned testimony of Mr. Charles Miller (Schering) and Mr. Gerald Bjorge (Schering) includes opinions on whether Upsher and AHP would have prevailed in an infringement suit regarding Schering's U.S. Patent 4,863,743 ("the '743 patent"). Both Mr.

[redacted] Such testimony, which attempts to advise how a judge would have applied the law, constitutes inadmissible legal opinion. If this Court wishes assistance in

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[26] Federal Trade Commission Rules of Practice Amendments, 61 Fed. Reg. 50, 640 at 50,644 (1996).

[27] FTC Rules of Practice for Adjudicatory Proceedings, 16 C.F.R. § 3.43(b) (2001).

understanding the specific issues from the patent litigation, the proper mode for that assistance is through attorney argument, not the testimony of patent attorneys posing as unbiased "experts."

Attorneys' testimony on the legal issues of a particular case is generally prohibited because it is the judge's province alone to determine the relevant legal standards.[28] "[I]t is axiomatic that the judge is the sole arbiter of the law and its applicability," with respect to a particular set of facts.[29] "In no instance can a witness be permitted to define the law of the case," because such testimony usurps the function of the court.[30]

The fact that respondents are attempting to insert a patent infringement determination into this antitrust case does not alter this basic principle of evidence law. It is "inappropriate and unnecessary to allow expert testimony on issues of [patent] law," in a particular case.[31] This is because "such legal opinions attempt to define the legal parameters which . . . should be left to the [c]ourt."[32] Accordingly, an opinion as to the legal issues in the case may not be presented.[33] Testimony of experts regarding patents often is limited to providing background information

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[28] *Burkhart v. Washington Metropolitan Area Transit Auth.*, 112 F.3d 1207, 1213 (D.C. Cir. 1997).

[29] *Specht v. Jensen*, 853 F.2d 805, 807 (10th Cir. 1988) (en banc).

[30] *Id.* at 810 (10th Cir. 1988).

[31] *Ely v. Manbeck*, 17 U.S.P.Q.2d 1252, 1254 (D.D.C. 1990).

[32] *Utah Med. Prods., Inc. v. Clinical Innovations Assocs.*, 79 F. Supp. 2d 1290, 1316 (D. Utah. 1999) (citing *Specht*, 853 F.2d at 807-10).

[33] *Id.*; *accord Nutrition 21 v. United States*, 930 F.2d 867, 871 n.2 (Fed. Cir. 1991) ("An expert's opinion on the ultimate legal conclusion is neither required nor indeed 'evidence' at all.").

regarding the procedure of prosecuting a patent before the Patent and Trademark Office. [34] A federal district court recently refused to consider testimony of exactly this sort "because it inappropriately renders an opinion on questions of law that rest solely within the province of the [c]ourt."[35] This Court should do the same.

In addition, the methods employed by Messrs. Miller and Bjorge are not sufficiently reliable to constitute admissible evidence under Commission Rule 3.43(b).[36] The Supreme Court, in *Daubert*, has provided four guides as to "whether a theory or technique" is reliable: 1) whether the theory or technique can or has been tested; 2) whether the theory or technique is subject to peer review; 3) the existence or maintenance of standards controlling the technique's operation; and 4) whether the theory or technique has achieved general acceptance.[37]

Application of the *Daubert* factors demonstrates the unreliable nature of the analysis provided by Mr. Miller and Mr. Bjorge. There are no known or generally accepted techniques of handicapping patent trials, no peer reviewed journals of patent case prediction techniques, no

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[34] *See, e.g.*, *VISX, Inc.*, FTC Docket No. 9286, Initial Decision, at 13 (May 27, 1999) (available at http://www.ftc.gov/os/1999/9906/visxid.pdf); *Buckley v. Airshield Corp.*, 116 F. Supp. 2d 658, 662 (D. Md. 2000) (permitting patent expert to testify as to PTO procedures but not to offer legal opinions about claim construction and infringement).

[35] *In re Cardizem CD Antitrust Litig.*, 105 F. Supp. 2d 682, 700 n.10 (E.D. Mich. 2000).

[36] FTC Rules of Practice for Adjudicatory Proceedings, 16 C.F.R. § 3.43(b) (2001) ("unreliable evidence shall be excluded").

[37] *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 593-95 (1993); *see also Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999) ("We conclude that *Daubert's* general holding – setting forth the trial judge's general 'gatekeeping' obligation – applies not only to testimony based on 'scientific' knowledge, but also to 'technical' and 'other specialized' knowledge [considered to constitute expert testimony under Fed. R. Evid. 702].").

standards for controlling the methods applied by Messrs. Miller and Bjorge, and no one has attempted to quantify the success of their methods.[38]

Relying primarily upon the patent, the prosecution history, and the expert testimony of another expert, Mr. Miller and Mr. Bjorge simply offer their *ad hoc* legal conclusions on the merits of the settled litigation, rather than employing "reliable principles and methods" to assist the finder of fact.[39] This type of "expert" testimony on the merits of a patent case has recently been excluded under *Daubert*.[40]

Accordingly, complaint counsel respectfully request that the inadmissible and unreliable testimony of Messrs. Miller and Bjorge should be precluded entirely under Commission Rule 3.43(b),[41] or limited to background information about patent-prosecution procedures. Specifically, they should be precluded from offering the following improper legal opinions:

- [redacted]
- [redacted]

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[38] *See In re Independent Serv. Orgs. Antitrust Litig.*, 114 F. Supp. 2d 1070, 1104 (D. Kan. 2000) (excluding the proffered expert testimony that a product infringed his client's patent based "on his review of the patent, the prosecution history, and his discussions with one of the inventors.").

[39] Fed. R. Evid. 702.

[40] *In re Independent Serv. Orgs.*, 114 F. Supp. 2d at 1104 (excluding expert testimony that a product infringed a particular patent, based on the expert's "review of the patent, the prosecution history, and his discussions with one of the inventors.").

[41] FTC Rules of Practice for Adjudicatory Proceedings, 16 C.F.R. § 3.43(b) (2001); *see also Chandler v. R&B Falcon Inland, Inc.*, 2001 WL 83019 at *4 (E.D. La. July 23, 2001) (excluding expert testimony where expert merely drew a conclusion based on facts available to the jury and did not rely on any type of "proven methodology" to assure a reliable result).

- [redacted]

- [redacted]

2. Schering's Proffered Patent Experts will Provide Unduly Cumulative Testimony

Even if this Court does not exclude the testimony of Mr. Miller and Mr. Bjorge as unreliable and inadmissible, it should nonetheless reign in Schering's strategy to transform this matter, from an antitrust case about Schering's unlawful payments to delay competitive entry, into a patent case about the hypothetical outcome of patent infringement litigation involving the '743 patent. As part of this strategy, Schering offers two "patent" experts, in addition to Mr. Miller and Mr. Bjorge. Upsher, which previously certified to a federal agency that its product did not infringe the '743 patent and vigorously contested Schering's patent infringement claim in court, offers no experts on the patent issues.

These four proposed "patent" experts will provide unduly cumulative testimony about whether Upsher's and AHP's generic K-Dur products would have infringed Schering's '743 patent:

- [redacted]

- [redacted]

- [redacted]

- [redacted]

The experts base their opinions on largely the same analysis:

- [redacted][42] [redacted]

- [redacted][43]

- [redacted][44] [redacted][45]

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[42] [redacted]

[43] [redacted]

[44] [redacted]

[45] Miller dep. at 218; Bjorge exp. rep. at 7-12.

[redacted]

In addition to the general repetitiveness of Schering's four patent experts, Mr. Miller and Mr. Bjorge shamelessly incorporate the work of other experts into their planned testimony.[46] Mr. Miller's testimony merely encapsulates the testimony of the other three experts on this subject to opine on the competitive effects of the settlement. He cites to Dr. Banker twelve times in his report, while also relying upon the work of Mr. Bjorge and Dr. Langer. He then sifts through these recycled opinions and the facts surrounding the Schering litigation to reach his various conclusions. For example, Mr. Miller asserts in his report that [redacted] Yet he admits that he is entirely reliant upon the opinions of Dr. Langer and Dr. Banker on this point. (dep. at 204)

Similarly, Mr. Bjorge relies inextricably on Dr. Banker's analysis, citing Dr. Banker's report as authority or otherwise drawing upon his work twenty-four times in the span of a seventeen page report. Mr. Bjorge admits that his opinion, in many respects, adds nothing but an additional voice to mimic work performed by others:

[redacted]

[46] [redacted]

[redacted]

(dep. at 119-20). Mr. Bjorge's [redacted] of Dr. Banker's opinion is unduly cumulative and should be excluded.[47]

Although some of the proposed experts approach the patent issues from a technical perspective, and others from a legal one, in the end, the testimony of each "patent' expert would be relevant, if at all, to a single issue: the outcome of a hypothetical patent infringement litigation involving Upsher's and AHP's generic K-Dur 20 products. Schering should not be permitted to "parad[e] additional experts before this Court in the hope that the added testimony will improve on some element of the testimony by the principal expert."[48] Accordingly, complaint counsel respectfully request that this Court limit Schering to one "patent expert" under Commission Rule 3.43(b).[49]

C. Respondents' Proffered Economic Experts will Provide Unduly Cumulative Evidence

Respondents proffer four experts to testify about the economic aspects of the challenged agreements. Since the reports and deposition testimony of these experts demonstrate that their

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[47] [redacted]

[48] *Leefe*, 876 F.2d at 411.

[49] FTC Rules of Practice for Adjudicatory Proceedings, 16 C.F.R. § 3.43(b) (2001); *see also Harbor Ins. Co.*, 1991 WL 222260 at *7 n.6 ("There is no authority permitting limitless expert testimony on the same subject on the grounds of diversity of perspective.").

trial testimony will provide unduly cumulative evidence, each party should be limited to one economic expert.

All four economists argue that [redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]

[redacted]

Upsher's two named economists, Dr. Kerr and Dr. Ordover, support their opinions with similar reasoning:

- [redacted]

- [redacted]

- [redacted]

Both of Schering's experts, Dr. Addanki and Dr. Willig, perform a similar analysis:

- [redacted]

- [redacted]

- [redacted]

- [redacted]

[redacted]

[redacted] Although the proposed experts may employ slightly different methodologies or emphasize slightly different points, the testimony would nevertheless be unduly cumulative.[50] In the end, each addresses the same issues and reaches a similar outcome.

Respondents' named economic witnesses will provide unduly cumulative testimony that will "merely burden the record and delay" the proceedings.[51] Accordingly, complaint counsel respectfully request that this Court limit Schering and Upsher each to one economic expert witness under Commission Rule 3.43(b).[52]

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[50] *See In re Taxable Municipal Bond Litig.*, 1994 WL 594270 at *1-*2 (holding that two experts' opinions on the same legal issue were unduly cumulative, despite certain differences between them).

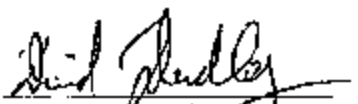
[51] Federal Trade Commission Rules of Practice Amendments, 61 Fed. Reg. 50,640 at 50,644 (1996).

[52] FTC Rules of Practice for Adjudicatory Proceedings, 16 C.F.R. § 3.43(b) (2001).

CONCLUSION

To prevent the presentation of unduly cumulative and improper evidence that would cloud the factual record, and delay trial, complaint counsel respectfully request that this Court limit respondents' expert testimony in accordance with the proposed orders.

Respectfully submitted,



Karen G. Bokat
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Dated: January 10, 2002

CERTIFICATE OF SERVICE

I, David Dudley, hereby certify that on January 10, 2002, caused two copies of the public version of the Memorandum In Support of Complaint Counsel's Motion To Limit Or Exclude Duplicative and Improper Expert Witness Testimony, to be served upon the following person by hand delivery:

Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission, Rm. H-104
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I caused one original and one copy of the public version of the Memorandum In Support of Complaint Counsel's Motion To Limit Or Exclude Duplicative and Improper Expert Witness Testimony, to be served by hand delivery and email upon the following Office:

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I caused one copy of the public version of the Memorandum In Support of Complaint Counsel's Motion To Limit Or Exclude Duplicative and Improper Expert Witness Testimony, to be served by hand delivery to the following parties:

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