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ORIGINAL

UNITED STATES OF AMERICA
BEFORE 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**

COMPLAINT COUNSEL'S RESPONSE TO RESPONDENTS' JOINT MOTION TO LIMIT THE TESTIMONY OF MAX H. BAZERMAN

I. Introduction

Complaint Counsel's rebuttal expert witness concerning settlements and settlement negotiations, Professor Max Bazerman, is one of the nation's preeminent experts in the area of negotiations and settlements.[1] He is the Jesse Isador Strauss Professor of Business Administration at the Harvard Business School, where he is co-coursehead of the School's required Negotiations course, and the Academic Program Coordinator of the School's executive program "Changing the Game." He also is affiliated with Harvard University's Kennedy School of Government, the Harvard University Psychology Department, and the Harvard Law School's Program on Negotiation, where he is Vice-Chair of Research.

[1] *See* Rebuttal Expert Report of Max Bazerman (Attachment A) at 1-2,10-25; Deposition Transcript of Max H. Bazerman (Attachment B) at 8:12 - 21:8).

Professor Bazerman has written or co-authored over 125 research articles, and authored, co-authored, or edited ten books. Professor Robert Mnookin, Schering's expert witness on negotiations and settlements in the present proceeding, and a colleague of Professor Bazerman at Harvard, has endorsed Professor Bazerman's latest book on negotiations and public policy -- You Can't Enlarge the Pie[2] -- stating on the book's dust jacket that "[i]t should be required reading for all those concerned with public life in America." Professor Bazerman is best known for his extensive empirical research on the judgments that people form during negotiations, and how these judgments affect the outcome of negotiations (Bazerman tr. at 47). Professor Bazerman is on the International Advisory Board of the *Negotiations Journal*, and serves on the Board of Directors of the Consensus Building Institute and the Israel Center for Negotiation and Conflict Management. In addition to publishing articles in journals that are targeted to his field of negotiation and settlements, Professor Bazerman has also published articles about negotiation in leading economics journals, such as *American Economic Review* (the official journal of the American Economics Association), *The Quarterly Journal of Economics* (published by Harvard University), and *Econometrica* (the official journal of the Econometric Society).

Professor Bazerman has taught many thousands of executive students at Harvard and at his previous position at Northwestern University, and has consulted for many major corporate clients, including pharmaceutical and other healthcare related clients. He has provided executive education to many of these firms in the areas of decision and negotiation, as well as advising them regarding specific business deals. He provides instruction on negotiation, intellectual property, antitrust issues, value creation, and alternative dispute resolution.

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[2] Basic Books (2001) (co-author).

II. Respondents' Arguments

In the face of Professor Bazerman's overwhelming and unassailable expertise regarding negotiation and settlements, Respondents Schering-Plough Corporation ("Schering") and Upsher-Smith Laboratories, Inc. ("Upsher-Smith") raise three arguments, all without merit, in a desperate effort to limit his testimony, which is so damaging to Respondents' arguments in this case. Thus, Respondents assert that Professor Bazerman's report and expected testimony must be disallowed because they go beyond mere rebuttal to Respondents' witnesses, that his testimony involves economics and pharmaceutical licensing matters that are beyond his expertise, and that he provides opinions relating to legal standards and public and antitrust policy that are not within the scope of properly allowable expert testimony.

In their Joint Motion, Respondents first argue that Professor Bazerman's rebuttal testimony is "much more than simply a rebuttal of Professor Mnookin and Mr. O'Shaughnessy." This characterization of Professor Bazerman's rebuttal expert report is inaccurate and misleading. His opinions directly address the content of Professor Mnookin's and Mr. O'Shaughnessy's reports, identifying the flaws in their analyses, and highlighting the impracticality and adverse implications for competition and the public interest of accepting their proposals regarding what should constitute acceptable settlement arrangements.

Respondents next assert that, insofar as Professor Bazerman's testimony in his expert report relates to matters contained in the reports of any of the economic experts in this matter, or relates to the licensing arrangement for Niacor-SR entered into between Schering and Upsher-Smith as part of the settlement of their patent infringement litigation, "[t]hese areas of proposed testimony are far beyond Professor Bazerman's expertise." Professor Bazerman quite properly

considers certain aspects of the reports of Respondents' economic experts, as well as information concerning the Niacor-SR license that was part of the Schering/Upsher-Smith settlement agreement. Professor Bazerman has considerable experience and expertise in economics and pharmaceutical licensing, and the information from these areas that Professor Bazerman considers is well within the scope of his expertise to evaluate and employ in his analysis. Moreover, all the information from these areas that Professor Bazerman incorporates into his analysis relates to the issue of settlements and dispute resolution, Professor Bazerman's central field of expertise. Finally, as Professor Bazerman's expert report and deposition testimony make abundantly clear, he has been extremely cautious and circumspect in using information relating to these topics, in order to assure that he in no way exceeds the limits of his established expertise.

Third, Respondents argue that Professor Bazerman's opinions "are far beyond the permissible scope of expert testimony" because they "opine as to the legal conclusion the Court should render in this case, and the rule of antitrust law that should be applied in this case and in the future." Respondents assert that Professor Bazerman may not 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." They assert that "[d]etermining public policy is a matter for the court, . . . and may not be the subject of expert testimony."

Respondents mis-characterize the nature of Professor Bazerman's opinions, which do not attempt to usurp the government's role in deciding public or antitrust policy, but rather explain the public policy implications of allowing or disallowing the types of settlement agreements at issue in this case. Such expert testimony is aimed at permitting the Commission to make an informed judgment on the issues raised by this case and in possible future cases involving similar

settlement agreements. Respondents also attempt to apply an overly-restrictive standard as to the permissible subjects of testimony in Commission proceedings that is inconsistent with the Commission's own Rules on admissible evidence. Finally, the testimony of Professor Bazerman purportedly relating to "legal conclusions" and the "rule of antitrust law" that Respondents seek to exclude directly rebuts testimony from Respondents' economic and negotiations experts. To the extent that Respondents' experts themselves are offering testimony on the implications of various rules and standards for settlement agreements, they cannot complain that Complaint Counsel is offering testimony that responds to the substance of their own experts' testimony on these issues. Consequently, Respondents' Joint Motion to Limit the Testimony of Professor Bazerman is entirely without merit, and should be denied.

III. Professor Bazerman's Testimony

A review of Professor Bazerman's expert report points out the degree of mis-characterization of his testimony by Respondents in their Joint Motion, and the lack of merit that their assertions possess. First, it is clear that Professor Bazerman's expert opinions are relevant to the Commission's inquiry in the present proceeding. As stated in his expert report (at 2), and in his deposition testimony (Bazerman tr. 58:13 - 59:17), Professor Bazerman was requested by Complaint Counsel to assess the conclusions in the expert reports of Robert H. Mnookin and James P. O'Shaughnessy, and to review and evaluate those portions of the Respondents' economic expert reports relating to the impact of the Schering/Upsher-Smith settlement process on the competitiveness of the K-Dur 20 marketplace, and the type of settlement processes that should be allowed between a branded pharmaceutical monopolist and generic entrants.

Professor Bazerman summarizes his conclusions at page 8 of his expert report:

[redacted]

Thus, Professor Bazerman's report is aimed at providing the Commission with the benefit of his expert insights on issues relating to negotiation processes and settlement agreements, and his conclusions address that specific area of concern. The issue of settlement agreements -- including both analysis of the nature of the specific agreements at issue in the present proceeding, and the implications for antitrust policy, other public policy, and consumer welfare of determining how similar settlement agreements should be evaluated -- obviously is relevant both to the Commission's task in the present proceeding of determining whether the agreements at issue violate the antitrust laws, and to the broader issue of the Commission's treatment of similar settlement agreements in possible future law enforcement proceedings.

In addition to being relevant to the present proceeding and the Commission's law enforcement responsibilities, Professor Bazerman's expert analyses and opinions fall squarely within the ambit of his clearly established and widely recognized expertise. It also is quite clear that Professor Bazerman's conclusions do not, as claimed by Respondents, opine as to legal conclusions or the rule of antitrust law that should be applied. Rather, he concludes that [redacted]

[redacted]

These expert conclusions by Professor Bazerman, while obviously relevant to, and having implications for, the legal conclusions to be reached by the Commission in this case, are not themselves such conclusions. They do not specify a rule of antitrust law, nor do they conclude that the agreements at issue in this case violate the antitrust laws. Rather, they provide a framework for analyzing the nature, operation, and effect of certain settlement agreements, both those in the present case, and similar ones in possible future situations. In his rebuttal expert report (p. 9), Professor Bazerman explains [redacted][3] With the benefit of Professor Bazerman's expert perspective,

[3] *See, e.g.*, Bazerman rpt. at 9; Bazerman tr. 51:14-18; 53:2-6; 56:13-23; 113:24 - 114:8.

the Commission can itself more knowledgeably determine whether or not such agreements are problematic and violate the law.

IV. The Legal Standard for Admission of Expert Evidence In Federal Trade Commission Proceedings

Respondents argue that expert testimony in this case "must comply" with Rule 702 of the Federal Rules of Evidence.[4] Respondents specifically assert that testimony regarding "antitrust policy," "public policy," "a legal conclusion, *i.e.*, that the settlements in this case are 'anticompetitive'," "the credibility and persuasiveness" of other expert witnesses, and the weight the court should give to their testimony is "impermissible" and "not allowed."[5] Respondents assume, without any support, that Rule 702 and various cited federal court decisions regarding expert testimony in federal court proceedings are controlling as to the permissible subjects and scope of expert testimony in Federal Trade Commission administrative proceedings. Respondents argue that the Commission therefore is prohibited from considering the testimony of Professor Bazerman that they claim falls within those categories.[6]

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[4] Respondents' Joint Memorandum at 4.

[5] Respondents' Joint Memorandum at 4-5, 7.

[6] By this standard, many of Respondents' experts should be precluded from testifying based on the scope of their proposed testimony, regardless of their qualifications to present reliable and relevant testimony. *See, e.g.*, Peter O. Safir, who has been designated by Schering to testify concerning "FDA Law and Hatch-Waxman" (Respondent Schering-Plough Corporation's Identification of Expert Witnesses (Attachment C) at 2; Expert Report of Robert H. Mnookin at 9-11 (Attachment D)(one of Schering's two experts designated to testify on "Settlement Negotiations and Dispute Resolution," who criticizes aspects of the economic analysis of Timothy F. Bresnahan, Complaint Counsel's expert economist, and offers his opinions as a matter of antitrust and public policy concerning what rules should or should not apply in evaluating future settlement agreements that include similar terms); Expert Report of James P.

Putting aside the question of the accuracy of Respondents' characterization of Professor Bazerman's testimony, as discussed above, the legal standard that Respondents seek to apply to limit the scope of Professor Bazerman's testimony simply does not apply in Federal Trade Commission proceedings. The Commission's own Rules define the scope of admissible evidence in Commission adjudicative proceedings. Section 3.43(b) of the Commission's Rules states that "[r]elevant, material, and reliable evidence shall be admitted [in Commission adjudicative proceedings]," and "[i]rrelevant, immaterial, and unreliable evidence shall be excluded."[7] Section 3.43(b) does not differentiate between expert and other evidence, and thus the standard for admissibility applies equally to expert testimony as to the other forms of evidence. Nor does § 3.43(b) impose any limitation on the subjects of testimony, including expert testimony, that would exclude "relevant, material, and reliable" expert testimony by Professor Bazerman regarding any of the issues about which Respondents object.[8]

It has long been clear that the Commission is not bound by the Federal Rules in its administrative proceedings.[9] As the Supreme Court decided long ago in *FTC v. Cement Institute,*

O'Shaughnessy at 10-17 (Attachment E)(Schering's other expert designated to testify on "Settlement Negotiations and Dispute Resolution," who criticizes at length aspects of the economic analysis of Timothy F. Bresnahan, Complaint Counsel's expert economist).

[7] 16 C.F.R. § 3.43(b) (emphasis added).

[8] Because the Commission's Rules do not go on to provide further guidance as to what is required for testimony to be considered "reliable," the Commission can and does look to the Federal Rules for further guidance in implementing the Commission's standard for admissible evidence. Thus, Rule 702 of the Federal Rules of Evidence, which specifically addresses what the Supreme Court has held constitutes reliable expert witness evidence, is instructive for the Commission in applying its reliability test for expert witnesses under Rule 3.43(b).

[9] *See FTC v. Cement Institute*, 333 U.S. 683, 705-706 (1948); *In re American Home Products* Corp., 98 F.T.C. 136, 368 n. 9 (1981); In *re Herbert R. Gibson, Sr.*, FTC Dkt. No.

"[a]dministrative agencies like the Federal Trade Commission have never been restricted by the rigid rules of evidence."[10] "Indeed," as the Commission has observed, "one of the purposes in establishing [tribunals such as the FTC] was to devise a way whereby the exclusionary rules of evidence would be eliminated as a bar to common sense resolution of certain classes of controverted cases."[11]

Thus, insofar as evidence, including expert testimony by Professor Bazerman, is reliable, relevant, and material,[12] not only is it not required to be excluded from this proceeding, but rather it is required to be admitted under the Commission's own Rules. Such properly admissible

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9016, 1978 FTC Lexis 324, ALJ Initial Decision at 14-15 (May 19, 1978); *In re Thompson Medical Co., Inc.*, 101 F.T.C. 385, 388 n. 7 (1983) (Interlocutory Order) (citing 56 Fed.Reg. 56,862, 56,863 (1978) (comment of Commission on adoption of its discovery rules noting advisory, but non-binding, nature of Federal Rules)).

[10] 333 U.S. 683, 705-06 (1948); *see also* Kenneth C. Davis and Richard J. Pierce, Jr., II *Administrative Law Treatise* (3d ed. 1994) § 10.3 at 125-26 (observing that "it makes little sense to take the risk of erroneous exclusion of reliable evidence through application of highly technical exclusionary rules in the context of agency adjudications"). Indeed, even in the context of a bench trial, court often apply more liberally the Federal Rules of Evidence, which were designed primarily to govern decision-making by juries. *Volk v. United States*, 57 F. Supp. 2d 888, 896 n.5 (N.D. Cal. 1999) (observing that the "*Daubert* gatekeeping" function is "less pressing" in connection with a bench trial because the judge and the fact finder are the same); *Ekotak Site PRP Committee v. Self*, 1 F. Supp. 2d 1282, 1296 (D. Utah 1998) (admitting expert testimony despite "reservations" about methodology); *Fierro v. Gomez*, 865 F. Supp. 1387, 1396 n. 7 (N.D. Cal. 1994) (stating that the better approach under *Daubert* in a bench trial is to permit expert testimony subject to cross-examination).

[11] *Philadelphia Carpet Co.*, 64 F.T.C. 762, 773 (1964) ("it is long settled that hearsay evidence is not to be out of hand rejected or excluded in administrative tribunals").

[12] Section 3.43(b) of the Commission's Rules also permits, though does not require, that "[e]vidence, even if relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or if the evidence would be misleading, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." None of these concerns has been raised concerning Professor Bazerman's expert testimony.

evidence includes within its scope Professor Bazerman's expert testimony regarding public policy issues within his nationally-recognized areas of expertise, his views about the persuasiveness of other expert testimony, including economic expert testimony, insofar as it is within his carefully delineated areas of economic expertise and bears on his expert opinions relating to settlement and negotiation issues, and his assessment of certain aspects of the Niacor-SR licensing arrangement that relate to his evaluation of the settlement agreement and settlement agreements generally. Admitting this relevant and reliable expert testimony into evidence will permit the Court and the Commission to fully assess and appreciate its importance and probative value in addressing the important and complex issues raised in this matter.

V. Professor Bazerman is Qualified to Provide Reliable Evidence as a Rebuttal Expert Witness Regarding Settlement Negotiations and Processes in the Present Matter, and Their Policy Implications for Treatment of Similar Settlements in the Future

As Dr. Bazerman's rebuttal expert report (at pp. 1-2, 10-25) and deposition testimony (tr. 8:12 - 21:8) detail, he has extensive expertise and experience, both academic and in practical, real world application, in the areas of negotiation and settlement of disputes, including extensive consulting experience with major firms in the health care and pharmaceutical industries. His pharmaceutical industry experience includes significant hands-on involvement regarding pharmaceutical licensing and due diligence issues in the context of settlement negotiations and dispute resolution. (*see, e.g.*, tr. 82:18 - 88:14). While not an attorney, Professor Bazerman also has taught in the areas of intellectual property and antitrust issues (report at p. 2), and his practical industry experience includes work in the context of settlement of patent disputes (*see* tr. 52:16 - 53:6). Professor Bazerman also has written and published extensively (report at pp. 11-

21), including writings on legal issues and legal reform (tr. 12:9 - 13:13). Over the last few years [redacted] (tr. 10:24-25), and just last year Professor Bazerman published a book on public policy issues (tr. 12:14-16; 20:2-4; 57:11-14). Professor Bazerman's knowledge and experience provide him with substantial expertise and experience regarding matters of public policy (tr. 57:11-25) and [redacted] (tr. 8:12-18).

While not himself an economist, Professor Bazerman has considerable expertise in understanding economic arguments [redacted] (tr. 59:18-60:1). In this regard, at his deposition Professor Bazerman proceeded to explain in detail the basis of his economic expertise (tr. 61:4 - 62:10), and observed that he even had published a number of papers in the leading economic journals (tr. 60:2-4). Therefore, he has the expertise to analyze and offer his opinions regarding the economic implications of the negotiation process and settlement agreements.

In the face of Professor Bazerman's overwhelming relevant expertise and experience, Respondents nevertheless attempt to challenge his qualifications to render his expert opinions based on the faulty logic that Professor Bazerman's expertise does not encompass certain substantive areas that are neither part of, nor necessary to, his analysis and conclusions. Thus, Respondents argue (Joint Motion at 4-5) that, since Professor Bazerman is "neither an economist nor an antitrust expert," he is not qualified to give testimony regarding "a legal conclusion, *i.e.*, that the settlements in this case are "anticompetitive." Similarly, Respondents assert (Joint

Motion at 5) that because Professor Bazerman "is not an expert in pharmaceutical licensing – nor is he an economist," he is not qualified to provide testimony "that the due diligence done on Niacor-SR, and the terms of the Niacor-SR license, suggest that the settlement delayed generic entry."

In his deposition testimony, Professor Bazerman is very careful to point out the scope and limits of his economic expertise, and to explain how his analysis of aspects of the reports of Respondents' economic experts is limited to those areas where he has such expertise and only insofar as the expert economic evidence relates to his academic and real world experience regarding negotiation behavior (*see, e.g.*, tr. 59:1 - 62:10; 107:17-23; 125:16 - 126:7). Thus, unlike many of Respondents' experts, Professor Bazerman has been very conservative and cautious in limiting his expert testimony that involves the discipline of economics to areas where he possesses the requisite degree of experience and expertise in the field. He has been careful to assure that, insofar as his opinions rely on economic information and analysis, he truly possesses sufficient relevant experience and expertise to evaluate and reliably employ that information.[13] He also has limited his evaluation and use of evidence from economic experts to those areas where they directly bear on his testimony in areas of his core competence and expertise.

Professor Bazerman likewise is qualified to render opinions that relate to Respondents'

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[13] *See, e.g.* Bazerman tr. 61:7 - 62:3. Where Professor Bazerman believes that he does not possess sufficient economics expertise to make an independent judgment or evaluate the opinions of the economist, he candidly admits the limits of his expertise (*See, e.g.*, Bazerman tr. at 62:4-7; 125:20 - 126:7; 146:2-7; 166:21 - 167:8) and he explicitly indicates where he has relied on the opinions of others in forming his own opinions. (*e.g.*, his reliance on Dr. Levy's conclusion as to the excessive nature of the $60 million payment by Schering to Upsher-Smith for the Niacor-SR and other licenses)(*see* Bazerman report at 3; Bazerman tr. 90:11-14; 112:4-9; 155:11-14).

inclusion of the Niacor-SR license arrangement as part of their settlement of the patent infringement litigation. As with his analysis of aspects of the reports of Respondents' economic experts, Professor Bazerman is careful to limit the information he employs, and the analysis he undertakes, regarding the licensure arrangement to those areas and issues with which he has considerable experience and expertise. Thus, in addition to generally indicating experience as a consultant to many well-known corporations involved in pharmacy and other health-related industries (Bazerman rpt. at pp. 2, 25), at his deposition, Professor Bazerman testified specifically that he had [redacted] (tr. 10:21-23). He also testified that, in the context of his work for pharmaceutical and other health-related organizations, he had [redacted] (tr. 10:23 - 11:2). He also testified that, in helping executives and managers think through the negotiation processes, including issues of licensing of pharmaceutical products and due diligence, he had [redacted] (*see* tr. 84:12-24).

Thus, despite Respondents' unsubstantiated and conclusory assertions of insufficient expert credentials to render his opinions, it is quite clear that Professor Bazerman in fact possesses ample experience and expertise to do so. His qualifications and experience as a nationally prominent expert in the area of negotiations and dispute resolution and settlement are manifest from his expert report (at pp. 1-2; 11-25), as well as his deposition testimony. Moreover, his expertise and experience extend sufficiently to other disciplines and areas related to negotiations and settlements – including aspects of economics and pharmaceutical patent licensing – that directly bear on his primary area of expertise. Finally, as discussed above,

Professor Bazerman has been very careful in his use of information from these related areas either to assure that the information does not exceed his expert ability to evaluate and properly use the information, and that he only uses such information insofar as it bears on the subject of his expert analysis – the type of settlement agreements that are at issue in this proceeding.

VI. Professor Bazerman's Expert Report Does Not Go Beyond Addressing the Issues Directly or Implicitly Addressed in the Expert Reports of Professor Mnookin, Mr. O'Shaughnessy, and Certain Relevant Portions of the Expert Reports of Respondents' Economic Experts

Professor Bazerman's Expert Report is Directly in Rebuttal to the Opinions of Professor Mnookin and Mr. O'Shaughnessy in Their Expert Reports

Respondents argue that Professor Bazerman's rebuttal expert report goes beyond the scope of proper rebuttal to Respondents' expert witnesses. Both Professor Mnookin and Mr. O'Shaughnessy discuss whether prohibiting settlement agreements like the ones at issue will prohibit or chill efficient resolution of patent infringement disputes. They also propose a "rule" for evaluating patent infringement litigation settlement agreements similar to those at issue in this case, **.[14]

Professor Bazerman's rebuttal report responds directly to the opinions of Professor Mnookin and Mr. O'Shaughnessy on these issues, pointing out flaws in their analyses, disputing their conclusions regarding the effect on settlements of prohibiting such agreements, and pointing out the impracticality and adverse public policy consequences of the rule they propose regarding settlement agreements. The primary thrust of Professor Bazerman's expert report is to point out

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[14] Mnookin rpt. at 11 (Attachment D); O'Shaughnessy rpt. at 10, 12-13 (Attachment E).

[redacted]

It simply strains credulity that Schering offers the opinions of its two experts on settlement negotiations and dispute resolution on these same issues and then, with a blind eye to the inconsistency, asserts with Upsher-Smith in their Joint Motion that the analysis of, and response to, these experts' opinions by Professor Bazerman – a nationally prominent expert on negotiations and settlements -- are "much more than simply a rebuttal of Dr. Mnookin and Mr. O'Shaughnessy," and are "far beyond the permissible scope of expert testimony."

Professor Bazerman's Testimony in Response to Respondents' Economic Experts is Proper Rebuttal to Their Opinions Relating to Settlement Agreements

Respondents proffer four experts to testify about the economic aspects of the challenged settlement agreements. However, all four economists opine on whether settlement agreements of the type at issue in the present proceeding should be considered illegal *per* se, and whether a court should compare the anticompetitive settlement agreement with an analysis of the outcome of litigation based on a review of the evidence in the patent case.[15] Each of the Respondents' four economic experts presents his economic analysis of settlement agreements in which the patent holder provides cash payments to the alleged infringer and the alleged infringer agrees to compete at some specified date in the future.[16] Each expert then considers whether such an arrangement harms consumers.[17]

Professor Bazerman's Rebuttal Expert Report directly responds to the conclusions proffered by Respondents' economic experts relating to settlement agreements, [redacted]

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[15] Expert Report of Sumanth Addanki at 41-42 (Attachment F); Expert Report of Robert D. Willig on Behalf of Schering-Plough Corporation at 9-19 (Attachment G); Expert Report by William O. Kerr at 7-9 (Attachment H); Expert Report by Janusz A. Ordover at 17-19 (Attachment I).

[16] Addanki rep. at 43-46 (Attachment F); Willig rep. at 11-12 (Attachment G); Kerr rep. at 7-8 (Attachment H); Ordover rep. at 14 (Attachment I).

[17] Addanki rep. at 43-46 (Attachment F); Willig rep. at 12-19 (Attachment G); Kerr rep. at 8-9 (Attachment H); Ordover rep. at 14-15 (Attachment I).

VIII. Conclusion

As an expert in negotiations and settlement agreements, Professor Bazerman's testimony, both in his rebuttal expert report and in his expected testimony at trial, is directly in rebuttal to

[redacted]

Respectfully Submitted,

David M. Narrow
Karen G. Bokat

Counsel Supporting the Complaint
Bureau of Competition
Federal Trade Commission
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Dated: January 22, 2002

CERTIFICATE OF SERVICE

I hereby certify that this 22nd day of January, 2002, I caused a copy of the foregoing Public Version of Complaint Counsel's Response to Respondents' Joint Motion to Limit the Testimony of Max H. Bazerman to be served upon the following person by hand delivery:

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

I caused one original and one copy to be served by hand delivery and one copy to be served by electronic mail upon the following person:

Office of the Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

I caused copies to be served upon the following persons by electronic mail and Federal Express:

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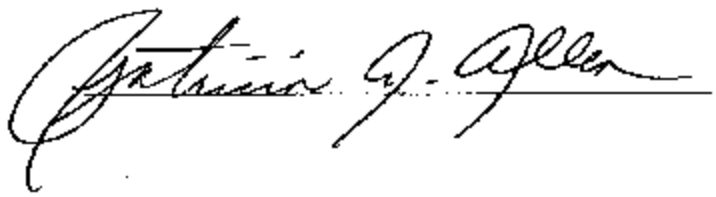

ATTACHMENT A

UNITED STATES OF AMERICA
BEFORE THE 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

REBUTTAL EXPERT REPORT OF PROFESSOR MAX BAZERMAN

The remaining pages of the expert report have been redacted.

ATTACHMENT B

In The Matter Of:

SCHERING-PLOUGH CORP. & UPSHER-SMITH LABS
MATTER NO. D09297

MAX H. BAZERMAN
December 18, 2001

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Word Index included with this Min-U-Script®

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ATTACHMENT C

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
and	)	
American Home Products Corporation, a corporation.	)	

RESPONDENT SCHERING-PLOUGH CORPORATION'S IDENTIFICATION OF EXPERT WITNESSES

This document has been redacted.

ATTACHMENT D

Report of

Robert H. Mnookin

On Behalf of
Schering-Plough Corporation

To The
Federal Trade Commission

Concerning
File No. 9910256

October 4, 2001

The remaining pages of the expert report have been redacted.

ATTACHMENT E

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
and	)	
American Home Products Corporation, a corporation	)	

Expert Report of James P. O'Shaughnessy
on Behalf of
Schering-Plough Corporation

The remaining pages of the expert report have been redacted.

ATTACHMENT F

UNITED STATES OF AMERICA
BEFORE 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

EXPERT REPORT OF SUMANTH ADDANKI

Restricted Confidential
Attorney's Eyes Only

The remaining pages of the expert report have been redacted.

ATTACHMENT G

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
and	)	
American Home Products Corporation, a corporation	)	

Expert Report of Robert D. Willig
On Behalf of Schering-Plough Corporation

Attorneys' Ey

The remaining pages of the expert report have been redacted.

ATTACHMENT H

United States of America
Federal Trade Commission

In the matter of
Schering-Plough Corporation
Upsher-Smith Laboratories, Inc.
and American Home Products Corporation

Docket No. 9297

Expert Report

by

William O. Kerr, Ph.D.

October 8, 2001

Restricted Confidential,
Attorney's Eyes Only

The remaining pages of the expert report have been redacted.

ATTACHMENT I

The remaining pages of the expert report have been redacted.