

UNITED STATES OF AMERICA

AMERICAN LEGATION
LONDON

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of)
)
)
)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Upsher-Smith Laboratories,
a corporation,

)
) Docket No. 9297
)
) **PUBLIC VERSION**

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

I. BACKGROUND

Complaint counsel designated Professor Bazerman as a proposed expert witness

in rebuttal to two of Schering's witnesses, Professor Robert H. Macklin and Mr. James D.

[REDACTED]

areas of proposed testimony are far beyond Professor Rizerman's expertise and in fact

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

But such testimony is impermissible, and in any event, Professor Bazerman is neither an

expert on what the rule of law should be. Expert testimony is allowed only when such

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

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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

would have Professor Bazerman opine that:

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

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 "noncompetitive" in

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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 Test at 21, 26, 105, 06, 284, 86. Complaint counsel did not

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

effect hygiene expectations that is the focus of this statement creation and the rest of the

- He does not have a "general understanding of what would formulate a set of common [due diligence] standards." *Id.* at 23

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Deppes testified in his deposition that it is "good advice" to have parties to a

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[REDACTED]

III. CONCLUSION

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.
Washington D.C. 20580

and one paper copy was hand delivered upon:

Karen Bokar
Bureau of Competition
Federal Trade Commission
Washington, D.C.
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Washington, D.C. 20580

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