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UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of: )  
IMPAX LABORATORIES, INC, )  
a corporation, ) Docket No. 9373  
Respondent. )  
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1 APPEARANCES: (continued)

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1 rate complaint counsel's case is going and thinking  
2 about our own case, I don't think Thanksgiving is  
3 going to be an issue, but I understand your desire to  
4 move us along and we'll talk to our witnesses and  
5 see --

6 JUDGE CHAPPELL: Let's revisit on two things,  
7 whether we would need to go beyond the 22nd, the day  
8 before Thanksgiving, and whether you would have  
9 witnesses on Wednesday, the 1st if we went that day.  
10 If both sides are confident we will wrap it up by the  
11 22nd, then we don't need to worry about the 1st.

12 MR. HASSI: I'm confident we'll wrap it up by  
13 the 22nd, Your Honor.

14 MR. LOUGHLIN: I am, too. The witnesses you  
15 have on that list are our remaining witnesses, other  
16 than our rebuttal witness, just FYI.

17 JUDGE CHAPPELL: Then you basically have  
18 experts and how many fact witnesses beyond your experts  
19 by the time complaint counsel rests?

20 MR. HASSI: We have four or five, but we're  
21 evaluating whether we need to call all of those,  
22 Your Honor.

23 JUDGE CHAPPELL: Okay. All right. Thank you.  
24 Let's call the next witness.

25 MR. LOUGHLIN: Your Honor, complaint counsel

1 calls Professor Max Bazerman.

2           And Your Honor, my colleague Markus Meier will  
3 conduct the examination.

4                           -   -   -   -   -

5 Whereupon --

6                           MAX HAL BAZERMAN

7 a witness, called for examination, having been first  
8 duly sworn, was examined and testified as follows:

9           MR. MEIER: Good morning, Your Honor.

10           May it please the court.

11                           -   -   -   -   -

12                           DIRECT EXAMINATION

13           BY MR. MEIER:

14           Q. Good morning, Professor Bazerman.

15           A. Good morning.

16           Q. How are you?

17           A. I'm good.

18           Q. Professor Bazerman, would you please introduce  
19 yourself by stating your full name.

20           A. Max Hal Bazerman.

21           Q. How are you currently employed?

22           A. I'm the Jessie Isador Straus Professor of  
23 Business Administration at the Harvard Business School  
24 at Harvard University.

25           Q. Professor Bazerman, there's a binder of

1 exhibits on the table to your left. You don't need to  
2 look at the binder right now, but I may refer to it  
3 during my questioning.

4           There's also a bottle of water on the table for  
5 you, too.

6           Professor Bazerman, we're going to start by  
7 reviewing the issues the FTC asked you to assess in  
8 this case.

9           Now, without actually stating your opinions at  
10 this time, what did the FTC ask you to do?

11         A. I was asked my opinion on two questions,  
12 one --

13         Q. What was the first issue the FTC asked you to  
14 assess?

15         A. So one question was whether the patent  
16 settlement was linked to the no-AG agreement, the Endo  
17 credit and the development and co-promotion agreement  
18 in order to allow Endo to provide compensation to Impax  
19 to accept the January 2013 entry date.

20         Q. And again, without actually stating your  
21 opinion at this time, have you formed an opinion  
22 concerning this question?

23         A. Yes.

24         Q. What was the second issue the FTC asked you to  
25 assess?



1       A. Whether the combination -- whether this  
2 combination moved back the entry date at which Impax  
3 could enter the market with a generic product.

4       Q. And again, without stating the opinion, have  
5 you formed an opinion concerning the second question?

6       A. Yes.

7       Q. Before we get to your opinions in this case,  
8 I'd like to ask you about your academic credentials,  
9 research and publications, and professional experience  
10 that qualify you to reach the opinions you'll be  
11 giving.

12           A few moments ago, you said you are a professor  
13 of business administration at Harvard Business School;  
14 correct?

15       A. Yes.

16       Q. What courses do you teach in your capacity as a  
17 professor of business administration at Harvard?

18       A. I teach courses on negotiation to M.B.A.  
19 students, to executive students, to doctoral students.  
20 I also teach material on decision-making and on  
21 ethics.

22       Q. You mentioned that your teaching work at  
23 Harvard includes teaching executives.

24           Can you explain that a little bit more, what  
25 that means?



1 Q. And would these be some of the leading  
2 corporations in the world?

3 A. Probably all of the leading corporations in the  
4 world show up at the Harvard Business School at one  
5 time or another.

6 Q. All told, how many years have you been working  
7 as a university professor?

8 A. 38.

9 So my first teaching position was at the  
10 University of Texas in 1979.

11 Q. In addition to being a professor at  
12 Harvard Business School, do you hold any other  
13 appointments or affiliations at Harvard University?

14 A. I do.

15 Q. What are they?

16 A. I have what's called a Schedule C appointment  
17 at the Harvard Kennedy School, which makes me a  
18 temporary tenured faculty member for promotion issues  
19 and, broadly, personnel management issues. And within  
20 the Harvard Kennedy School I'm also the cochair of the  
21 Behavioral Insights Group.

22 Q. Okay. I'm going to ask you a little bit more  
23 about that in a moment, but what -- do you have any  
24 other appointment or affiliation at Harvard?

25 A. I do. I have a courtesy appointment in the

1 Department of Psychology. And I also am on the  
2 executive committee of The Program on Negotiation at  
3 the Harvard Law School.

4 Q. Okay. So let's go back to your appointment  
5 with the Harvard Kennedy School of Government.

6 Can you give a little bit more detail about  
7 what it means to be the cochair of the  
8 Behavioral Insights Group?

9 A. Yes.

10 In 2013, my colleague Iris Bohnet and I led a  
11 group of eight faculty members who thought it would be  
12 useful to put together a research unit that focused on  
13 using behavioral insights through field experiments for  
14 the public good. And we created this research group to  
15 facilitate connecting our faculty and researchers to  
16 the government entities in the U.S. and throughout the  
17 globe who are using behavioral insights to improve the  
18 function of government.

19 Q. Is this primarily a research function or does  
20 it also include teaching and instruction?

21 A. It was started as a research activity, but we  
22 quickly learned that there's enormous demand from  
23 students for this work as well, so there's now a  
24 sister organization called the Behavioral Insights  
25 Student Group consisting of 800 graduate students at

1 Harvard University who are affiliated with our  
2 initiative.

3 Q. And if I understood you correctly, you said you  
4 have an affiliation with the Harvard Law School  
5 Program on Negotiation; is that correct?

6 A. Yes.

7 Q. What is the Harvard Law School Program on  
8 Negotiation?

9 A. The Harvard Law School Program on Negotiation  
10 is a multi-college, multi-university consortium to  
11 bring together the community in the Boston area of  
12 dispute resolution experts for research and for  
13 teaching activities. And I've been on the executive  
14 committee of The Program on Negotiation essentially  
15 since I arrived at Harvard.

16 Q. What is the function of the executive committee  
17 of that program?

18 A. To oversee the research activities and also the  
19 teaching activities that The Program on Negotiation  
20 provides.

21 Q. To sum up then, does your academic experience  
22 relate to any of the opinions you intend to give in  
23 this case?

24 A. Yes.

25 Q. What are your primary fields of research?

1       A. Negotiation, decision-making, ethics, creating  
2 value in society.

3       Q. I think I understand what "negotiation" means,  
4 but what does "creating value in society" mean?

5       A. It means helping to orchestrate systems that  
6 will lead people to make decisions and to negotiate in  
7 ways that will create cumulative benefit for society as  
8 a whole.

9       Q. And I think you also mentioned managerial  
10 decision-making.

11               What does that mean?

12       A. So the field of managerial decision-making,  
13 sometimes now referred to as behavioral economics,  
14 looks at the systematic ways in which

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1       A. I've authored, coauthored or coedited  
2 20 books.

3       Q. And can you give us a couple of the titles of  
4 some of your best-known or most-cited works?

5       A. So my three books that are perhaps most visible  
6 would be Judgment in Managerial Decision-Making,  
7 Negotiation Genius, and many years ago  
8 Negotiating Rationally.

9       Q. Approximately how many research articles have  
10 you authorize or coauthored?

11      A. Over 200.

12      Q. Do most of your more than 200 research articles  
13 appear in peer-reviewed journals?

14      A. The majority do.

15      Q. And how often has your research been cited by  
16 others in their publications?

17      A. The last I checked, it would have been over  
18 30,000 citations to my work.

19      Q. How would you know that?

20      A. There's a -- there's a website called  
21 GoogleScholar.com. And if you go to GoogleScholar.com  
22 and type in the name of any academic, you would quickly  
23 see the total number and also all the publications and  
24 how many times each publication was cited.

25      Q. Do your publications and research inform any of

1 the opinions you intend to give in this case?

2 A. Yes.

3 Q. In addition to your academic work, publications  
4 and research, have you also consulted with businesses  
5 and industry?

6 A. Yes.

7 Q. Can you describe at a high level the types of  
8 consulting work you've done.

9 A. The two most common activities that I'm  
10 involved in with private corporations would be  
11 executive training within the corporation, so a  
12 specific company would hire me to teach a focused  
13 course within the company, and the second most common  
14 activity that I would be engaged in would be advising  
15 companies on the negotiation of specific deals or  
16 specific resolutions to conflicts.

17 Q. And can you name some of the companies that  
18 you've done this type of work for?

19 A. Sure.

20 AIG.

21 Slice Insurance.

22 AstraZeneca.

23 Abbott.

24 Biogen.

25 Astra Merck.



1 Johnson & Johnson.

2 Bristol-Myers Squibb.

3 Pfizer.

4 Q. So some of those companies are pharmaceutical  
5 companies; correct?

6 A. Pharmaceuticals represent the industry that  
7 I've done more work in than any other industry.

8 Q. Now, without going into anything that might be  
9 subject to a nondisclosure agreement, what kinds of  
10 consulting work have you done in the pharmaceutical  
11 industry?

12 A. I've worked on a wide range of topics from  
13 procurement to sales to business development to  
14 advising firms in the midst of litigation.

15 Q. Does that include settling litigation?

16 MR. HASSI: Your Honor, if I may be heard.

17 JUDGE CHAPPELL: Go ahead.

18 MR. HASSI: We were prohibited by these  
19 nondisclosure agreements from inquiring into anything  
20 that Mr. Bazerman did for these various pharmaceutical  
21 companies, including, for example, settlement. And  
22 having been prohibited at the deposition from asking  
23 those questions, we would -- we would ask that he not  
24 be allowed to testify to them now.

25 MR. MEIER: Your Honor, if I may be heard, I

1 prefaced my question specifically about without going  
2 into anything subject to a nondisclosure agreement.  
3 And I'm only asking at a very high, general level, and  
4 Mr. Hassi did inquire about these very things at that  
5 same general level. That's all I'm going into,  
6 Your Honor.

7 JUDGE CHAPPELL: When you hear something that  
8 you weren't allowed to inquire into regarding an expert  
9 in discovery, object and let me know.

10 MR. HASSI: Yes, Your Honor.

11 JUDGE CHAPPELL: Have you heard anything like  
12 that yet?

13 MR. HASSI: Just the word "settlement" so far,  
14 Your Honor.

15 JUDGE CHAPPELL: All right.

16 So I will hold your objection in abeyance at  
17 this time.

18 MR. HASSI: Thank you, Your Honor.

19 MR. MEIER: Your Honor, I might also point out  
20 that paragraph 8 of Professor Bazerman's expert report  
21 says, "This work includes advising pharmaceutical  
22 companies in settling litigation and negotiating  
23 agreements." That's all I was pulling out with this  
24 witness at this time, Your Honor.

25 JUDGE CHAPPELL: All right.

1 BY MR. MEIER:

2 Q. About how much work have you done consulting in  
3 the pharmaceutical industry?

4 A. I believe it's over 150 days over the last  
5 25 years.

6 Q. And does that include both the advising  
7 function and the teaching function?

8 A. Yes. But it doesn't include all the executive  
9 programs at Harvard, which would include pharmaceutical  
10 firms.

11 Q. And sometimes at those executive programs do  
12 you have conversations with some of these executives  
13 about issues that they face?

14 A. Yes.

15 JUDGE CHAPPELL: Remember, I'm allowing  
16 leading right now in the beginning. Don't get used to  
17 it.

18 MR. MEIER: No, Your Honor. I think I've asked  
19 pretty much 99 percent nonleading so far. Thank you,

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1 about negotiations outside the pharmaceutical  
2 industry?

3 A. Yes.

4 Q. Does your consulting experience inform any of  
5 the opinions you intend to give in this case?

6 A. Yes.

7 MR. MEIER: At this time, Your Honor, I tender  
8 Professor Bazerman as an expert in negotiation and  
9 managerial decision-making, and I submit that he is  
10 qualified by reason of his academic credentials,  
11 research and publications, and experience consulting in  
12 the pharmaceutical industry for more than 25 years.

13 MR. HASSI: Your Honor, on the issue of  
14 negotiations we have no objection. And if "managerial  
15 decision-making" means behavioral economics, we'll  
16 agree there as well, but if it's something broader than  
17 that, we don't think that that's appropriate.

18 JUDGE CHAPPELL: Is he being tendered for  
19 anything broader than that?

20 MR. MEIER: No, Your Honor. He explained that  
21 by "managerial decision-making" that's exactly what he  
22 meant.

23 JUDGE CHAPPELL: And since we don't have a  
24 jury, I will state what I consider to be the law.

25 Any opinions that meet the proper legal

1 standards will be considered; those that do not will  
2 not be considered.

3 MR. MEIER: Thank you, Your Honor.

4 BY MR. MEIER:

5 Q. Now that we've reviewed your qualifications as  
6 an expert in negotiations and managerial  
7 decision-making, Professor Bazerman, let's get to your  
8 first major opinion in this case.

9 Do you have an opinion on whether the focus of  
10 negotiations between Impax and Endo was on identifying  
11 ways for Endo to compensate Impax for accepting the  
12 proposed entry date in 2013?

13 A. I do.

14 Q. What is that opinion, just generally?

15 A. My general opinion is the focus of the  
16 negotiation involving the patent settlement focused on  
17 using the no-AG agreement, the Endo credit and the  
18 development and co-promotion agreement as a means to  
19 providing compensation from Endo to Impax to accept  
20 the January 2013 entry date in the patent settlement.

21 Q. Do you hold this opinion to a degree of  
22 certainty reasonable in your professional fields?

23 A. Yes.

24 Q. Turning to the second question you were asked  
25 to examine, do you have an opinion on whether

1 including the branded-to-generic compensation in the  
2 negotiations to settle the patent litigation would be  
3 expected to push back the generic entry date?

4 A. I do.

5 Q. And what is that opinion?

6 A. That the linkage served as a means to  
7 compensate Impax, and as a result, the date of entry  
8 was pushed back in comparison to an entry-only  
9 agreement.

10 Q. Do you hold this opinion to a degree of  
11 certainty reasonable in your professional fields?

12 A. Yes.

13 JUDGE CHAPPELL: Hold on a second.

14 Push back? You might want to clarify what you  
15 mean by "push back the entry date."

16 THE WITNESS: I'd be happy to.

17 I'm offering the opinion that the entry  
18 date --

19 JUDGE CHAPPELL: That was actually a comment  
20 to the attorney.

21 THE WITNESS: Oh, I apologize.

22 MR. MEIER: Your Honor, we are absolutely  
23 going to explore that more, but before I do that, I  
24 had a few other questions I wanted to ask, but we are  
25 going to go into detail on that very issue,

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1 consulting experience inform your opinions?

2       A. I think it helps me understand the specifics of  
3 the facts in this specific case by understanding how  
4 negotiations commonly occur across different activities  
5 within pharmaceutical firms.

6       Q. Are there any other things beyond your academic  
7 experience and your consulting work that you drew upon  
8 in forming your opinions in this case?

9       A. Yes.

10      Q. And what were those, broadly speaking?

11      A. I can think of a few categories.

12             One is the ability to apply theory to the facts  
13 of the specific case.

14             Two, past -- sort of past experience in the  
15 Schering case and other cases for the FTC.

16             And probably most importantly, the vast  
17 quantity of documents that I've read as part of my  
18 assignment for the FTC in conjunction with the current  
19 case.

20             JUDGE CHAPPELL: I have a question since you  
21 told us about how your consulting work is something  
22 you drew upon in forming your opinions in this case.

23             This consulting work you drew upon, were you  
24 there at the time consulting one of the parties as an  
25 agreement was being formulated?



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1 upon it.

2 THE WITNESS: Yeah.

3 JUDGE CHAPPELL: So -- now, if I understood  
4 your answer, I was going to ask you to give me a  
5 percentage of how many times you were actually  
6 involved in negotiating, but you said you had not  
7 been.

8 THE WITNESS: That's right.

9 So I've -- I'm sure that I've negotiated on  
10 behalf of friends, but in corporate contexts, I would  
11 not advise a corporate client to show up with a  
12 hired-gun negotiator from Harvard Business School at  
13 the negotiation table, so I typically would function  
14 behind the scenes, advising my client as they prepared  
15 to get ready for a negotiation as opposed to being at  
16 the negotiation table.

17 JUDGE CHAPPELL: So give me an example of the  
18 majority of your consulting business, what actually did  
19 you do.

20 THE WITNESS: So the majority would be  
21 teaching. I would estimate that 60 percent of my  
22 external work is teaching.

23 The -- probably 30 percent would consist of a  
24 client who is facing a very important negotiation, and  
25 in order to help them think through the negotiation

1 and plan for the negotiation and develop their  
2 strategy, identify their own reservation values, look  
3 for opportunities for joint gain, create -- to develop  
4 creative options, I would be with my client, without  
5 the other side present, to help them get ready.

6 JUDGE CHAPPELL: And just so we're clear, I  
7 asked about consulting.

8 Do you consider teaching to be consulting?

9 THE WITNESS: Yes. Perhaps just because of the  
10 way I report it on my annual report at the  
11 Harvard Business School, consulting is external work  
12 where I'm being paid by the corporation, so I -- I do  
13 consider teaching to be part of -- teaching for a  
14 specific company on the company location or at a hotel  
15 that they've hired, I consider that to be consulting  
16 work, but I do view it as being qualitatively different  
17 than advising on a specific negotiation.

18 JUDGE CHAPPELL: I don't disagree with you.  
19 I'm just inquiring into what -- how you define  
20 "consulting."

21 THE WITNESS: Yes.

22 JUDGE CHAPPELL: Thank you.

23 Go ahead.

24 BY MR. MEIER:

25 Q. Now, in some of that discussion I think I

1 heard you talk about negotiation theory, and then  
2 you've talked about reservation values a couple times,  
3 so I want to go into that in a little more detail.

4           Did you apply lessons from negotiation theory  
5 to your work in this case?

6       A. Yes.

7       Q. And what is negotiation theory?

8       A. Negotiation theory consists of a set of  
9 insights created in the academic community both about  
10 how negotiators should behave and how they actually do  
11 behave.

12      Q. And what aspects of negotiation theory were the  
13 most relevant to you in forming your opinions in this  
14 case?

15      A. So there's a concept of a bargaining zone, and  
16 the bargaining zone consists of the range between the  
17 reservation prices of the two parties. And that was  
18 certainly part of the logic and theory that I used.

19           There's also a significant literature on value  
20 creation, often called logrolling, win-win agreements,  
21 Pareto-efficient agreements, and I certainly drew on  
22 the literature on value creation in my testimony. And  
23 I also drew on a concept that I believe I first wrote  
24 about called parasitic value creation.

25      Q. We are going to go back and break that down a

1 little bit more.

2           Let me first ask you, what do you mean by  
3 "reservation prices"?

4       A.   So a reservation price or a reservation value  
5 is, if you think about a buyer or seller context, the  
6 most the buyer would pay or the lowest that the seller  
7 would accept before they prefer walking away with no  
8 deal, that would be the reservation value.

9           In a legal case, you could imagine the most  
10 one party would pay to settle the agreement and the  
11 lowest another party would accept to settle the  
12 agreement.

13       Q.   All right. I'd like to explore a little bit  
14 more this concept of parasitic value creation.

15           What do you mean by "parasitic value creation"?

16       A.   So -- so value is created whenever two parties  
17 trade off issues such that each side gets more of what  
18 they care about in return for giving the other side  
19 what they care more about.

20           And "parasitic value creation" is a term I  
21 believe that I first wrote about with James Gillespie  
22 in 1997, which highlights the fact that two parties  
23 could reach an agreement that makes both parties  
24 better off by trading off across issues, but in fact  
25 they're not actually creating value out of the air,

1 rather they're taking that value from parties who don't  
2 happen to be part of the negotiation.

3 Q. And earlier you mentioned the words  
4 "Pareto-efficient."

5 What do you mean by "Pareto-efficient"?

6 A. Pareto-efficient is an economic concept that  
7 refers to an agreement where there are no further  
8 opportunities for the two parties to make trade-offs to  
9 make both of them better off.

10 Q. And how does the --

11 JUDGE CHAPPELL: Who is Pareto?

12 THE WITNESS: We're a couple centuries -- it  
13 was a couple centuries ago. I don't remember his first  
14 name. But he developed this concept a fairly long time  
15 ago, so I don't remember my economic history well  
16 enough to tell you who he was.

17 BY MR. MEIER:

18 Q. How does the concept of Pareto-efficient and  
19 parasitic value creation intermesh?

20 A. Sure.

21 So -- so any time two parties trade things off  
22 so that party A gets more of issue one and party B gets  
23 more of issue two and that's better for both of them  
24 than simply compromising on both issues, that's a  
25 Pareto-efficient trade. It moves us -- if you imagine

1 a chart with value to company A on the vertical and  
2 value to company B on the horizontal, it moves you to  
3 the northeast, to the efficient frontier.

4           So when we make a trade that's good for both of  
5 us, that's Pareto-efficient. And fully  
6 Pareto-efficient would mean no more trades are left  
7 that would make us both better off.

8           Parasitically basically says that the chart is  
9 limited because we only have value at A and B on the  
10 chart, and the trade moved them to the northeast, made  
11 both parties better off, but they did so by making  
12 other people worse off who weren't at the table.

13       Q. Is parasitic value creation a concept or term  
14 you created for this case?

15       A. No. I created it before, not only -- I created  
16 it long before this case.

17       Q. And when was that again?

18       A. I believe it was 1997 was the first time it was  
19 in print, so probably a couple years before that is  
20 when I would have first drafted that concept.

21       Q. What's the significance of the concept of  
22 parasitic value creation to your opinions in this case,  
23 again, just at a general level?

24       A. Well, like most people in the negotiation  
25 field, I think of value creation as generally a good

1 thing. And we certainly teach our students to create  
2 value in negotiations.

3 But the important commentary offered by the  
4 idea of parasitic value creation is, as a society, we  
5 also want to think where does the value come from, is  
6 it created by simply those two parties without --  
7 without any -- without costs being imposed on anyone  
8 else, or are those two parties in fact taking that,  
9 that value, from somebody not at the table.

10 JUDGE CHAPPELL: So if I understand you, sir,  
11 parties may have been negotiating with these techniques  
12 for thousands of years, they just didn't know what you  
13 would have called these techniques?

14 THE WITNESS: I think that that's right,  
15 Your Honor. I would say that as we're able to  
16 organize the ideas, we're able to train executives so  
17 that they can do this more effectively and more  
18 reliably. But certainly I'm confident that thousands  
19 of years ago there were people using good intuition who  
20 did create value on a regular basis.

21 BY MR. MEIER:

22 Q. In your opinion, are settlements among  
23 pharmaceutical companies viable without parasitic  
24 brand-to-generic payments?

25 A. Yes.



1 Q. And what is that opinion?

2 A. I think of at least two sources.

3 One would be the work of Professor Hemphill at  
4 Columbia University who in a pretty well-known  
5 2009 paper documented that the majority of agreements  
6 under Hatch-Waxman are settled without any  
7 branded-to-generic side payment.

8 And second, just negotiation theory tells us  
9 that if parties can negotiate an agreement rather than  
10 ending up with that same agreement or the same expected  
11 value of an agreement through litigation, they can save  
12 court costs, which has the significant potential -- not  
13 just court costs, litigation costs, which has the  
14 potential to create a positive bargaining zone or a  
15 range for which both sides should prefer over an  
16 impasse.

17 Q. I think you indicated earlier this is not the  
18 first time that you've served as an expert in an FTC  
19 case; correct?

20 A. Yes.

21 Q. And when was the first time?

22 A. The first time I served as an expert witness  
23 for the FTC was in the Schering case in 2002 I  
24 believe.

25 Q. And that was right here in this courtroom?

1 A. It was.

2 Q. Any other cases?

3 A. Yes.

4 Q. And can you name the next one?

5 A. Cephalon.

6 Q. And when was that?

7 A. I believe 2011 plus or minus a year.

8 Q. And you prepared an expert report in that case;

9 correct?

10 A. I did.

11 Q. Did you testify in that case?

12 A. I was deposed in that case. I was not in the

13 courtroom in that case.

14 Q. Do you know how the Cephalon case ended?

15 A. I believe the FTC settled with Cephalon.

16 Q. And do you know what the settlement consisted

17 of?

18 A. I recall reading about a --

19 MR. HASSI: Your Honor?

20 THE WITNESS: -- about a 1.2 --

21 JUDGE CHAPPELL: Hold it. When an attorney

22 stands to object, hold your answer.

23 THE WITNESS: I apologize.

24 MR. HASSI: I'm not sure what the relevance of

25 some other case that the FTC brought and some other

1 settlement is --

2 JUDGE CHAPPELL: Nor am I.

3 MR. HASSI: -- to this case.

4 MR. MEIER: Well, Your Honor, only I raise it  
5 because Mr. Hassi asked Professor Bazerman about this  
6 extensively at his deposition from pages 17 to  
7 pages 19, asked him all about his work in the Cephalon  
8 case, so if it was relevant then, it seems it would be  
9 relevant now.

10 JUDGE CHAPPELL: Well, something inquired into  
11 in a deposition doesn't mean it's relevant for this  
12 trial.

13 MR. MEIER: Okay.

14 JUDGE CHAPPELL: And it sounds like he is  
15 waiving anything about that case; is that correct?

16 MR. HASSI: I'm sorry, Your Honor?

17 JUDGE CHAPPELL: You're waiving any point you  
18 were trying to make about Cephalon?

19 MR. HASSI: Your Honor, I asked him about his  
20 opinions in that case, not about the FTC's negotiated  
21 outcome which he was not a part of. And I may ask him  
22 about his opinions here.

23 JUDGE CHAPPELL: Are his opinions in his  
24 report, expert report -- do they include an opinion on  
25 this issue he's inquiring into now?

1 MR. HASSI: No.

2 JUDGE CHAPPELL: That's sustained. He's not  
3 allowed to go beyond his report.

4 MR. MEIER: It's correct that it wasn't in the  
5 report, Your Honor, but it was discussed at the  
6 deposition. But that's fine. I'll move on.

7 BY MR. MEIER:

8 Q. Have you worked for the FTC on any other  
9 cases?

10 A. Yes.

11 Q. And what was that case?

12 A. The Actavis case.

13 Q. You indicated earlier that you did a review of  
14 discovery materials from this case as part of your  
15 work; is that correct?

16 A. Yes.

17 Q. Did the FTC provide you with all the materials  
18 you requested?

19 A. Yes.

20 Q. Approximately how many documents did you  
21 review in the process of forming your opinions in this  
22 case?

23 A. Hundreds.

24 Q. And are these materials listed in your expert  
25 report and rebuttal expert report?

1 A. Yes.

2 Q. And approximately how many pages of documents?

3 A. Thousands.

4 Q. And approximately how many transcripts of  
5 witness testimony did you read in forming your opinions  
6 in this case?

7 A. I would estimate a dozen.

8 Q. Did these discovery materials include documents  
9 and transcripts from Impax, Endo and others?

10 A. Yes.

11 Q. In addition to the discovery materials, did you  
12 also read the expert reports from any of Impax' expert  
13 witnesses?

14 A. Yes.

15 Q. And which ones? Do you recall?

16 A. Dr. Addanki and Mr. Figg.

17 Q. And who is Dr. Addanki?

18 A. He is a Ph.D. in economics from  
19 Harvard University.

20 Q. And what is -- who is Mr. Figg?

21 A. I believe he's an attorney in the patent  
22 world.

23 Q. Did you also review the primary source  
24 materials cited in the relevant sections of  
25 Dr. Addanki's and Mr. Figg's reports?

1 A. Yes.

2 Q. Is there anything you saw in Impax' expert  
3 reports that caused you to revise any of your opinions  
4 in this case?

5 A. No. Other than to make my opinions stronger.

6 Q. How is that?

7 A. So I was struck by a few pieces, one, the lack  
8 of a coherent story of what -- of what happened in  
9 this story between Endo and Impax that would account  
10 for all the facts, so I saw a variety of critiques  
11 authored by Dr. Addanki and Mr. Figg, but I didn't see  
12 a coherent story that would explain the -- all the  
13 pieces of evidence, all the facts that I read about  
14 that I -- that I presented in my report.

15 Second, I was struck by the kind of  
16 inconsistency between Dr. Addanki and Mr. Figg  
17 associated with what would have happened without  
18 the -- without the no-AG agreement, the Endo credit  
19 and the co-development agreement in the sense that  
20 Mr. Figg implied that the January 13th (sic) date would  
21 have been the obvious date that would have occurred  
22 absent the other items.

23 In contrast, Dr. Addanki strongly implied that  
24 in fact the date did move back in a logical way as a  
25 result of these other pieces.

1 Q. Okay. So I want to now turn back to your first  
2 opinion and get into more detail about the factual  
3 bases for your opinion.

4 How does your review of the settlement and  
5 license agreement between Impax and Endo inform your  
6 opinions in this case?

7 A. Well, I'm struck by a number of features, one,  
8 that Endo provided the no-AG agreement from  
9 essentially the beginning of their negotiations. And  
10 a no-AG agreement is a means of providing value to  
11 Impax, and Endo would get no value -- Endo would have  
12 no reason to provide a no-AG agreement other than to  
13 provide compensation to Impax.

14 Q. Why is that?

15 A. Because having the right to create their own  
16 authorized generic provides a means to compete against  
17 Impax for the generic part of the market.

18 A no-AG agreement provides considerable value  
19 to a generic like Impax, and so the question -- the  
20 question in my mind is what is it doing there other  
21 than providing compensation to Impax, and I can't come  
22 up with any alternative answer.

23 Q. Are you opining that Endo definitely would have  
24 decided to introduce its own authorized generic version  
25 of Opana ER?

1 A. I'm not offering that opinion.

2 Q. What, if anything, did you observe happening to  
3 the settlement terms concerning the no-AG term over the  
4 course of the negotiations between the parties?

5 A. So at some point Impax became concerned that  
6 the no-AG agreement would have little value if in fact  
7 Endo reformulated and moved patients to a reformulated  
8 product before Impax could enter the market and get a  
9 significant amount of market share.

10 And as I recall, Impax in fact requested an  
11 acceleration trigger that if there were signs that  
12 Impax -- that Endo was shrinking the market to the  
13 current product largely because they were moving  
14 patients to the new product that they could enter  
15 earlier.

16 So you can see, based on the flow of the  
17 negotiation, Impax being concerned about a reformulated  
18 market -- a reformulated product.

19 Q. And what have you observed that the parties  
20 actually did about this?

21 A. Well, Endo came back with an alternative,  
22 which was the -- this fairly complicated formula,  
23 which I've spent a lot of time looking at and working  
24 through examples on, of this Endo credit, which  
25 provided a way of compensating Impax in the event that



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1 while they were signed on different days, there was  
2 some legal provision that the document that was signed  
3 on day one couldn't go into effect or was embargoed  
4 until the other agreement was signed on day two.

5 Q. I'm going to ask you a little bit more about  
6 the part of the answer where you talked about how they  
7 were discussed simultaneously.

8 JUDGE CHAPPELL: Before you do that, when you  
9 say "pushed back" or "moved back" regarding a date, do  
10 you mean a later date?

11 THE WITNESS: Yes.

12 JUDGE CHAPPELL: And "moved up" or "pushed up"  
13 would be an earlier date?

14 THE WITNESS: I -- I'm concerned that I may  
15 not have been clear in my wording, but that's how I  
16 would intend to use it. "Pushed back" I would think of  
17 as a later date. And I will try to use "later" or  
18 "earlier" to be clear.

19 BY MR. MEIER:

20 Q. Is there anything about the way that Impax and  
21 Endo conducted their settlement negotiations that leads  
22 you to conclude that the settlement and the development  
23 agreements were linked?

24 A. Yes.

25 Q. And what did you observe?

1       A. Well, I observed that there were e-mails that  
2 explicitly talked about sort of compensating Impax,  
3 that Mr. Mengler was -- offered the opinion that we're  
4 bound to get significant value one way or the other  
5 based on either the no-AG agreement or the Endo  
6 credit.

7               So throughout we see a bundling of these  
8 issues such that you get the sense that the parties  
9 were intentionally putting the pieces together as a  
10 means for Endo to compensate Impax to agree to a later  
11 entry date.

12       Q. Is there anything you observed about the nature  
13 of the relationship between Impax and Endo that leads  
14 you to conclude the settlement and development  
15 agreements were linked?

16       A. Yes.

17       Q. And what is that?

18       A. Well, part of the peculiar nature of seeing the  
19 linkages that I've offered the opinion to earlier is  
20 that there wasn't a very good relationship between  
21 these parties.

22       Q. What do you mean, there wasn't a good  
23 relationship?

24       A. There was a sort of a history of the parties  
25 not being able to resolve this issue. There were

1 insults between the parties. I remember language like  
2 "piggy" and "oinkpax" I believe being used. There's  
3 arguments by Impax that Endo had people who were lying  
4 to them.

5           So the relationship is not one that would make

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1 the topic. I think of a paper by Valley, et al.,  
2 V-A-L-L-E-Y. Her name is currently Kathleen McGinn.  
3 She's my colleague at the Harvard Business School.

4 But those are just two of many, many sources in  
5 the academic literature that would highlight the  
6 importance of relationships -- of a high-quality  
7 relationship to create a natural environment for value  
8 creation to occur.

9 Q. Does the fact that the -- Endo and Impax were  
10 in active trial with each other at the time of these  
11 settlements have any relationship to this discussion  
12 we're having?

13 A. Yes.

14 I think that parties in active litigation tend  
15 to not have the best of relationships and don't have a  
16 natural propensity to say, Let's see what other kinds  
17 of things we can work on, because maybe if we were  
18 talking about other issues we'd find good opportunities  
19 to do business together.

20 In fact, I have often observed just the  
21 opposite, that parties don't want to talk about other  
22 things in the midst of litigation.

23 Q. I'm going to turn now to exploring the factual  
24 bases for your second opinion.

25 Why, in your opinion, would the parties create

1 linkages between Endo's payments to Impax and the  
2 January 2013 entry date?

3       A. Well, if we think about the branded-to-generic  
4 negotiation issue, the value to a branded firm of  
5 keeping their product without generic competition, the  
6 dollar value, is far larger than the benefit that the  
7 generic obtains by being able to enter. That could be  
8 three, five, ten times larger.

9           And as a result, when we're negotiating an  
10 entry date issue, there are -- there's more dollar  
11 value to the branded than there is to the generic. If  
12 we now add any other issue to the table, there's value  
13 to be created between the two parties by simply moving  
14 the entry date later and overcompensating the generic  
15 on the other issues that are being discussed  
16 simultaneously.

17           Basically, there's a -- there's a logic created  
18 under this particular context that if there's another  
19 issue there, it quickly leads to the suspicious  
20 possibility of the parties linking and trading those  
21 issues off.

22       Q. Based on the documents and information you  
23 reviewed, do you have an opinion on whether this case  
24 presents an example of parasitic value creation?

25       A. I do.

1 Q. And what is that opinion?

2 A. That -- my opinion is that they very clearly  
3 linked the various agreements in order to move the  
4 entry date back by -- by Endo providing Impax with  
5 compensation through these other issues.

6 Q. And what leads you to that conclusion?

7 A. The fact that there's an incentive for that,  
8 for the parties to do so, the fact that there's an  
9 unnatural combination of these issues across the  
10 negotiation process, that there's an unnatural linkage  
11 of the issues through the legal documents that they're  
12 creating.

13 Q. You explained a moment ago that part of the  
14 dynamic was that the brand can make more money than the  
15 generic. How do you know that?

16 A. So I believe in my report I cite to specific  
17 documents that I see in this specific case, that the  
18 amount that Endo estimates that they would lose through  
19 generic entry and the amount that Impax estimated that  
20 they would gain.

21 But I would say that this also brings in my  
22 expertise from working with pharmaceuticals for so  
23 long. Without the specifics of this case, I would  
24 know that the general state of negotiations between a  
25 branded and a generic are such that the branded loses

1 more than the generic gains in terms of dollars.

2 Q. And what difference does that make?

3 A. It creates the opportunity to make a trade, a  
4 trade that might be harmful to consumers, but it  
5 creates an environment where, if we add another means  
6 for the parties to negotiate, they -- they end up as a  
7 result having the incentive to move the entry date back  
8 because the generic -- the entry date later because the  
9 branded gains more than the generic.

10 And there's some amount of compensation that  
11 the branded can pay to the generic and other forms  
12 either directly or indirectly that would make them  
13 both better off than if they came up with an entry-only  
14 date that they would reach if the side deals weren't  
15 there.

16 Q. Earlier I think you said that the  
17 branded-to-generic payment didn't make sense from  
18 Endo's perspective absent the ability to avoid the risk  
19 of competition.

20 What did you mean by that?

21 A. So if we look at the no-AG agreement and the  
22 Endo credit combined, and you basically ask sort of if  
23 we -- if we assume an entry date, would Endo want to  
24 have the no-AG/Endo credit addi7TjEMdrt of ca3 dBD C 3 0 T(have nk y

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1 the answer is obviously no, that Endo would not want  
2 the no-AG agreement and the Endo credit, that without  
3 that being part of the entry date discussion Endo would  
4 never agree to those provisions.

5 Q. As you know, Impax argues that the Endo credit  
6 was a penalty or a stick to prevent Endo from  
7 reformulating Opana to a tamper-resistant  
8 formulation.

9 What's your opinion of that argument?

10 A. So throughout my expert report I try to  
11 combine the no-AG agreement with the Endo credit, and I  
12 think it makes sense to think of those as a combined  
13 package because the Endo credit came about as Endo's  
14 response to Impax' request for an acceleration  
15 trigger.

16 And when you combine the no-AG agreement and  
17 the Endo credit together, the primary function that  
18 they serve is to provide a means to guarantee Impax of  
19 a significant transfer of value.

20 And again, that's consistent with documents  
21 that I read citing Mr. Mengler.

22 Q. Impax also argues that no earlier entry date  
23 was possible.

24 What's your opinion of this argument?

25 A. I disagree with that opinion.

1 Q. And why?

2 A. Because if Endo would agree to  
3 January 2013 with a provision that provides  
4 significant payment to Impax, then simple negotiation  
5 logic tells me that if -- if Endo didn't have to pay  
6 tens of millions or, as it turns out, 102 million to  
7 Impax, they would have agreed to an earlier date  
8 without that amount of money being paid.

9 Q. Earlier you were talking about the acceleration  
10 clause.

11 Do you have an opinion on what the difference  
12 would have been for consumers between an acceleration  
13 trigger and the Endo credit?

14 MR. HASSI: Your Honor, I'd be interested to  
15 know where this is in his report.

16 MR. MEIER: Paragraph 53, Your Honor. I can  
17 read it right now if you want me to.

18 JUDGE CHAPPELL: Hold on.

19 (Pause in the proceedings.)

20 MR. HASSI: I'll withdraw, Your Honor.

21 JUDGE CHAPPELL: All right.

22 BY MR. MEIER:

23 Q. Dr. Bazerman, do you have an opinion of what  
24 the difference would have been for consumers between an  
25 acceleration trigger and the Endo credit?

1       A.  It's my opinion that an acceleration trigger  
2 would be much more likely to bring the generic product  
3 to market earlier than the Endo credit.

4       Q.  In your opinion, what was the effect of  
5 agreeing to the Endo credit rather than the market  
6 acceleration trigger?

7       A.  It guaranteed Endo the opportunity to make sure  
8 that they could reformulate and move patients to the  
9 reformulated product before the generic could come to  
10 market, allowing them to maintain their monopoly or  
11 near-monopoly market for that particular category of  
12 product.

13      Q.  Do you have an opinion on whether Impax might  
14 have entered at risk absent the settlement?

15      A.  I have -- yes.

16      Q.  And what have you seen?  What facts show you  
17 that Impax might have entered at risk absent the  
18 settlement?

19      A.  So I think that they -- they certainly had a  
20 credible threat of entering, based on internal  
21 documents that I read, where they at some point moved  
22 from no launch to at-risk launch.

23           They were certainly working with the FDA to do  
24 the appropriate -- to follow the appropriate legal  
25 steps in order to be able to enter at risk, and they



1 BY MR. MEIER:

2 Q. What information did you see, Dr. Bazerman?

3 A. Well, certainly there's the July 2011 agreement  
4 date between Endo and Actavis, so I saw that date.

5 Q. And do you know whether that Endo-Actavis  
6 settlement date of July 2011 included any  
7 brand-to-generic payments?

8 A. My understanding is that it did not.

9 Q. So, Professor Bazerman, would you just please  
10 provide again a brief, high-level summary of your  
11 opinions in this case.

12 A. My opinions are that the patent settlement was  
13 linked to the no-AG/Endo credit agreement and also  
14 linked to the development and co-promotion agreement  
15 and that this linkage served as a means for Endo to  
16 compensate Impax to accept the January 2013 date and  
17 that these additional deals beyond the patent  
18 settlement served to move the entry date to a later  
19 point in time.

20 MR. MEIER: Your Honor, may I consult with  
21 counsel?

22 JUDGE CHAPPELL: Go ahead.

23 (Pause in the proceedings.)

24 MR. MEIER: Your Honor, I have no further  
25 questions.

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1       A.  Much of the field of behavioral economics is  
2 about the systematic and predictable mistakes that  
3 people make on a regular basis.

4       Q.  You're also not a lawyer?

5       A.  I'm definitely not a lawyer.

6       Q.  And you wouldn't offer any legal opinions  
7 today; right?

8       A.  I don't plan to and I hope I don't.

9       Q.  Now, in the process of preparing your  
10 opinions, you didn't speak to anyone other than the  
11 FTC staff about this matter; is that right?

12      A.  I spoke to you during the deposition, but  
13 other than that, I don't recall speaking to anybody  
14 else.

15                JUDGE CHAPPELL:  You spoke to him in preparing  
16 your opinions?

17                THE WITNESS:  No, no, no.  But I -- in offering  
18 my opinions, so maybe I didn't listen to the question  
19 clearly enough.

20                BY MR. HASSI:

21      Q.  I was asking about the preparation of your  
22 reports.

23                In the preparation of your reports, you spoke  
24 only to the FTC staff.

25      A.  That is correct.

1 I apologize.

2 Q. For example, you didn't speak to anybody from  
3 Endo; correct?

4 A. Correct.

5 Q. You didn't speak to anybody from Impax;  
6 correct?

7 A. Correct.

8 Q. And other than the materials cited in your  
9 report, you didn't review any other information;  
10 right?

11 A. Well, I didn't review any other information  
12 specifically for this project other than what I put in  
13 the report, I believe that that's correct.

14 Q. Now, you received some documents from the  
15 Federal Trade Commission; is that right?

16 A. I did.

17 Q. I think you said several hundred documents; is  
18 that right?

19 A. I don't remember if it was a hundred -- I think  
20 I said hundreds. That sounds about right, so  
21 whether -- if it was only 140, that wouldn't shock me,  
22 but...

23 Q. But not the several thousand that have been  
24 introduced as exhibits in this case; right?

25 A. I don't know that there are several thousand,



1 but I can believe you. I -- I'm confident that I read  
2 most of and skimmed all of the documents that are in my  
3 report and I'm confident that I didn't read anything  
4 that isn't cited in my report.

5 Q. And the FTC staff helped identify for you  
6 documents to read and portions of depositions to read;  
7 is that right?

8 A. Yes.

9 Q. You refer to settlements where the brand  
10 company asserting a patent claim settles with a generic  
11 and that settlement provides something of value to the  
12 generic as pay-for-delay; is that right?

13 A. I apologize, Mr. Hassi. I didn't follow that  
14 question.

15 Q. So a brand company has a patent. They're in  
16 litigation with a generic. There's a settlement. And  
17 in that settlement, value is transferred from the brand  
18 to the generic company.

19 You refer to that settlement as a pay-for-delay  
20 settlement; is that right?

21 A. If that payment is a separate -- is something  
22 other than the settlement itself, so the -- as a  
23 generic, if we reach agreement, I am getting some  
24 value by -- by a settlement, by the settlement itself.  
25 But I would use the term "pay-for-delay" if the branded

1 is compensating the generic through the means of some  
2 other issue.

3 Q. So settlements themselves have value; right?

4 A. Settlement -- yes.

5 Q. And that applies to entry date settlements?

6 A.

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1 JUDGE CHAPPELL: It was just as uncomfortable;  
2 right?

3 THE WITNESS: I'm barely noticing the comfort  
4 of the chair, to be honest, yeah.

5 MR. HASSI: I'm hoping it gets less  
6 comfortable today, Your Honor, but I'm not promising  
7 anything.

8 BY MR. HASSI:

9 Q. And in that case, you offered, in addition to  
10 an original report, a supplemental report; is that  
11 right?

12 A. Yes.

13 Q. And that supplemental report was excluded as  
14 being provided out of time?

15 A. That's my understanding.

16 Q. You also testified as an expert in the Cephalon  
17 case which was litigated in federal court?

18 A. Yes.

19 Q. And in that case, you offered opinions that  
20 Cephalon's entry date agreements with the four generics  
21 were linked to the reverse payments to all four of  
22 those generics in different ways across four generic  
23 firms; is that right?

24 A. I apologize. I don't know if I'm allowed to  
25 speak about them.

1           MR. MEIER: Your Honor, as Mr. Hassi well  
2 knows, the Cephalon case is still under a protective  
3 order in federal district court. Mr. Hassi worked here  
4 at the FTC at the time, so he knows that.

5           So I would say that we really ought not to be  
6 getting into the details of what is in a federal court  
7 protective order in the case, and so I object.

8           MR. HASSI: I'm simply asking him something he  
9 responded to in his deposition, and no objection was  
10 raised at that time. I just want to elicit the fact  
11 that -- well, I won't get into what I want to elicit,  
12 but the cases are similar, Your Honor.

13          MR. MEIER: Your Honor, if Mr. Hassi can show  
14 us that the exact --

15          JUDGE CHAPPELL: Take a moment and --

16          MR. MEIER: -- then I won't --

17          JUDGE CHAPPELL: -- discuss it between  
18 yourselves.

19          (Pause in the proceedings.)

20          MR. MEIER: Okay. I will withdraw the  
21 objection to that question, Your Honor.

22          JUDGE CHAPPELL: All right. Thank you.

23          Do you want to restate it or have it read back?

24          Or do you remember the question?

25          THE WITNESS: I could use a refresher.

1 MR. HASSI: If you wouldn't mind reading it  
2 back, Josett.

3 (The record was read as follows:)

4 "QUESTION: And in that case, you offered  
5 opinions that Cephalon's entry date agreements with the  
6 four generics were linked to the reverse payments to  
7 all four of those generics in different ways across  
8 four generic firms; is that right?"

9 THE WITNESS: Yes.

10 BY MR. HASSI:

11 Q. And you opined that the entry date agreement  
12 was linked to other parts of the agreement and that  
13 they served to move back the entry date at which the  
14 generic firms could enter the market; correct?

15 A. Yes.

16 Q. And you also testified -- I think you referred  
17 to it as the Actavis case in federal court; is that  
18 right?

19 A. Yes.

20 Wait. I'm sorry. I didn't testify in a  
21 courtroom in the Actavis case.

22 Q. You testified in a deposition.

23 A. Correct.

24 Q. And you prepared a report.

25 A. Yes.

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1           "QUESTION:  You'd agree that in all four cases,  
2 including this one, in other words, where the FTC has  
3 hired you, you've offered opinions that the  
4 agreements -- terms in the agreements were linked;  
5 correct?"

6           THE WITNESS:  Yes.

7           BY MR. HASSI:

8           Q.  And in all four cases you've testified or  
9 opined that the linkages served to delay generic entry;  
10 is that right?

11          A.  Yes.

12          Q.  In terms of the linkages that you found in this  
13 case, you agree that if a term is in the settlement  
14 agreement, it's linked; correct?

15          A.  I -- I could imagine that you could have a  
16 case where two things would be in the same legal  
17 document where they would only be linked in that  
18 technical sense, but they wouldn't be linked together  
19 in terms of they affected each other.

20                 You know, in these cases I'm saying that the  
21 settlement -- the entry date was linked to other  
22 elements of the agreement conceptually in terms of how  
23 they were negotiated.

24          Q.  But, for example, there was a broad patent  
25 license that Endo granted to Impax as a result of this

1 negotiation, and that was linked as well; right?

2 A. Yes.

3 Q. And there's a choice of law clause in the  
4 settlement.

5 That was linked as well; right?

6 A. Technically so.

7 Q. If it's in the contract, it's linked; right?

8 A. Yes.

9 I'm making a distinction between two things  
10 co-occurring in the same document for -- for either for  
11 legal reasons or for reasons other than the parties  
12 intentionally putting them together to trade them off  
13 versus linked in the sense that I've used them  
14 throughout my report, which is to suggest that these  
15 other issues, that is, the no-AG agreement, the Endo  
16 credit and the co-promotion agreement, they were linked  
17 as a specific means for Endo to obtain a later entry  
18 date as a result.

19 So that's -- that's a more specific version of  
20 linkage than a particular legal phrase that's in the  
21 document but didn't serve that same kind of purpose.

22 JUDGE CHAPPELL: You said "two things  
23 co-occurring in the same document."

24 In the way you use that term "co-occurring,"  
25 does that mean anything other than occurring?





1 accept a later entry date.

2 Q. Sir, my question was just about the no-AG  
3 provision.

4 Is it your opinion that the no-AG provision  
5 was there and was linked to allow for a later entry  
6 date?

7 A. I think it was first offered for that purpose  
8 but in terms of how it existed in the final agreement,  
9 as I understand it, has to be incorporated with the  
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1       A. I am offering the opinion that the only reason  
2 that I can come up with for why Endo was offering the  
3 no-AG agreement in the early part of the negotiation  
4 was specifically to encourage Impax to take the later  
5 entry date.

6       Q. Sir, I asked you about changing the entry  
7 date.

8               Did the no-AG provision cause a change in the  
9 entry date, in your opinion, yes or no?

10       A. I'm uncomfortable with the word "change"  
11 because there wasn't another agreement, so I'm -- what  
12 I'm arguing is that the no-AG agreement was offered  
13 for the purpose of encouraging Impax to take a later

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1 A. I did.

2 Q. And if we could put up as a demonstrative --  
3 and we'll call it RX D-2 -- sorry -- the  
4 Negotiation Genius book.

5 This is the copy of Negotiation Genius that was  
6 provided to us by your counsel; is that right?

7 A. I fully accept that.

8 Q. And if we could go to the footnote regarding  
9 Schering-Plough.

10 You wrote, in this book, "The administrative  
11 law judge ruled in favor of the pharmaceutical firms.  
12 An FTC bipartisan panel overruled the administrative  
13 judge by a 5-0 vote. They in turn were overruled by an  
14 appeals court. The U.S. Supreme Court refused to hear  
15 the FTC's appeal of the appellate court ruling, helping  
16 create the blueprint for parasitic value creation that  
17 has become even more common in the pharmaceutical  
18 arena."

19 You wrote that --

20 JUDGE CHAPPELL: Hold on, hold on.

21 Did you write that footnote?

22 THE WITNESS: Yes, I did.

23 JUDGE CHAPPELL: First of all, there was no  
24 administrative judge. There was an administrative law  
25 judge. There's a huge difference. You should check



1 your book, but based on the footnote, are you touting  
2 that case, which I think everyone would agree was,  
3 let's just say, not a victory for your side, as some  
4 kind of accomplishment?

5           THE WITNESS: So I -- wait. I -- so -- so I  
6 don't think of myself as working for a side as an  
7 expert, I want to provide the best information that I  
8 can --

9           JUDGE CHAPPELL: Let's say the side that paid  
10 your fee.

11          THE WITNESS: Sure.

12          JUDGE CHAPPELL: That would have been the  
13 government; right?

14          THE WITNESS: Yes.

15          And the question you want me to address,  
16 Your Honor?

17          JUDGE CHAPPELL: Are you touting what happened  
18 in that case as an accomplishment on your part  
19 professionally?

20          THE WITNESS: No. I would not do that.

21          JUDGE CHAPPELL: What's the point of citing  
22 that case in your book?

23          THE WITNESS: I'm talking -- in the book, I'm  
24 talking about how institutions create structures that  
25 will affect negotiations moving forward.

1 JUDGE CHAPPELL: Go ahead.

2 MR. HASSI: Thank you, Your Honor.

3 BY MR. HASSI:

4 Q. You think Congress should make a legislative  
5 change to address what you refer to as pay-for-delay  
6 cases; is that right?

7 A. I would certainly recommend that.

8 Q. You don't think the legal system has dealt with  
9 them effectively?

10 A. I -- I -- I believe that the way things have  
11 developed creates enormous litigation costs and has  
12 resulted in a set of decisions that are harmful to  
13 consumers.

14 Q. Your views on pay-for-delay cases have not  
15 changed since your time when you testified in  
16 Schering-Plough; is that right?

17 A. My views on pay-for-delay cases as a matter of  
18 legislative opportunities have not changed  
19 substantially. My opinions about any specific case  
20 would depend on the specific facts of that case.

21 Q. You talked earlier this morning about parasitic  
22 value creation; right?

23 A. Yes.

24 Q. And that's a term that you coined together with  
25 your coauthor James Gillespie?

1 A. Yes.

2 Q. And you believe that parasitic value creation  
3 is unethical; is that right?

4 A. I wouldn't say that. It would -- it raises  
5 suspicions about the possibility of ethical issues.

6 JUDGE CHAPPELL: You think the word "parasitic"  
7 is favorable?

8 THE WITNESS: I wouldn't think of it as most  
9 people would view it as favorable, but I've used it in  
10 other contexts.

11 For example, I've used the term "parasitic" to  
12 describe real estate agents and -- and some of my  
13 friends are real estate agents, but they do take value  
14 out of the middle.

15 So I certainly appreciate the fact that  
16 "parasitic" has more negative than positive  
17 connotations.

18 BY MR. HASSI:

19 Q. You believe the settlement between Impax and  
20 Endo was parasitic; is that right?

21 A. Yes.

22 Q. Now, your opinion is that the process of the  
23 negotiations between Impax and Endo created a  
24 structure that is likely to be bad for consumers; is  
25 that right?



1 A. Yes.

2 Q. And you've not studied the outcome of the  
3 settlement and the development and co-promotion  
4 agreement to determine whether or not the agreements  
5 between Endo and Impax were bad for consumers;  
6 correct?

7 A. So I have read about what happened following  
8 the negotiation, but they were -- but my opinions were  
9 not dependent on those, those outcomes, correct.

10 Q. And you've not studied those outcomes to  
11 determine whether or not the agreement between Endo and  
12 Impax was bad for consumers; correct?

13 A. It's not part of my opinion.

14 Q. In your report you've not assessed the  
15 benefits consumers got from the agreement versus the  
16 benefits they might have gotten if, for example, there  
17 had been an earlier entry date-only settlement;  
18 correct?

19 A. I haven't -- I haven't put a value on it. I  
20 have offered an opinion about the direction of that.

21 Q. You've not done a calculation to determine  
22 whether or not consumers would have benefited had Impax  
23 continued to litigate with Endo with or without a  
24 launch at risk; correct?

25 A. I have not calculated that value.

1 Q. And you'd agree that when you're evaluating a  
2 settlement, for example, to determine if it's  
3 parasitic, you look at all the terms and their effects  
4 on both parties and the parties not at the table;  
5 correct, sir?

6 A. I apologize, Mr. Hassi. Can I have that  
7 question again.

8 JUDGE CHAPPELL: Hold that question.

9 You were asked a couple questions previously  
10 about assigning value or determining value.

11 THE WITNESS: Uh-huh.

12 JUDGE CHAPPELL: You said you have not done  
13 that in this case; correct?

14 THE WITNESS: Correct.

15 JUDGE CHAPPELL: Is that something you could  
16 have done?

17 THE WITNESS: I would probably need more data  
18 that I didn't have access to to do that kind of work.

19 JUDGE CHAPPELL: But you could have done that  
20 had you been asked to do it and given the information  
21 you'd require.

22 THE WITNESS: Yeah. I believe I have the  
23 technical skills.

24 JUDGE CHAPPELL: It's something within your  
25 bailiwick.

1 THE WITNESS: Yes.

2 JUDGE CHAPPELL: All right. Thank you.

3 MR. HASSI: Thank you, Your Honor.

4 BY MR. HASSI:

5 Q. You would agree that when you're evaluating a  
6 settlement, for example, to determine if it's  
7 parasitic, you look at all the terms and their effects  
8 on both parties and the parties not at the table;  
9 correct, sir?

10 A. Yes.

11 Q. You provide consulting services to  
12 corporations on issues related to negotiations; is  
13 that right?

14 A. Yes.

15 Q. Including to pharma companies?

16 Q.  
A. Yes.

17 JUDGE CHAPPELL: Based on what he told me

18 Y5 Td(earlier SSI: )-600.2(Thank youI willnor.)†J/T10 1 TR. HA

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1 A. That is correct.

2 Q. And that's because you have a set of ethics  
3 that you don't violate in order to please a client;  
4 correct?

5 A. Yes.

6 Q. And you're suspicious of any agreement that  
7 includes a reverse payment; correct?

8 A. I'm suspicious by the existence of a reverse  
9 payment.

10 Q. You believe that people who negotiate reverse  
11 payments are nefarious; correct?

12 A. No.

13 Q. Did you use that term in your deposition, sir?

14 A. I don't recall whether that word is in my  
15 deposition.

16 But -- but -- but if I was to write about --  
17 if I was to use the word "nefarious," I would -- I  
18 would hope that I would use it in context of the  
19 agreement rather than to cast aspersions on a specific  
20 person.

21 Q. So it's not the people who are nefarious, it's  
22 the agreement that they're negotiating; is that right,  
23 sir?

24 A. I see it as my job to talk about the agreement  
25 rather than to evaluate someone's personality.

1 JUDGE CHAPPELL: Well, so that we're clear, he  
2 did -- you did say "nefarious"?

3 THE WITNESS: In the deposition?

4 JUDGE CHAPPELL: Right.

5 THE WITNESS: I don't remember my deposition  
6 well enough to answer your question.

7 JUDGE CHAPPELL: On a continuum, which is  
8 worse, parasitic or nefarious?

9 THE WITNESS: I'm -- I don't -- I think of them  
10 as similarly negative.

11 JUDGE CHAPPELL: Very good. Thank you.

12 BY MR. HASSI:

13 Q. Sir, because of your ethical views, you would  
14 have problems advising a firm that entertained a  
15 no-authorized-generic clause; correct?

16 A. I would be open to learning more in case I  
17 was -- in case I was missing something, but when I was  
18 hearing about a no-AG agreement, it would raise  
19 suspicions, and my first inclination would be to be  
20 disinclined to work on that project.

21 Q. And even if consumers were better off under an  
22 agreement that contained a reverse payment, in your  
23 mind, that would not justify the agreement; correct?

24 A. If -- if I expected that consumers would  
25 benefit on an expected value basis at the time of the

1 agreement based on the agreement and somehow a no-AG  
2 agreement was involved, I would want to dig in and  
3 learn more. I can't imagine that story, but I would  
4 want to better understand it to make a decision on  
5 that, so I'm not comfortable answering "correct."

6 Q. Sir, I want to talk about negotiations.

7 Now, you use a term called BATNA. Can you tell  
8 the court what a BATNA is?

9 A. Sure.

10 It's a -- it's an acronym first created by  
11 Roger Fisher and Bill Ury in a book called  
12 Getting to Yes in 1981, and the acronym stands for your  
13 best alternative to a negotiated agreement or what are  
14 you going to do if you don't reach an agreement with a  
15 party, with the other party.

16 Q. And in your opinion, the first step in a  
17 negotiation should be to identify a party's BATNA;  
18 correct?

19 A. In any important negotiation, one of the first  
20 steps would be to negotiate -- to identify your own  
21 BATNA and to think carefully about the BATNA of the  
22 other party.

23 Q. And in this case, to determine Impax' BATNA as  
24 it entered into settlement negotiations with Endo, you  
25 would want to play out almost in decision tree format

1 what are the possible events that would occur and try  
2 to estimate the probability of those various events  
3 and calculate the value of those events for Impax;  
4 correct?

5 A. That would be good practice. Yes.

6 Q. So determining Impax' BATNA requires you to  
7 perform a probabilistic assessment of the different  
8 possible scenarios Impax was facing; correct?

9 A. To have a good assessment of their BATNA  
10 would -- it would be helpful to do all those things.  
11 There are times when doing -- looking at a historic  
12 event we have a -- have a rough understanding of a  
13 BATNA without doing all those things.

14 Q. You didn't perform this decision tree analysis  
15 to determine Impax' BATNA, did you, sir?

16 A. That is correct.

17 Q. And you haven't, for example, calculated the  
18 expected values across the various nodes of that  
19 decision tree for Impax; correct, sir?

20 A. That is correct.

21 Q. In fact, you haven't even identified the  
22 various nodes of the decision tree; correct?

23 A. I think -- I believe that I have thought about  
24 what those nodes are, so I think that I could -- with a  
25 blackboard I think I could do a pretty good job of

1 drawing that out so that we knew what the nodes were,  
2 but I wouldn't have the details to do the kind of  
3 calculation you're describing.

4 Q. You'd agree, at a high level, Impax' BATNA  
5 would be to continue the patent litigation with Endo if  
6 it couldn't settle?

7 A. At a high level, yes.

8 Q. And then you'd also want to consider what  
9 would happen with and without entry at risk; is that  
10 right?

11 A. That's correct.

12 Q. But you've not evaluated those events or  
13 outcomes; correct?

14 A. Not quantitatively, correct.

15 JUDGE CHAPPELL: I have a question.

16 In response to a question asked earlier, sir,

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1 this work simply to help one organization against  
2 another organization. I don't enjoy this work enough  
3 to do that.

4           JUDGE CHAPPELL: And again, you don't consider

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1 other?

2           Have you ever been employed by a drug company  
3 as an expert witness?

4           THE WITNESS: No, sir.

5           JUDGE CHAPPELL: Thank you.

6           BY MR. HASSI:

7       Q. If Endo and Impax had continued to litigate and  
8 Impax lost that litigation without every launching at  
9 risk, you would agree that consumers would not benefit;  
10 correct?

11       A. If we pursue that, that history, that's  
12 correct.

13       Q. Now, you mentioned this morning that one of  
14 your assigned tasks was to determine whether the  
15 guaranteed 180-day payment, using your language, and  
16 the side deal, again your language, in the Endo  
17 negotiations -- excuse me -- in the Endo-Impax  
18 negotiations to settle the underlying patent litigation  
19 would be expected to push back the generic entry date;  
20 correct, sir?

21       A. Yes.

22       Q. And you offered the opinion that the alleged  
23 payments to Impax pushed back the entry date that Impax  
24 received; correct?

25       A. Yes.

1 Q. And it's your opinion that were it not for  
2 those terms, Impax could have and would have  
3 hypothetically negotiated an earlier entry date;  
4 correct?

5 A. It's my opinion that they could have. I did  
6 not offer the opinion that they definitely would have.

7 Q.

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1 JUDGE CHAPPELL: Wait a second.

2 You said you think they should have or you  
3 think they could have? They're two different things.  
4 What's your answer?

5 THE WITNESS: Both. I think that they should  
6 have negotiated an earlier entry date and that they  
7 could have and they should have known that they could  
8 have based on a reasonable analysis of thinking about  
9 the perspective of the other party, Endo.

10 BY MR. HASSI:

11 Q. Sir, you can't say -- using just the  
12 no-authorized-generic term, you can't say what effect  
13 that had, if any, on the entry date, can you?

14 A. I almost don't know how to think about that  
15 question. I can think about how -- the role it played  
16 in the negotiation process, but as I -- as I said

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1 it's explicitly linked both in how it was created and  
2 how it operates to the Endo credit, I -- I don't know  
3 how to think about analyzing one without the other in  
4 terms of how they function in the final agreement.

5 BY MR. HASSI:

6 Q. Sir, I deposed you last month?

7 A. Yes.

8 Q. Do you recall that?

9 A. I do.

10 Q. And do you recall I asked you that question in  
11 your deposition?

12 A. I don't recall that specific question. I  
13 remember us talking about these issues.

14 Q. You don't recall being able to answer that  
15 question back on September 28?

16 A. I don't remember the specific dialogue as I sit  
17 here right now.

18 Q. Would you like to look at a copy of your  
19 deposition?

20 A. Yes, please.

21 Q. I believe it's in the binder next to you.

22 Take a look at, please, page 54,  
23 lines 13 through 17.

24 Do you have that?

25 And do you see I asked you the question --

1           JUDGE CHAPPELL: Hold on a second. Let's make  
2 sure he's on the page and line first.

3           BY MR. HASSI:

4       Q. Are you on the page and line numbers, sir?

5       A. I'm on page 54 and I'm at line 13.

6       Q. And do you see I asked you the question "And  
7 you can't say, using just the no-authorized-generic  
8 term, you can't say what effect that had, if any, on  
9 the entry date, can you?" and you answered, "Not in  
10 terms of number of days, weeks or months, no"; correct,  
11 that was your answer?

12      A. I see that. Yes.

13      Q. Thank you.

14           And the same is true for the Endo credit; is  
15 that right, sir?

16      A. Yes.

17      Q. And the same is true for the development and  
18 co-promotion agreement; is that right, sir?

19      A. So I'm --

20      Q. Can you answer my question yes or no, you could  
21 that?

22      A. So can you give me that specific question in  
23 full rather than cross-referencing it to another  
24 question so I make sure that I'm answering you  
25 correctly.

1           JUDGE CHAPPELL:  What you're saying is, he  
2 began with "And the same is true," you want an actual  
3 question.

4           THE WITNESS:  Yes, please.

5           JUDGE CHAPPELL:  Go ahead.  Rephrase.

6           He's objecting that your question is vague.

7           MR. HASSI:  And again, he was able to answer in  
8 September, Your Honor, but I'll -- in fact, in this  
9 same line.

10           BY MR. HASSI:EMC /P-EMC Baa lnadD 0 BDC 710.2 -2.035 TdQ. S

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1 correct?

2 A. I do.

3 Q. But separating them, you've not seen any actual  
4 analysis where, prior to the settlement, Impax valued  
5 the Endo credit; correct?

6 A. I haven't seen any such analysis.

7 Q. And you've not seen any analysis, prior to the  
8 entry date of the settlement, where Impax valued the  
9 no-AG provision; correct?

10 A. Correct.

11 Q. And the Endo credit as signed -- in -- as it  
12 appears in the final agreement, Impax doesn't have any  
13 control over the magnitude of the payment once it's  
14 signed; correct?

15 A. I can't think of how they could control it.

16 Q. And you've not seen any actual analysis that  
17 Endo did where it expected to make a payment to Impax  
18 pursuant to the Endo credit; correct?

19 A. I haven't seen their analysis.

20 Q. And you haven't seen anything -- strike that.  
21 You mentioned reservation dates earlier this  
22 morning.

23 You didn't identify what Impax' reservation  
24 date was, did you?

25 A. No.



1 Q. And if Impax was expecting to lose the patent  
2 litigation, that would affect its reservation date;  
3 correct?

4 A. Yes.

5 Q. And you're not offering any opinion on whether  
6 Impax expected to win or lose the patent litigation  
7 with Endo; correct?

8 A. Correct.

9 Q. And you didn't identify what Endo's reservation  
10 date was either, did you?

11 A. No.

12 Q. And if Endo expected to win the patent  
13 litigation, that would have an effect on its  
14 reservation date; correct?

15 A. Yes.

16 Q. And you're not offering any opinion on whether  
17 Endo expected to win or lose the patent litigation with  
18 Impax; correct?

19 A. Correct.

20 Q. You mentioned, in the context of reservation  
21 dates, and you write about this, something called a  
22 zone of possible agreement.

23 You can't say whether there was a zone of  
24 possible agreement between Impax and Endo that would  
25 have included another entry date other than the one in

1 the settlement agreement; correct, sir?

2 A. I can't identify as -- what the zone is, but I  
3 can -- I -- I offered the opinion -- I'm offering the  
4 opinion that the zone would have included an earlier  
5 entry date.

6 Q. You can't tell us what the zone is, sir?

7 A. No, sir.

8 Q. And you can't say with certainty that an  
9 alternative settlement was possible in this case, can  
10 you?

11 A. No.

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1 Next question.

2 MR. HASSI: Thank you.

3 BY MR. HASSI:

4 Q. Professor Bazerman, you're largely approving of  
5 date-only settlements; correct?

6 A. Yes.

7 Q. And you're aware that Impax asked for a simple  
8 date-only settlement with Actavis -- I mean, with the  
9 Actavis entry date; correct?

10 A. I recall that happening toward the end of the  
11 negotiation. Yes.

12 Q. And do you know whether Impax asked for the  
13 Actavis entry date at the beginning of the negotiation  
14 as well?

15 A. I don't recall that.

16 JUDGE CHAPPELL: Let me make sure the record is  
17 clear on what you mean by "the Actavis entry date."

18 MR. HASSI: Absolutely, Your Honor.

19 BY MR. HASSI:

20 Q. Sir, do you understand when I refer to the  
21 Actavis entry date that I'm referring to the entry date  
22 that Actavis in its settlement with Endo got, i.e., a  
23 July 2011 licensed entry date?

24 A. Yes.

25 Q. And you're aware that however many times Impax

1 requested it, Endo rejected it; correct?

2 A. I'm -- I -- as I sit here right now, I only  
3 recall the one specific instance where they requested  
4 it. I don't doubt that they asked for it other times.

5 Q. And in that one specific instance that you're  
6 aware of, you're also aware that Endo rejected Impax'  
7 request; correct?

8 A. Correct.

9 Q. And Impax was then left evaluating whether to  
10 settle on some other date or to go forward with the  
11 litigation; correct?

12 A. No.

13 Q. Its BATNA is not the only option?

14 A. No. They could have continued to negotiate.

15 Q. And they did continue to negotiate; correct?

16 A. They -- there was additional negotiation after  
17 the episode that you described a couple minutes ago.

18 Q. You've not done an analysis of the Actavis  
19 settlement with Endo, have you?

20 A. I'm sorry. I can't --

21 Q. You have not done an analysis of the Actavis  
22 settlement with Endo, have you?

23 A. No.

24 JUDGE CHAPPELL: Do you mean in connection with  
25 his work for this case?

1 MR. HASSI: Yes, sir.

2 JUDGE CHAPPELL: Did you understand that to be  
3 the deal?

4 THE WITNESS: Yes. I certainly read about

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1 settlement is therefore better for consumers; correct?

2 A. Which?

3 Q. Settlement. The Actavis settlement with Endo  
4 or the Impax settlement with Endo, which of the two is  
5 better for consumers, you've not done that analysis;  
6 correct?

7 A. I need clarification. And if it helps, I need  
8 clarification on the expected value to consumers at  
9 time of settlement versus the outcome based on what  
10 happened in this uncertain history, which has now been  
11 revealed.

12 Q. Well, did you calculate an expected value for  
13 consumers of the Actavis settlement?

14 A. No.

15 Q. Did you calculate an expected value for  
16 consumers of the Impax settlement?

17 A. No.

18 Q. And so you can't tell us which one -- strike  
19 that.

20 And you've not done an analysis in the real  
21 world as to which one was better for consumers;  
22 correct?

23 A. No. I think that I've looked at -- I can tell  
24 you about features of those two settlements in a  
25 comparative way and talk about how those features

1 would have -- would comparatively affect consumers.

2 Q. Now, you have a section in your report in which  
3 you describe that you believe Impax was preparing for  
4 an at-risk launch significantly earlier than  
5 January 2013; is that right?

6 A. Yes.

7 Q. And your opinion is that there was a  
8 possibility that Impax would have launched at risk;  
9 correct?

10 A. Yes.

11 Q. And that's based on your review of Impax'  
12 documents?

13 A. Yes.

14 Q. You don't have any expertise in launches at  
15 risk, do you, sir?

16 A. I've been in discussions about launches at  
17 risk, but I would not claim to be specifically an  
18 expert about launching at risk.

19 Q. Have you ever advised a generic company, drug  
20 company, that was considering a launch at risk, sir?

21 A. No.

22 Q. And you mentioned that Impax represented a  
23 credible threat to launch at risk; correct?

24 A. Yes.

25 Q. And for someone like Impax, hoping to engage in



1 settlement negotiations with Endo, you'd want them to  
2 be a credible threat --

3 A. Yes.

4 Q. -- to launch at risk; correct?

5 I'm sorry. To launch at risk; correct?

6 A. Yes.

7 Q. It improves Impax' potential negotiation  
8 outcomes?

9 A. Yes.

10 Q. And a launch at risk or the potential thereof  
11 can be a form of bluffing; correct?

12 A. Yes.

13 Q. Now, you understand that there's a difference  
14 between preparing to launch at risk and making a  
15 decision to launch at risk; correct?

16 A. I do understand that.

17 Q. And you did not analyze the risks associated  
18 with an at-risk launch of oxymorphone ER, did you?

19 A. I'm sorry. Can I have that question again.

20 Q. Let me rephrase it.

21 You didn't analyze the risks to Impax  
22 associated with an at-risk launch of oxymorphone ER,  
23 did you?

24 A. Qualitatively, yes, but quantitatively, no.

25 Q. You can't put any odds on the possibility that



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1 Q. And indeed, there were events, such as the  
2 warning letter that Novartis received from the FDA,  
3 that took matters out of their hands; correct?

4 A. Correct.

5 Q. Now, in your report, you don't provide any  
6 modeling or calculations to figure out how likely it  
7 was that Endo would have switched the market without  
8 having to pay anything under the Endo credit; correct?

9 A. Can I have that question again.

10 Q. In your report, you do not provide any  
11 modeling or calculations to figure out how likely it  
12 was that Endo could have switched the market without  
13 having to pay anything under the Endo credit; correct?

14 A. I -- that is not in my report.

15 Q. And you also did not calculate an expected  
16 value for the no-authorized-generic term; correct?

17 A. Correct.

18 Q. And you didn't calculate an expected value for  
19 the development and co-promotion agreement, did you?

20 A. I did not.

21 Q. And you didn't calculate an expected value for  
22 the combined no authorized generic and Endo credit  
23 terms, did you?

24 A. I did not.

25 Q. And you didn't consider the value of Impax'

1 broad patent license under the settlement agreement;  
2 correct?

3 A. I'm sorry. Can I have that again.

4 Q. You did not consider the value of Impax' -- the  
5 broad patent license Impax received under the  
6 settlement and license agreement; correct?

7 A. I believe I considered it. I did not -- I did  
8 not assess a quantitative value on it.

9 Q. And you're not offering any direct opinions  
10 related to the licenses; correct?

11 A. Correct.

12 Q. And you didn't calculate the value of what Endo  
13 received under the development and co-promotion  
14 agreement, did you?

15 A. I did not calculate the value of what Endo received under the development and co-promotion agreement, did you?

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1 A. Yes.

2 Q. You think Endo should have paid less than  
3 ten million; right?

4 A. Yes.

5 Q.

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1 their differences through bets that both sides expected  
2 to win; right?

3 A. I would believe you. I would edit that to say  
4 "can create value," but if you tell me I wrote what you  
5 just said, I'll believe you.

6 Q. If you want to go back to your editor, it's in  
7 Negotiation Genius at page 110.

8 A. Thank you. I appreciate the help.

9 MR. MEIER: Your Honor, if he's got the book,  
10 he can put it up instead of asking Dr. Bazerman to  
11 remember something from -- recall something that he  
12 wrote when he's written dozens and dozens of book, so  
13 if you want to put it up and let us all see exactly  
14 what he said --

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1 including a provision in a licensing agreement where,  
2 if a licensed show does well, company A will owe  
3 company B an additional sum of money, but if  
4 company B's projections are correct, company A will  
5 refund some of the money paid in the licensing fee;  
6 right?

7 A. Yes.

8 Q.

9 A. Yes. Q.

10 A. Yes. Q.

11 A. Q.

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1       A. I haven't used the word "anticompetitive"  
2 anywhere in my report.

3       Q. And you don't offer an opinion as to whether  
4 the settlement was actually bad for consumers, standing  
5 here seven years later; correct?

6       A. I've offered the opinion that the -- that the  
7 negotiation moved back the entry date. I haven't  
8 offered the opinion in comparison to the outcome that  
9 would have occurred in an alternative world.

10      Q. You haven't analyzed the events and outcomes  
11 of the last seven years since the settlement was signed  
12 to determine whether it was actually good or bad for  
13 consumers; right?

14      A. Correct.

15            JUDGE CHAPPELL: Did you use the term  
16 "alternative world"?

17            THE WITNESS: I believe I did.

18            JUDGE CHAPPELL: What do you mean by that?

19            THE WITNESS: So in a -- what would have  
20 happened in an alternative -- in a state of the world  
21 that didn't exist for the negotiators at the time that  
22 they were actually negotiating.

23            JUDGE CHAPPELL: All right.

24            BY MR. HASSI:

25      Q. And you've not offered the opinion that

1 consumers would have been better off if Impax had  
2 continued litigating against Endo; correct?

3 A. I've offered the opinion that an entry  
4 date-only agreement was probably possible and that  
5 consumers would have been better off with an entry-only  
6 date.

7 Q. My question was about continuing the  
8 litigation, which was, as we both agree, Impax' best  
9 alternative to a negotiated agreement.

10 You've not offered the opinion that consumers  
11 would have been better off if Impax had continued  
12 litigating against Endo; correct?

13 A. No, I've not.

14 MR. HASSI: Nothing further, Your Honor.

15 JUDGE CHAPPELL: Any redirect?

16 MR. MEIER: Yes, Your Honor, if I may --

17 JUDGE CHAPPELL: Go ahead.

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19 REDIRECT EXAMINATION

20 BY MR. MEIER:

21 Q. Dr. Bazerman, Mr. Hassi asked you whether Impax  
22 preparing to launch at risk could be a form of  
23 bluffing. Do you remember that?

24 A. I do.

25 Q. Is there any evidence you've seen in this case

1 discovery material that show Impax' behavior was  
2 consistent with bluffing?

3 A. No.

4 Q. If you were trying to bluff, you'd want the  
5 other side to be aware of the steps you make to make a  
6 credible threat; correct?

7 A. Absolutely.

8 Q. And what evidence have you seen that suggests  
9 to you that Impax wasn't bluffing?

10 A. The fact that when Impax interacted with the  
11 FDA, they wanted to keep information about their  
12 potential at-risk launch secret, and they -- they -- in  
13 a number of ways they tried to keep the information  
14 from being available in ways that Endo or others would  
15 have seen it.

16 Q. When you said "the FDA" a moment ago, were you  
17 confusing that with the DEA?

18 A. Yes.

19 Q. The Drug --

20 A. Thank you. I apologize.

21 Q. Excuse me. Sorry.

22 You were asked by Mr. Hassi about work you've  
23 done for pharmaceutical companies. Do you remember  
24 that?

25 A. I do.

1 Q. And you've done a lot of consulting work for  
2 pharmaceutical companies, haven't you?

3 A. Yes.

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1 Negotiation Genius, too.

2           Your Honor, we're going to mark this as

3 CX D-1.

4           JUDGE CHAPPELL: And I agree with you, if  
5 you're placing the witness by leading based on what  
6 happened on cross, I allow that.

7           MR. MEIER: That's exactly what I was trying  
8 to do, Your Honor, but perhaps I wasn't very artful.

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1 JUDGE CHAPPELL: You haven't forgot how to  
2 focus it?

3 MR. MEIER: It says it's on autofocus. I think  
4 that's the best I can do.

5 JUDGE CHAPPELL: It could be accumulated dust  
6 on the lens.

7 MR. MEIER: I've tried to make it as big as  
8 possible.

9 JUDGE CHAPPELL: It could be parasitic dust on  
10 the lens.

11 MR. MEIER: Well, Your Honor, this is from the  
12 section on parasitic value creation.

13 JUDGE CHAPPELL: Of course.

14 THE WITNESS: Your Honor, you're not asking for  
15 my expert opinion on this; right?

16 JUDGE CHAPPELL: Not yet.

17 BY MR. MEIER:

18 Q. Do you see in the middle of that paragraph  
19 where it says "For example"? The paragraph that's  
20 highlighted?

21 A. Yes, I do.

22 Q. And it says, "For example, we view the U.S.  
23 pharmaceutical industry as one of the great success  
24 stories of the past century. If these firms hadn't  
25 achieved healthy profits, many drugs that save lives,

1 reduce the need for surgery and relieve pain would not  
2 exist"; correct?

3 A. Correct.

4 Q. And you wrote that.

5 A. I wrote that. And I still believe it today ten  
6 years later.

7 Q. Thank you.

8 Judge Chappell asked you earlier whether you  
9 consider yourself as working for the FTC; correct?

10 A. He did.

11 Q.

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1 MR. LOUGHLIN: Yes, Your Honor.

2 JUDGE CHAPPELL: And both sides are confident  
3 we wrap before Thanksgiving?

4 MR. HASSI: Yes, Your Honor.

5 JUDGE CHAPPELL: So next week we will take the  
6 planned days off on 30 October and 1 November?

7 MR. LOUGHLIN: Yes, Your Honor.

8 JUDGE CHAPPELL: We'll reconvene Tuesday at  
9 9:45 a.m.

10 We're in recess.

11 (Whereupon, the foregoing hearing was adjourned  
12 at 12:15 p.m.)

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CERTIFICATE OF REPORTER

I, JOSETT F. WHALEN, do hereby certify that the foregoing proceedings were taken by me in stenotype and thereafter reduced to typewriting under my supervision; that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were taken; and further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of the action.

s/Josett F. Whalen  
JOSETT F. WHALEN  
Court Reporter