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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.)
-----)

October 27, 2017
9:47 a.m.
TRIAL VOLUME 4
PUBLIC RECORD

BEFORE THE HONORABLE D. MICHAEL CHAPPELL
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C.

Reported by: Josett F. Whalen, Court Reporter

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1 APPEARANCES: (continued)

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FEDERAL TRADE COMMISSION

I N D E X

IN THE MATTER OF IMPAX LABORATORIES, INC.

TRIAL VOLUME 4

PUBLIC RECORD

OCTOBER 27, 2017

8 WITNESS:	DIRECT	CROSS	REDIRECT	RECROSS	VOIR
9 BAZERMAN	831	878	930		

EXHIBITS FOR ID IN EVID IN CAMERA STRICKEN/REJECTED

CX

(none)

RX

(none)

JX

(none)

1 P R O C E E D I N G S

2 - - - - -

3 JUDGE CHAPPELL: Okay. Let's go back on the
4 record, Docket 9373.

5 Before we call our next witness, let's discuss
6 scheduling.

7 I got an e-mail this morning on the list of
8 witnesses for next week, or my office got an e-mail.

9 Just the face of the e-mail made it look like
10 we're here five days next week. I just want to
11 double-check that you asked for the 30th off; correct?

12 MR. LOUGHLIN: Yes, Your Honor.

13 JUDGE CHAPPELL: Then I have a question. If we
14 could go on the 1st, can you wrangle up witnesses for
15 Wednesday, the 1st if we go on that day? That's
16 Wednesday. This is Friday.

17 MR. LOUGHLIN: I don't know, Your Honor. We'd
18 have to check with our colleagues across the aisle.

19 JUDGE CHAPPELL: I don't need an answer right
20 now. Just confer. Look into it.

21 MR. HASSI: We'll confer, Your Honor.

22 JUDGE CHAPPELL: Because going on that day
23 would move us along, in the hopes of finishing before
24 Thanksgiving.

25 MR. HASSI: I will say, Your Honor, at the

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 A. Sure.

2 I'm the faculty coordinator of a one-week
3 executive program called Changing the Game, which is
4 primarily on negotiations and decision-making. And I
5 teach about ten sessions in a one-week program that's
6 offered two to four times a year. And over the last
7 15 years, I've taught over 3,000 students in that
8 program. And that consists of over 40 different groups
9 who have shown up for our one-week program.

10 I've also been the lead negotiation teacher in
11 all of our advanced management programs, longer
12 programs, for executives.

13 Q. And when we say "executives," what do we mean
14 by that?

15 A. Executives are people employed at higher
16 levels of an organization who come back in large
17 numbers to the Harvard Business School to take
18 programs of education that last between one and eight
19 weeks.

20 Q. And when you say "executives," are we talking
21 about people in private business, government? Can you
22 give me examples of the kinds of people?

23 A. All of those, the vast majority of the people
24 who take executive programs at Harvard Business School
25 come from private corporations.

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 human beings
15 actually make decisions, often in contrast to the
16 standard neoclassical model of economics which assumes
17 people are fully rational.

18 It's perhaps best represented in the
19 Nobel Prizes to Daniel Kahneman and more recently
20 Richard Thaler.

21 Q. Have you written any books or research articles
22 in the fields of negotiation and managerial
23 decision-making?

24 A. Yes.

25 Q. About how many books have you written?

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,
20 Your Honor.

21 BY MR. MEIER:

22 Q. Has your consulting work in the pharmaceutical
23 industry involved both brand and generic products?

24 A. Yes.

25 Q. Have you also consulted and advised companies

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,

1 Your Honor.

2 JUDGE CHAPPELL: All right.

3 BY MR. MEIER:

4 Q. Before we go into the detail on that question,
5 Professor Bazerman, let's talk about how you arrived at
6 both of your opinions in this case.

7 Earlier you indicated that your academic
8 experience, publications and research relate to the
9 opinions you've reached in this case.

10 Generally, in what way?

11 A. My background in negotiation provides
12 expertise to understand how negotiations should and
13 likely did occur and helps me understand what the
14 negotiations would look like in an entry-only
15 discussion. It helps me understand how parties think
16 about their reservation value, their -- how they think
17 about the opportunities to create joint gain across
18 issues and to broadly understand the structure in which
19 negotiations is likely to occur.

20 Q. I'm going to go back into some of that in a
21 moment, but I want to continue and ask whether --
22 earlier you indicated that your consulting experience
23 in the pharmaceutical industry relates to the opinions
24 you've reached in this case.

25 Again, just generally speaking, how does your

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?

1 THE WITNESS: In this particular case?

2 JUDGE CHAPPELL: This -- it's your answer.
3 This background history that you drew upon, were you
4 there at the time consulting with a party who was
5 forming an agreement in a case?

6 THE WITNESS: I've often been present with
7 companies as they're developing their strategy to
8 negotiate.

9 I've had no connection to Endo or Impax at any
10 point in the past.

11 JUDGE CHAPPELL: I assumed that. I was
12 talking about -- I was following up on what you told
13 us --

14 THE WITNESS: Uh-huh.

15 JUDGE CHAPPELL: -- you drew upon to form
16 opinions in this case.

17 THE WITNESS: Yes, sir.

18 So I've often been involved with companies
19 where I've been present as they've developed their
20 strategies for a variety of reasons, which I'd be happy
21 to go into. I haven't been at the negotiation table
22 when they've been implementing strategies that I've
23 advised on.

24 JUDGE CHAPPELL: That's what I was trying to --
25 I'm just trying to get more into your -- since you drew

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

1 Endo reformulated, moved patients and as a result that
2 the market for the original product had been shrunk
3 significantly.

4 Q. Professor Bazerman, let's turn now to another
5 agreement between Impax and Endo known as the
6 development and co-promotion agreement.

7 Have you seen that agreement?

8 A. Yes.

9 Q. And did you read it?

10 A. Yes.

11 Q. As part of your work in this matter, did you
12 see anything in the settlement and license agreement
13 that shed light on whether the settlement agreement and
14 the development agreement were linked?

15 A. Yes.

16 Q. And what was that?

17 A. A couple of things.

18 One would be the fact that they were discussed
19 simultaneously in the negotiation dialogue. And
20 obviously I wasn't there for the negotiation dialogue,
21 but I see it in e-mails from -- on both sides of the
22 table.

23 Second, that there's a cross-referencing in
24 some of the legal documentation.

25 And third, as I recall, the two agreements,

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
6 binding value creation agreements all that easy to
7 achieve. There's a significant academic literature
8 documenting the difficulty of reaching value-creating
9 agreements in poor relationships.

10 Without -- but in fact you can imagine that the
11 litigation context creates a motivation to create this
12 linkage.

13 Q. You mentioned something about the negotiation
14 literature.

15 Could you just briefly discuss what the
16 negotiation literature has to say about how important
17 relationships are to negotiations.

18 A. Absolutely.

19 That's a core part of a book by
20 Professor Robert Mnookin at the Harvard Law School,
21 where he talks about the value of creating high-quality
22 relationships in order to allow value creation to
23 occur.

24 It's also represented in the work of many
25 empirical scholars who have done empirical analyses of

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 added to the agreement, and
25 I think that the answer is -- I offer the opinion that

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 were certainly developing the product itself so that
2 they could potentially enter at risk.

3 Q. Are you opining that Impax definitely would
4 have launched generic Opana at risk?

5 A. No, I'm not.

6 Q. So what conclusions do you draw from the facts
7 that Impax was preparing to launch at risk?

8 A. That they -- that they had a credible threat
9 that Endo would be -- would be concerned about and that
10 Endo was willing to compensate Impax in order to
11 eliminate that, that risk.

12 Q. As part of your review of the materials in this
13 case, did you see any information concerning
14 settlements that Endo entered with other generic
15 companies involving Opana ER?

16 A. I did.

17 Q. And did you rely upon any of this information
18 in forming your opinions?

19 A. Yes.

20 MR. MEIER: And I think as you know, some of
21 this information, Your Honor, is subject to in camera,
22 so I'm not going to ask any of the information that
23 deals with the in camera, only publicly available
24 information.

25 JUDGE CHAPPELL: All right.

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.

1 JUDGE CHAPPELL: Cross?

2 MR. HASSI: Yes, Your Honor.

3 - - - - -

4 CROSS-EXAMINATION

5 BY MR. HASSI:

6 Q. Good morning, Professor Bazerman. How are you?

7 A. Good. Good morning, Mr. Hassi.

8 Q. I want to start -- when I asked you about your
9 expertise, you mentioned one other thing, and I wanted
10 to ask about that.

11 In addition to being an expert in negotiations
12 and behavioral economics, you also hold yourself out as
13 an expert in behavioral ethics; is that right?

14 A. I do.

15 Q. You wouldn't claim to be an economist.

16 A. I would not claim to be an economist.

17 That gets a little bit confusing because the
18 field kind of has moved from behavioral decision
19 research to now being called behavioral economics, and
20 I'm certainly a part of that field, but I don't have a
21 Ph.D. in economics.

22 Q. And as you mentioned, the behavioral economics
23 piece is really about how people don't always act
24 rationally in -- for example, in decision-making;
25 right?

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. Yes.

7 Q. And you were asked a question about the risk of
8 competition.

9 Would you agree that an entry date-only
10 settlement eliminates the risk of competition from a
11 generic?

12 A. Yes.

13 Q. Now, you find pay-for-delay fascinating, don't
14 you?

15 A. Yes.

16 Q. And this is the fourth pay-for-delay case in
17 which you're serving as an expert for the FTC?

18 A. Yes.

19 Q. The first one was the Schering-Plough case; is
20 that right?

21 A. Yes.

22 Q. And you sat in that chair and offered testimony
23 in this courtroom?

24 A. I don't know if it was the same chair, but I
25 sat around this area.

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.

1 Q. And in that case, you opined on the matter of
2 linkage and the fact that the non-entry date elements
3 of what was agreed to served as a mechanism for the
4 branded to delay the entry of the generic and to delay
5 the access of consumers to have access to the product,
6 the generic product; correct?

7 A. Yes.

8 Q. You'd agree that in all four cases, including
9 this one, in other words, where the FTC has hired you,
10 you've offered opinions that the agreements -- terms in
11 the agreements were linked; correct?

12 MR. MEIER: I'm going to object, Your Honor.

13 I don't believe that's what Dr. Bazerman
14 testified to in the Schering case. Mr. Hassi hasn't
15 established a foundation for that.

16 MR. HASSI: Again, I'm relying on his
17 deposition, Your Honor. If he wants to correct me and
18 correct his deposition, that's fine.

19 JUDGE CHAPPELL: I think it's a fair question.
20 He's an expert on the stand. He can handle it.
21 Overruled.

22 BY MR. HASSI:

23 Q. Would you like it read back?

24 A. Yes, please.

25 (The record was read as follows:)

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 THE WITNESS: No. I accept that friendly edit,
2 Your Honor.

3 BY MR. HASSI:

4 Q. So there are different levels of linkages; is
5 that what you're telling me?

6 A. Rather thinking of different levels, I'm
7 making a distinction between linked meaning occurring
8 together versus linked where some issues are there
9 specifically as a means of adjusting the terms on some
10 other issue.

11 So what's special to me about the -- about the
12 no-AG agreement, the Endo credit and the co-promotion
13 agreements is that I see their primary function as
14 providing a means to change what the entry date would
15 be and specifically to move the entry date later.

16 There are many other -- many, many other
17 clauses in the legal agreements, like there are in any
18 other legal agreement, that need to be there for some
19 other purpose but aren't there in order to specifically
20 adjust the terms of the entry date.

21 Q. So it's your opinion that the no-AG provision
22 in the settlement was there to change the entry date;
23 correct?

24 A. I would say the no-AG agreement and the Endo
25 credit are there specifically to help get Impax to

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
10 Endo credit, so I've repeatedly argued, both in my
11 report but also in the deposition, that it typically
12 doesn't make sense to think about the no-AG agreement
13 or the Endo credit in the final contract without the
14 other one, because they exist to coexist to take care
15 of both the two conditions of reformulation occurring
16 and reformulation not occurring.

17 Q. Do all the agreements -- all the terms in the
18 contract coexist or just those two?

19 A. I think that anything that's in the contract
20 coexists with everything else that exists in the
21 contract.

22 Q. And you can't speak to the idea -- excuse me.

23 You're not offering an opinion that just the
24 no-AG provision standing on its own was there to effect
25 a change in the date; correct?

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
14 entry date than they would have without the no-AG
15 agreement.

16 JUDGE CHAPPELL: Is that what you're arguing or
17 is that your opinion?

18 THE WITNESS: It's my opinion.

19 BY MR. HASSI:

20 Q. Sir, you wrote the book Negotiation Genius; is
21 that right?

22 A. I coauthored that book.

23 Q. And in that book you wrote about your
24 experience testifying for the FTC in the
25 Schering-Plough case; is that right?

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 that out before you write about the title of a judge in
2 the future, sir.

3 THE WITNESS: Thank you.

4 So I'm not sure I fully understood that, but I
5 will --

6 JUDGE CHAPPELL: An administrative judge is
7 much different than an administrative law judge --

8 THE WITNESS: I apologize.

9 JUDGE CHAPPELL: -- under rules and
10 regulations. I happen to know that judge who ruled in
11 that case.

12 Also, I note that you say before the five
13 commissioners that they were a bipartisan panel, yet
14 you leave out "independent," "objective" or any other
15 term to describe the judge. Why is that?

16 Were you trying to imply that the judge was not
17 neutral and independent?

18 THE WITNESS: No.

19 My goal in writing about what happened at the
20 time, really it focused more on thinking about how
21 Congress could potentially change a law in the future.
22 My goal wasn't to talk about any of the specific people
23 but to provide the history of what occurred to the best
24 of my understanding.

25 JUDGE CHAPPELL: Okay. And I haven't read

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 A. Yes.

17 JUDGE CHAPPELL: Based on what he told me
18 earlier, you might want to verify whether he's talking
19 about teaching or negotiating.

20 MR. HASSI: I will, Your Honor.

21 BY MR. HASSI:

22 Q. If a consulting client that hired you for a
23 negotiation brought up the idea of a reverse payment,
24 you'd be disinclined to continue the consultation;
25 correct?

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,
17 you said, "I don't think of myself as working for a
18 side as an expert"; correct?

19 THE WITNESS: I did say that.

20 JUDGE CHAPPELL: And in this case you don't
21 consider yourself working for a side, one side or the
22 other?

23 THE WITNESS: I'm -- I know I'm hired by the
24 FTC and that they're paying me, but I'm -- I take this
25 work only in the pursuit of justice. I would not do

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
5 yourself working for one side or the other.

6 THE WITNESS: I think technically I am, but we
7 could ask a lawyer whether that's true or not. I think
8 of myself as taking this work because I care about
9 justice.

10 JUDGE CHAPPELL: Well, I'm not asking you what
11 the lawyers say, but your response is, the truth is,
12 according to you, you don't consider yourself -- you
13 yourself don't consider yourself to be working for one
14 side or the other; correct?

15 THE WITNESS: Well, I don't want to -- I don't
16 want to say no to that if I'm technically working for
17 the FTC, but -- but as I -- as I think about taking
18 this work, I don't think I want to work for the FTC, I
19 think I want to create justice for consumers.

20 JUDGE CHAPPELL: Have you ever worked for a
21 drug company in a case as an expert?

22 THE WITNESS: No.

23 JUDGE CHAPPELL: I'm sorry. Have you ever
24 been an expert in case for a drug company, although you
25 may not have considered yourself on one side or the

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. Okay. So hypothetically, they could have
8 negotiated an earlier entry date; correct?

9 A. Correct.

10 Q. But you can't tell us what that entry date
11 would have been; correct?

12 A. Correct.

13 Q. And you've not seen any evidence in the record
14 that Endo offered an earlier entry date; correct?

15 A. Correct.

16 Q. You've seen evidence that Impax requested
17 earlier entry dates and Endo rejected them; correct?

18 A. Correct.

19 Q. You think Impax should have been able to obtain
20 an earlier entry date, but you can't tell us what that
21 date would have been; correct?

22 A. I cannot tell you that date. I think that they
23 should have and I think that they should have known
24 that they could have.

25 Q. And you can't say --

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
17 multiple times, I think that the no-AG agreement and
18 the Endo credit worked together in parallel to cover
19 multiple different contingencies.

20 Q. Sir --

21 JUDGE CHAPPELL: You said you don't know how to
22 think about that question. Are you saying you don't
23 understand the question?

24 THE WITNESS: No. I don't think -- so given
25 that the no-AG agreement is in the final contract and

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:

11 Q. You can't say, can you, sir, evaluating just
12 the development and co-promotion agreement, what effect
13 that had, if any, on the entry date, can you?

14 A. I would have an opinion about the direction
15 that it would move the entry date.

16 Q. Sir, you can't say what effect it would have;
17 correct?

18 A. It depends on -- on how we specify "effect."
19 I'm saying I'm offering an opinion about the effect in
20 terms of moving the entry date later. If "effect"
21 means the number of days, weeks or months, I cannot
22 say.

23 Q. Now, sir, you've combined a number of times
24 this morning the Endo credit and the
25 no-authorized-generic. You think of the two together;

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.

12 JUDGE CHAPPELL: Is this a good point for a
13 short break?

14 MR. HASSI: Certainly, Your Honor.

15 JUDGE CHAPPELL: How much more time do you
16 think you have?

17 MR. HASSI: Fifteen minutes to a half an hour I
18 would guess, but...

19 JUDGE CHAPPELL: Then we'll have redirect I'm
20 sure.

21 We'll take a short morning break. We'll
22 reconvene at 11:50.

23 We're in recess.

24 (Recess)

25 JUDGE CHAPPELL: We're back on the record.

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
5 pieces of it and I -- I think I understand the context
6 and how it differs from this case, so there are
7 contextual issues I understand. I didn't do a
8 thorough analysis of that negotiation process or
9 agreement.

10 BY MR. HASSI:

11 Q. You'd agree with me that one reason for Endo to
12 settle with Actavis is that the two dosages on which
13 Actavis was first to file did not represent a
14 meaningful portion of Endo's sales; correct?

15 A. That is one factor, yes.

16 Q. Impax was first to file on more than 90 percent
17 of Endo's Opana ER sales; correct?

18 A. Yes.

19 Q. And so the negotiations and settlement
20 agreement with Impax were more important to Endo than
21 the negotiations and settlement with Actavis; correct?

22 A. Yes or no doesn't quite capture it, but I'd go
23 more with yes, but I would add on to the -- to that
24 that -- that the agreement with Actavis might be
25 creating psychological precedent for their upcoming

1 negotiation with Impax.

2 Q. And it did create psychological precedent --

3 JUDGE CHAPPELL: Hold on, hold on.

4 Were you finished?

5 THE WITNESS: I think I was finished.

6 Thank you, sir.

7 JUDGE CHAPPELL: Go ahead.

8 MR. HASSI: Thank you, Your Honor.

9 BY MR. HASSI:

10 Q. It did create psychological precedent in the

11 fact that Impax asked for the same entry date as

12 Actavis got; right?

13 A. That follows.

14 Q. Now, do you know whether Actavis -- strike

15 that.

16 You're aware that Actavis did not get the same

17 broad patent license that Impax got in its settlement;

18 correct?

19 A. Yes.

20 Q. And you're aware that as a result, Actavis is

21 not selling Opana ER today; correct?

22 A. Yes.

23 Q. And you would agree with me that -- strike

24 that.

25 You've not done an analysis as to which

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

1 Impax would have launched at risk; correct?

2 A. Correct.

3 Q. You can't say whether those odds are greater or
4 less than 50 percent; correct?

5 A. Right.

6 Q. And you recognize that there are very serious
7 penalties if Impax were to launch at risk and end up
8 losing the patent case; correct?

9 A. Yes.

10 Q. That could include patent damages that would
11 be measured as of the brand's lost profits; is that
12 right?

13 A. I understand that.

14 Q. And I think you testified earlier this morning
15 that the brand can make three, five, even ten times as
16 much as the generic; correct?

17 A. Yes.

18 Q. So a decision to launch at risk for a generic
19 company is a decision that should be made with care;
20 correct?

21 A. Yes.

22 Q. Now, you also don't put any percentage on the
23 chance that the court would decide in favor of Impax;
24 correct?

25 A. Correct.

1 Q. You used the term "expected value" several
2 times this morning; right?

3 A. Yes.

4 Q. But you didn't calculate an expected value for
5 the Endo credit; correct?

6 A. Correct.

7 Q. And you've not seen any calculations prepared
8 by Endo that assessed the value of the Endo credit
9 during the settlement negotiations; correct?

10 A. Correct.

11 Q. You've not seen any calculations prepared by
12 Impax that assessed the value of the Endo credit during
13 the settlement negotiations; correct?

14 A. Correct.

15 Q. And you acknowledge that Impax, once it signed
16 the agreement, had no control over the magnitude of the
17 Endo credit; correct?

18 A. I believe I testified that I can't -- I can't
19 come up with an answer to how they would have an
20 impact -- an impact.

21 Q. And indeed, Endo did not have complete control
22 over the events that led to the Endo credit; correct?

23 A. So you added in the word "complete." They had
24 substantial control, but in the world of managerial
25 decision-making we rarely have complete control.

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.

16 Q. And you agree that if the very same parties
17 entered into the very same development and
18 co-promotion agreement but did so six years later, you
19 wouldn't have any reason to question the agreement;
20 right?

21 A. Correct.

22 Q. Now, even though you made no attempt to value
23 the rights Endo received under the development and
24 co-promotion agreement, you conclude that Endo overpaid
25 Impax; right?

1 A. Yes.

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

4 A. Yes.

5 Q. But you can't say how much less than
6 ten million Endo should have paid; correct?

7 A. Correct.

8 Q. You're not offering an opinion that the
9 development and co-promotion agreement standing alone
10 was an example of parasitic value creation, are you?

11 A. I don't -- I can't comprehend the question
12 standing alone.

13 Q. Well, you would agree that if the development
14 and co-promotion agreement had been entered into six
15 years after the settlement that it would not be an
16 example of parasitic value creation; right?

17 A. I would have no reason to suspect that it would
18 be an example of parasitic value creation.

19 Q. You've written about contingency contracts?

20 A. Yes.

21 Q. You love contingency contracts; right?

22 A. I do.

23 Q. And you've written that contingency contracts
24 create value by allowing negotiators to stop arguing
25 about their different beliefs and instead leverage

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 --

15 JUDGE CHAPPELL: Well, what we have missing
16 here is the expert witness, who I am sure is well-paid
17 and is competent to do so, has not said, "May I see
18 that."

19 MR. MEIER: But I think that --

20 JUDGE CHAPPELL: So I'm going to wait until the
21 witness asks for it, so if you're objecting, I'm going
22 to overrule it.

23 MR. MEIER: All right, Your Honor. Thank you.

24 BY MR. HASSI:

25 Q. Sir, you use an example in your book of

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. And you state: This solution avoids the costs
9 of gathering more data, avoids the hassle of trying to
10 convince the other side that you are correct and avoids
11 capitulating to the desires of a party you do not
12 trust; right?

13 A. Yes.

14 Q. Would you agree that the Endo credit and
15 royalty provisions are an example of a contingency
16 contract that addressed Impax and Endo's different
17 beliefs about what was going to happen in the future to
18 Opana ER sales?

19 A. Yes.

20 Q. But in this case you have an ethical objection
21 to this particular contingency contract; is that right?

22 A. Yes.

23 Q. Now, you've not analyzed whether the
24 settlement between Impax and Endo was actually
25 anticompetitive; correct?

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.

18 - - - - -

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.

4 Q. And you listed some of those companies earlier
5 this morning.

6 A. Yes.

7 Q. And that includes advising pharmaceutical
8 companies on negotiations; correct?

9 A. Yes.

10 JUDGE CHAPPELL: You need to stop leading.

11 BY MR. MEIER:

12 Q. Do you have a bias against pharmaceutical
13 companies?

14 A. No. I love pharmaceutical companies. I think
15 that they're one of the most important industries in
16 the U.S.

17 Q. In fact, Mr. Hassi earlier today showed you an
18 excerpt from your book Negotiation Genius; correct?

19 A. Yes.

20 JUDGE CHAPPELL: I asked you to stop leading.
21 It's no longer a warning; it's an instruction.

22 MR. MEIER: I'm sorry, Your Honor. I was just
23 trying to set the foundation for the question.

24 BY MR. MEIER:

25 Q. I'd like to show you an excerpt from

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.

9 JUDGE CHAPPELL: I don't think that ELMO has
10 been used in ten years.

11 MR. MEIER: It's been a while since I've used
12 it, too, so I had to practice.

13 JUDGE CHAPPELL: I didn't know it was still
14 here.

15 BY MR. MEIER:

16 Q. This is your book Negotiation Genius?

17 A. Yes. With the cover that I'm more accustomed
18 to.

19 Q. Okay. Thank you.

20 And on page 230 you have a discussion of the
21 pharmaceutical industry; correct?

22 This is from page 230 of your book; correct?

23 A. I don't see the number 230, but I believe you.

24 There we go. And we now have the information.

25 Q. It's been a while since I've used an ELMO, too.

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. What do you do with the money that you earn
12 from working for the FTC?

13 A. I donate a hundred percent of it to charity.

14 MR. MEIER: No further questions, Your Honor.

15 JUDGE CHAPPELL: Anything else?

16 MR. HASSI: No, Your Honor.

17 JUDGE CHAPPELL: Thank you, sir. You're
18 excused.

19 THE WITNESS: Thank you.

20 JUDGE CHAPPELL: Any housekeeping or anything
21 else before we recess?

22 MR. HASSI: No, Your Honor.

23 MR. LOUGHLIN: Not from us, Your Honor.

24 JUDGE CHAPPELL: And we have someone teed up
25 for Tuesday at 9:45?

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