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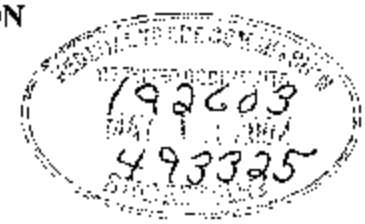

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of **SCHERING-PLOUGH CORPORATION,** **a corporation,** **UPSHER-SMITH LABORATORIES, INC.** **a corporation,** **and** **AMERICAN HOME PRODUCTS CORPORATION,** **a corporation.**	**Docket No. 9297**

To: The Honorable D. Michael Chappell
Administrative Law Judge

COMPLAINT COUNSEL'S REPLY TO SCHERING-PLOUGH'S PROPOSED FINDINGS OF FACT RELATING TO THE SETTLEMENT WITH ESI-LEDERLE

[PUBLIC VERSION]

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Michael B. Kades
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Counsel Supporting the Complaint

May 14, 2002

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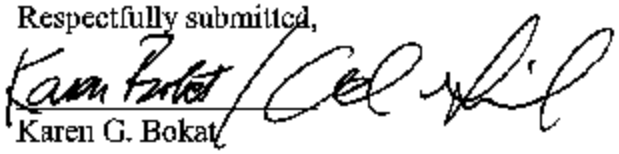
Complaint counsel respectfully submit their reply to Schering-Plough's proposed findings of fact relating to the settlement with ESI-Lederle. For the convenience of the court, we have reprinted each of proposed findings, followed by complaint counsel's reply. A separate reply brief accompanies these reply findings.

Respectfully submitted,



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INTRODUCTION

Respondent's proposed findings of fact should not be adopted by the Administrative Law Judge. Many of those findings are unsupported by the record, contrary to more reliable evidence, incomplete, misleading, or otherwise unreliable. On the following pages, we have reproduced each of respondent's proposed findings of fact. Complaint counsel's response ("CPRF") follows each finding or group of findings responded to. While we have attempted to address the most important issues posed by the proposed findings, we have not responded to every point made by respondent. Accordingly, the failure to address a particular proposed finding or part thereof does not signify endorsement of the finding, and should not be taken as agreement that the proposed finding be adopted.

The following citation forms are used in these reply findings.

CPRF - Complaint Counsel's Reply Finding

CPF - Complaint Counsel's Proposed Finding of Fact

CX - complaint counsel exhibit

SPX - Schering-Plough exhibit

USX - Upsher-Smith exhibit

Complaint - Complaint of the Federal Trade Commission, issued March 30, 2001.

Schering Answer - Answer of Schering-Plough Corporation, filed April 23, 2001.

Upsher Answer - Answer of Upsher-Smith Laboratories, Inc., filed April 23, 2001

AHP Answer - Answer of American Home Products Corporation, filed April 23, 2001.

Schering First Admissions - Schering-Plough Corporation's Objections and Responses to Complaint Counsel's First Requests for Admissions, filed August 6, 2001.

Schering Second Admissions - Schering-Plough Corporation's Objections and Responses to Complaint Counsel's Revised Second Requests for Admissions, filed November 14, 2001.

Upsher First Admissions - Upsher-Smith's Objections and Responses to Complaint Counsel's First Set of Requests for Admissions, filed Sept. 10, 2001.

Upsher Second Admissions - Upsher-Smith's Objections and Responses to Complaint Counsel's Second Set of Requests for Admissions, filed November12, 2001.

Upsher Third Admissions - Upsher-Smith's Objections and Responses to Complaint Counsel's Revised Third Set of Requests for Admissions, filed September 13, 2001.

Citations to the transcript include the volume, page number, and witness name: Tr. at 1:125 (Goldberg).

Pages of exhibits are referenced by bates number: CX 422 at SP 06 00009.

References to investigational hearing or deposition transcripts that have been included in the trial record as exhibits include the exhibit number, the page and lines of the deposition or investigational hearing transcript, the witness name, and the designation "IH" or "dep": CX 1516 at 40:7-12 (Lauda dep).

Citations to admissions include the designated abbreviation and the paragraph number of the request and response: Schering First Admissions No.1.

In camera material and citations are in italics.

Documents that were admitted subject to the limitation that they were not offered for the truth of the matters asserted are indicated by an asterisk after the exhibit number: SPX 693*.

The investigational hearings of Schering officials that have been admitted against Schering but are used for the purpose of contradicting and impeaching the trial testimony of Upsher's Ian Troup (a purpose which is currently excluded) are marked by a superscript ($^{\#}$) following the exhibit number.

AHP documents, depositions, and investigational hearings were admitted subject to the Administrative Law Judge's satisfaction that complaint counsel properly proved a conspiracy and all the required elements under the co-conspirator rule. These documents are marked by a superscript ($^{\wedge}$) following the exhibit number.

I. THE SCHERING/ESI SETTLEMENT NEGOTIATIONS

2.1. In February 1996, Schering's Key Pharmaceuticals division filed a complaint against ESI for patent infringement. (11 Tr. 2486 (Herman); SPX 680). The complaint was filed in federal district court in Philadelphia, Pennsylvania. (SPX 680). Key sought injunctive relief, as well as costs and reasonable attorneys' fees. (11 Tr. 2555 (Herman); SPX 680).

Complaint Counsel's Response to Finding No. 2.1:

Complaint counsel has no specific response.

2.2. Schering's lead counsel on the patent infringement case brought by Key Pharmaceuticals against ESI Lederle case was Anthony Herman. (11 Tr. 2486 (Herman)). Mr. Herman is a partner at the law firm of Covington & Burling, who focuses on intellectual property and patent litigation. (11 Tr. 2485-86 (Herman)).

Complaint Counsel's Response to Finding No. 2.2:

Complaint counsel has no specific response.

2.3. The parties first began discussing a possible settlement of the case in October 1996. (11 Tr. 2487 (Herman)). These discussions culminated in a January 23, 1998 agreement in principle

to settle the lawsuit. (11 Tr. 2488-89 (Herman); 12 Tr. 2650-51 (J.F. Hoffman); CX 1482 at 85:4-20 (Alaburda I.H.)).

Complaint Counsel's Response to Finding No. 2.3:

The proposed finding is incomplete. While the agreement in principle settled the lawsuit, the final settlement agreement reached in June, 1998 contained several anticompetitive terms added after the agreement in principle was reached. CPF 881; CPRF 2.84.

2.4. The issue of settlement was brought up at the urging of the presiding judge in the case, Judge DuBois. (11 Tr. 2487 (Herman); SPX 1222 at 51:1-52:17 (Alaburda I.H.); CX 1492 at 121:3-11 (Dey I.H.)). At a status conference, Judge DuBois told them that he wanted the parties to participate in a mediation session with a U.S. magistrate judge. (11 Tr. 2487 (Herman)).

Complaint Counsel's Response to Finding No. 2.4:

The proposed finding is misleading, irrelevant, and not supported by the evidence to the extent it suggests or implies that the magistrate judge or the trial judge coerced Schering into its agreement with AHP, or that Schering acted on a belief that it was being threatened by these court officials. Judges routinely encourage litigants to settle, a fact acknowledged by Schering's witnesses. See Tr. at 12:2647 (John Hoffman) (Mr.

Hoffman agreed that it is not uncommon for judges and magistrates to bang "attorneys' heads together in an effort to settle the case . . . ." and that he has he has "come across" such judges.). Mr. Herman conceded on cross-examination that the transcript of the Markman hearing shows the trial judge: (1) expressing his desire to hear closing arguments and willingness to "remain this evening as long as it takes to finish this matter." (Tr. at 11:2551); (2) agreeing to a request from the parties that he defer closing arguments to enable them to pursue settlement discussions (Tr. at 11:2551-52); and (3) stating "if we don't settle the case, I want to conclude the Markman hearing with closing arguments tomorrow." *See* Tr. at 11:2554, Tr. at 11:2548. Additionally, one Schering executive described the magistrate judge's approach as "recommend[ing] and encourag[ing]," not ordering Schering and AHP to settle the patent litigation. CX 1527 at 183:21-184:12 (Raymond Russo dep). Finally, Schering was represented by experienced counsel. *See* Tr. at 12:2600-03, 2647-48 (John Hoffman) (testified about his litigation experience, his responsibilities, including overseeing most of Schering's litigation, and his experience in other settlement discussions); Tr. at 11:2485-86 (Herman) (testified that he specializes in litigation with a focus on patent and intellectual property). Schering's Associate General Counsel, Mr. Hoffman, acknowledged that where parties cannot agree on a settlement the judge must try the case. See Tr. at 12:2647-48. Mr. Hoffman admitted that the magistrate never said that a party who did not settle would be penalized. See Tr. at 12:2648.

2.5. Throughout the course of the litigation between Schering and ESI, Judge DuBois made it

clear that he wanted the parties to settle the case. (SPX 1222 at 53:13-25 (Alaburda I.H.)). Judge DuBois brought up settlement every time he talked to the parties, usually as the first order of business. (SPX 1222 at 73:3-16 (Alaburda I.H.)). Judge DuBois "kept at" the parties regularly on the topic of settlement. (SPX 1222 at 77:22-78:10 (Alaburda I.H.)). According to ESI's counsel, Judge DuBois urged settlement on the parties to a greater degree than any judge or magistrate in that counsel's experience. (SPX 1222 at 77:22-78:6 (Alaburda I.H.)). Judge DuBois simply told the parties that they had to settle. (SPX 1222 at 80:5-11 (Alaburda I.H.)). The parties ultimately reached an agreement after being "pushed to the wall" by Judge DuBois and Judge Rueter. (CX 1492 at 146:19-147:4 (Dey I.H.)).

Complaint Counsel's Response to Finding No. 2.5:

The proposed finding is misleading, irrelevant, and not supported by the evidence to the extent it suggests or implies that the magistrate judge or the trial judge coerced Schering into its agreement with AHP, or that Schering acted on a belief that it was being threatened by these court officials. See CPRF 2.4.

A. The Settlement Mediation Process with Judge Rueter Began in October 1996

2.6. On October 16, 1996, both Key and ESI agreed to participate in mediation. (11 Tr. 2495 (Herman); SPX 73).

Complaint Counsel's Response to Finding No. 2.6:

The proposed finding is not relevant. Otherwise, complaint counsel has no specific response.

2.7. The magistrate judge appointed to participate in the mediation was Judge Rueter. (11 Tr. 2486 (Herman)). The mediation process with Judge Rueter ultimately lasted approximately 15 months. (11 Tr. 2486 (Herman)).

Complaint Counsel's Response to Finding No. 2.7:

The proposed finding is irrelevant and incomplete. The negotiating process did not proceed uninterrupted for the entire 15 month period. Schering's proposed findings 2.21-2.22.

2.8. On October 21, 1996, Judge DuBois sent a letter to Judge Rueter thanking him for agreeing to preside over the mediation process, and stating that, it in his view, it would be appropriate for Judge Rueter to request mediation conference memoranda from the parties. (11 Tr. 2496 (Herman); SPX 550).

Complaint Counsel's Response to Finding No. 2.8:

The proposed finding is not relevant. Otherwise, complaint counsel has no

specific response.

2.9. On November 12, 1996, the parties provided Judge Rueter with mediation conference memoranda. (11 Tr. 2496-97 (Herman); SPX 74).

Complaint Counsel's Response to Finding No. 2.9:

The proposed finding is not relevant. Otherwise, complaint counsel has no specific response.

B. The November 1996 Settlement Mediation Conference with Judge Rueter

2.10. A settlement conference was scheduled for November 19, 1996. (11 Tr. 2497 (Herman); SPX 77). The November 19, 1996 settlement conference took place in Judge Rueter's chambers. (11 Tr. 2497 (Herman)). Mr. Herman and Susan Lee, in-house counsel for Schering, attended on behalf of Schering. (11 Tr. 2497 (Herman)). ESI's outside counsel, Paul Heller and Deborah Somerville, and American Home Products' in-house patent lawyer, Larry Alaburda, attended on behalf of ESI. (11 Tr. 2497 (Herman)); CX 1482 at 17:2-8 (Alaburda I.H.)).

Complaint Counsel's Response to Finding No. 2.10:

Complaint counsel has no specific response.

2.11. It is possible that Martin Driscoll, the head of Key Pharmaceuticals may have been there. (11 Tr. 2498 (Herman)). At that time, Mr. Driscoll was Vice President of Marketing and Sales for Key. (12 Tr. 2702-03 (Driscoll)). He first became involved in the settlement discussions between Key and ESI in late 1996 or early 1997. (12 Tr. 2703 (Driscoll).

Complaint Counsel's Response to Finding No. 2.11:

Complaint counsel has no specific response.

2.12. It is also possible that Michael Dey, CEO of ESI, may have attended. (11 Tr. 2498 (Herman)).

Complaint Counsel's Response to Finding No. 2.12:

Complaint counsel has no specific response.

2.13. During that first mediation conference on November 19, 1996, Judge Rueter requested oral argument on the substantive merits of the case. (11 Tr. 2498 (Herman); SPX 1222 at 58:13-23 (Alaburda I.H.)). Judge Rueter gave the parties a sheet of questions that provided a framework for the oral argument, and that served as discussion points for settlement. (11 Tr. 2498 (Herman); SPX 77). The oral argument lasted between 1 and 2 hours. (11 Tr. 2499 (Herman)). After the argument, Judge Rueter called the parties into his chambers one at a time to explore their settlement positions, which was his practice throughout the mediation process. (11

Tr. 2499 (Herman)).

Complaint Counsel's Response to Finding No. 2.13:

Complaint counsel has no specific response.

2.14. At the first settlement conference, Judge Rueter told Schering that ESI was demanding between $90 and $100 million in exchange for its staying off the market during the life of the patent. (11 Tr. 2500 (Herman); CX 1508 99:24-100:8 (J.F. Hoffman I.H.)). In response, Mr. Herman told Judge Rueter that Schering was not interested in such a settlement. (11 Tr. 2503 (Herman)). Schering agreed to propose an alternative framework for a settlement. (11 Tr. 2503 (Herman); SPX 75).

Complaint Counsel's Response to Finding No. 2.14:

The proposed finding is irrelevant, based on hearsay, and not supported by the evidence. Testimony regarding statements allegedly made by the magistrate and the trial judge was the subject of numerous objections at trial, and was admitted only on a limited basis and not for the truth of the matters asserted. *See* 11:2500-01, 11:2511-12, 12:2605-09; *see also* Tr. at 11:2517 (Nields) ("I've said that several times, and it's a -- kind of a standing statement, that [the testimony regarding what the judges said] is not being offered for the truth.").

The proposed finding is irrelevant and improperly relies on attorney statements made in the course of negotiation to imply that the parties acted in accordance with the cited statements. Drawing inferences concerning how the client acted based on attorneys' statements, while simultaneously asserting privilege as to underlying communications between those attorneys and their client, is unfounded and impermissible. CPRF 2.17.

2.15. On December 10, 1996, Schering proposed to ESI that they enter into a co-promotion venture in which Schering and ESI would jointly fund and manage a third-party workforce in marketing K-Dur 20. (11 Tr. 2503-04 (Herman); CX 1482 at 67:9-24 (Alaburda I.H.); CX 1494 at 101:4-16 (Driscoll I.H.); SPX 76).

Complaint Counsel's Response to Finding No. 2.15:

The proposed finding is incomplete. Under Schering's proposal, AHP would have to abandon its ANDA, which would have kept AHP's generic off the market permanently. *See* CPF 854-55.

2.16. ESI rejected the proposal on February 20, 1997, stating that, as a generic manufacturer, ESI did not have a sales and detail force capable of selling and marketing K-Dur 20. (11 Tr. 2504 (Herman); CX 1482 at 70:1-14 (Alaburda I.H.); CX 1492 at 56:5-24 (Dey I.H.); CX 457).

Complaint Counsel's Response to Finding No. 2.16:

The proposed finding is incomplete. AHP ultimately rejected Schering's proposal, stating it was concerned that abandoning its ANDA product under such an agreement would violate the antitrust laws. *See* CPF 856; Schering's proposed finding 2.20; CX 458 (3/19/97 letter from Paul H. Heller, outside counsel for AHP, to Anthony Herman, outside counsel for Schering); SPX 79 (4/18/97 joint letter regarding settlement discussions from Anthony Herman, outside counsel for Schering, to Magistrate Judge Rueter, reporting that AHP rejected Schering's proposal "citing antitrust concerns."); CX 1482† at 97:8-97:25 (Alaburda IH) (explaining that Schering had the only 20 mEq product and that AHP's agreement not to sell any product during the period of the patent gave rise to concerns that the agreement would violate the antitrust laws). Also, the February 20th letter reiterated AHP's offer to settle on the basis of a license that would allow AHP to market its own K-Dur product, and under which it would pay Schering "a significant fee." CX 457.

C. The February 1997 Settlement Mediation Conference with Judge Rueter

2.17. Eight days later, on February 28, 1997, another mediation session took place in Judge Rueter's chambers in Philadelphia. (11 Tr. 2504 (Herman); SPX 1202). Mr. Herman, Ms. Lee, and Mr. Driscoll attended on behalf of Key. (11 Tr. 2504 (Herman)). Mr. Heller, Ms. Somerville, and Mr. Alaburda were there representing ESI. (11 Tr. 2504 (Herman); CX 1482 at 17:2-8 (Alaburda I.H.)). Judge Rueter called each party into his chambers separately, explored

the parties' respective settlement positions, and relayed what the opposition was proposing. (11 Tr. 2505 (Herman)). Schering told Judge Rueter that it had made the copromote proposal. (11 Tr. 2510 (Herman)). Judge Rueter told Schering that ESI's position remained that it wanted Schering to make a payment. (11 Tr. 2510-11 (Herman)). Schering told Judge Rueter that it was not interested in that approach, because Schering had antitrust concerns and because Schering was reasonably confident it would win the case. (11 Tr. 2511 (Herman); SPX 1222 at 64:7-14 (Alaburda I.H.)). Schering told Judge Rueter that it did not want to settle at all. (SPX 1231 at 96:10-97:4 (Driscoll I.H.)). Judge Rueter responded that both he and Judge DuBois wanted the case to settle, and he wanted Schering to go back and find a creative approach that would settle the case. (11 Tr. 2511 (Herman); SPX 1231 at 96:10-98:3 (Driscoll I.H.)). Judge Rueter told Schering that Judge DuBois did not want to try the case, and wanted a settlement. (SPX 1231 at 96:12-22, 97:5-9 (Driscoll I.H.)).

Complaint Counsel's Response to Finding No. 2.17:

The proposed finding is irrelevant and improperly relies on attorney statements, made in the course of negotiations, to imply that the parties acted in accordance with the cited statements. Complaint counsel was not allowed any discovery as to what advice attorneys actually gave their clients, due to assertions of privilege by respondents' counsel. *See, e.g.* Tr. at 12:2609-10; *Cf.* CX 1509 at 5:8-20 (Mr. Nields saying he would object to questions relating to privileged communications); 19:15-20:7 (privilege objection to question concerning whether Mr. Hoffman was bluffing during his

negotiating with Upsher); 35:21-25 (privilege objection to question concerning whether Mr. Hoffman had talked with Mr. Rule about the Upsher patent infringement litigation (Hoffman dep). Drawing inferences concerning how the client acted based on attorneys' statements, while simultaneously asserting privilege as to underlying communications between those attorneys and their client, is unfounded and impermissible. Tr. at 12:2617-18 (Judge Chappell reasoning that implying a client's conduct based on what his attorney said to a Magistrate without connecting the attorney's remarks to the client does not "add[] up"; Tr. at 16:3853-55 (Judge Chappell reasoning that it is impermissible to have attorney testify as to client's intentions without providing a foundation which does not rely on privileged communications.). Furthermore, the statements are inconsistant with Schering's conduct: many occurred after Schering had already agreed to pay Upsher $60 million to stay off the market (*see, e.g.*, Schering's proposed findings 2.26, 2.29-2.33, 2.39, 2.40); and in the end Schering paid AHP $15 million to stay off the market. The attorney statements should only be taken as Schering simply posturing as part of the negotiating process, in order to strike a better deal.

The proposed finding is irrelevant, based on hearsay, and not supported by the evidence. Testimony regarding statements allegedly made by the magistrate and the trial judge was the subject of numerous objections at trial, and was admitted only on a limited basis and not for the truth of the matters asserted. *See* 11:2500-01, 11:2511-12, 12:2605-09; *see also* Tr. at 11:2517 (Nields) ("I've said that several times, and it's a -- kind of a standing statement, that [the testimony regarding what the judges said] is not being offered for the truth.").

The proposed finding is misleading, irrelevant, and not supported by the evidence to the extent it suggests or implies that the magistrate judge or the trial judge coerced Schering into its agreement with AHP, or that Schering acted on a belief that it was being threatened by these court officials. *See* CPRF 2.4.

2.18. On March 12, 1997, Judge DuBois sent a letter to counsel stating that he understood from Judge Rueter that settlement negotiations were continuing, and expressing his hope that the parties would settle. (11 Tr. 2513 (Herman); SPX 1198).

Complaint Counsel's Response to Finding No. 2.18:

The proposed finding is not relevant. Otherwise, complaint counsel has no specific response.

2.19. By the time of the February 1997 mediation session, John F. Hoffman had been given supervisory responsibility for the ESI case. (12 Tr. 2603, 2623-24 (J.F. Hoffman)). Mr. Hoffman is Staff Vice President and Associate General Counsel for Schering, and has responsibility for all investigations and litigation facing Schering, including patent litigation and with the exception of employment litigation. (12 Tr. 2603 (J.F. Hoffman). For the last 25 years, Mr. Hoffman's legal practice has focused on antitrust law. (12 Tr. 2602 (J.F. Hoffman). Mr. Hoffman does not recall specifically when his first meeting with Judge Rueter was. (12 Tr. 2603-05 (J.F. Hoffman)).

Complaint Counsel's Response to Finding No. 2.19:

Complaint counsel has no specific response.

2.20. Following the February 1997 mediation session, the parties continued to discuss settlement proposals. Mr. Hoffman had one telephone conference with counsel for ESI. (12 Tr. 2603 (J.F. Hoffman)). Mr. Hoffman told ESI that Schering would not pay another company to stay off the market. (12 Tr. 2631-32 (J.F. Hoffman); CX 1508 at 100:13-16 (J.F. Hoffman I.H.)). In response, ESI's representatives said that any antitrust problems could be worked out. (12 Tr. 2632 (J.F. Hoffman)). On March 19, 1997, Mr. Heller wrote Mr. Herman a letter stating that he had been advised that Schering's copromote proposal "raises considerable antitrust risks." (11 Tr. 2513 (Herman); CX 458). The letter noted, again, that ESI was amenable to an arrangement whereby Schering would pay ESI and ESI would receive a license to enter the market in the future. (12 Tr. 2659-60 (J.F. Hoffman); CX 458). As Schering had already explained to ESI, this proposal was unacceptable. (12 Tr. 2631-32 (J.F. Hoffman)).

Complaint Counsel's Response to Finding No. 2.20:

The proposed finding is irrelevant and improperly relies on attorney statements made in the course of negotiation to imply that the parties acted in accordance with the cited statements. Drawing inferences concerning how the client acted based on attorneys' statements, while simultaneously asserting privilege as to underlying communications between those attorneys and their client, is unfounded and impermissible. CPRF 2.17.

2.21. On April 18, 1997, Mr. Herman sent a letter to Judge Rueter on behalf of both Schering and ESI reporting on the state of the settlement efforts as being at "a standstill." (11 Tr. 2514 (Herman); CX 459; CX 1492 at 129:1-2 (Dey I.H.)).

Complaint Counsel's Response to Finding No. 2.21:

The proposed finding is not relevant. Otherwise, complaint counsel has no specific response.

2.22. Judge DuBois held a conference call with the parties, and urged them to return to mediation with Judge Rueter. (11 Tr. 2514 (Herman); CX 1492 at 129:12-17 (Dey I.H.)). On July 16, 1997, Judge DuBois ordered the parties to submit a settlement report. (11 Tr. 2514-15 (Herman); CX 462). In response to that order, on July 25, 1997, Mr. Herman wrote to Judge DuBois on behalf of both ESI and Key reporting on the status of settlement. (11 Tr. 2514-15 (Herman); CX 462) That letter states that Key will be prepared to begin meeting with Judge Rueter during the week of August 18. (11 Tr. 2515 (Herman); CX 462).

Complaint Counsel's Response to Finding No. 2.22:

The proposed finding is misleading, irrelevant, and not supported by the evidence to the extent it suggests or implies that the magistrate judge or the trial judge coerced Schering into its agreement with AHP, or that Schering acted on a belief that it was being

threatened by these court officials. See CPRF 2.4.

D. The August 1997 Settlement Mediation Conference with Judge Rueter

2.23. On August 20, 1997, Judge Rueter held a third mediation session in his chambers. (11 Tr. 2515 (Herman); SPX 552). Ms. Lee, Mr. Herman, Charles Rule, Jeffrey Wasserstein, and Raman Kapur, attended on behalf of Schering. (11 Tr. 2515-16 (Herman); 2573-2614 (Rule); 7 Tr. 1432 (Kapur I.H.)). Mr. Kapur is the head of Schering's generic division. (11 Tr. 2525 (Herman).

Complaint Counsel's Response to Finding No. 2.23:

The proposed finding is incomplete. The chronology of events fails to state that in June 1997, Schering agreed to pay Upsher $60 million to stay out of the market with its generic K-Dur 20. CPF 166-169.

2.24. Charles F. Rule is an attorney specializing in antitrust law. (11 Tr. 2571 (Rule). In 1987, Mr. Rule was appointed Assistant Attorney General in charge of the Antitrust Division of the U.S. Department of Justice. (11 Tr. 2572-73 (Rule); CX 1525 at 9:8-15 (Rule Depo.); 11 Tr. 2516 (Herman)). After leaving the Department of Justice in 1989, Mr. Rule became a partner at Covington & Burling. (11 Tr. 2573 (Rule); CX 1525 at 9:8-15 (Rule Depo.); 11 Tr. 2516 (Herman)). He is now a partner and head of the antitrust group at Fried, Frank, Harris, Shriver & Jacobson. (11 Tr. 2573 (Rule); CX 1525 at 7:4-5 (Rule Depo.)). Mr. Rule was a partner at

Covington & Burling in 1997. (11 Tr. 2573 (Rule)).

Complaint Counsel's Response to Finding No. 2.24:

The proposed finding is incomplete. Mr. Rule, who testified about his discussions regarding antitrust issues with the magistrate judge in the Schering/AHP patent litigation, admits that he was not retained by the magistrate as a special master, he was not providing expert testimony to the magistrate, he was not neutral in the proceeding, and he was "definitely representing [his] client" which had the incentive to minimize its payments to AHP. *See* CPF 861; Tr. at 11:2588-89 (Rule). Thus, any statements made by Mr. Rule to Magistrate Judge Rueter cannot be regarded as an objective assessment of the antitrust laws as they stood at the time, but rather as advocacy to bolster his client's negotiating position. Mr. Rule also admitted that Schering paid him to testify in this proceeding. Tr. at 11:2585 (Rule).

2.25. Dr. Dey, Mr. Alaburda, Mr. Heller, and Ms. Somerville attended the August 20, 1997 mediation session on behalf of ESI. (11 Tr. 2515 (Herman)).

Complaint Counsel's Response to Finding No. 2.25:

Complaint counsel has no specific response.

2.26. The mediation session began with a joint meeting in Judge Rueter's courtroom, and then

each party met separately with the judge in his chambers. (11 Tr. 2515-16 (Herman)). During the joint session Mr. Rule commented that there were antitrust concerns raised by ESI's settlement proposal, under which ESI would stay off the market in exchange for a large sum of money that would be calculated on the basis of the profits that Schering stood to lose if ESI's generic equivalent to K-Dur entered the market. (11 Tr. 2575-76 (Rule); SPX 1241 at 138:17-25; 139:1-5 (Kapur I.H.); 7 Tr. 1429-30 (Kapur I.H.).

Complaint Counsel's Response to Finding No. 2.26:

The proposed finding is incomplete. Schering did not present an impartial brief of the antitrust issues in the Schering/AHP patent litigation to the magistrate judge. See CPRF 2.24.

The proposed finding is irrelevant and improperly relies on attorney statements made in the course of negotiation to imply that the parties acted in accordance with the cited statements. Drawing inferences concerning how the client acted based on attorneys' statements, while simultaneously asserting privilege as to underlying communications between those attorneys and their client, is unfounded and impermissible. CPRF 2.17.

The proposed finding is also irrelevant. There is no evidence that the magistrate saw his role as passing judgment on antitrust issues that might be raised by the settlement. The magistrate sought no impartial advice from a special master or other independent resource. Instead, he was given an apparently rather limited discussion of antitrust issues, presented by an advocate for Schering. Tr. at 11:2589 (Rule) (he was there as Schering's lawyer to represent his client). The magistrate may have viewed Schering's protestations

as mere posturing, particularly once the terms of Schering's settlement with Upsher-Smith became known. Moreover, according to Mr. Rule's testimony, the magistrate was advised that: (1) a settlement with a payment to stay off the market would raise less serious issues as long as it was based on AHP's lost revenues rather than being calculated as a percentage of Schering's profits; Tr. at 11:2584 (told magistrate there was "a big difference" between the two, both in size and conceptually); (2) any settlement that occurred would automatically escape *per se* condemnation. Tr. at 11:2581. Paying a competitor to stay off the market can be expected to harm the competitive process, and thereby injure consumers, regardless of whether the payment is framed in terms of replacing the lost revenues of the generic or paying a portion of the branded company's profits. This could well have suggested to the magistrate that no significant antitrust problems would be raised by payments based on AHP's lost revenues. No one ever appeared before the magistrate to oppose the January 1998 agreement or to argue that it would violate the antitrust laws.

2.27. During the afternoon, the parties met with Judge Rueter separately. (11 Tr. 2576 (Rule)). Judge Rueter made clear that Judge DuBois wanted the case to settle. (SPX 1260 at 131:13-17 (Wasserstein I.H.); SPX 1267 at 27:1-15, 27:23-25 (Rule Depo.)).

Complaint Counsel's Response to Finding No. 2.27:

The proposed finding is misleading, irrelevant, and not supported by the evidence to the extent it suggests or implies that the magistrate judge or the trial judge coerced Schering into its agreement with AHP, or that Schering acted on a belief that it was being threatened by these court officials. See CPRF 2.4.

2.28. Judge Rueter asked why an antitrust lawyer was engaged in the mediation. (11 Tr. 2579 (Rule); CX 1525 at 28:18-25 (Rule Depo.)). Judge Rueter stated that he and Judge DuBois would be approving the settlement, and that he could not understand how there could be "real antitrust issues." (11 Tr. 2516 (Herman); SPX 1260 at 131:22-132:9 (Wasserstein I.H.)).

Complaint Counsel's Response to Finding No. 2.28:

The proposed finding is irrelevant, hearsay, and not supported by the evidence. Testimony regarding statements allegedly made by the magistrate and the trial judge was the subject of numerous objections at trial, and was admitted only on a limited basis and not for the truth of the matters asserted. See CPRF 2.17.

The proposed finding is incomplete. Schering did not present an impartial brief of the antitrust issues in the Schering/AHP patent litigation to the magistrate judge. See CPRF 2.24, 2.26.

The proposed finding's suggestion that the magistrate or trial judge approved the agreement in principle is not supported by the evidence. There was no court approval of either the January 1998 settlement terms, or the June 1998 final agreement. *See* CPF 893-

900. Neither agreement was submitted for approval, embodied in any court order, or subjected to any approval process. *See* CPF 893-900. Furthermore, the June 1998 final agreement contains additional terms not contained in the January 1998 agreement in principle that further reflect the anticompetitive nature of the parties' agreement. *See* CPF 881; CPRF 2.84.

2.29. Mr. Rule responded that in his view, Judge Rueter's approval would be "helpful but not dispositive." (11 Tr. 2519 (Herman); SPX 1260 at 131:22-132:9 (Wasserstein I.H.)). Mr. Rule told Judge Rueter that his involvement in the settlement mediation was not sufficient to give the settlement Noerr-Pennington protection immunizing it under the antitrust laws. (11 Tr. 2581 (Rule); CX 1525 at 28:18-29:12, 31:14-32:21 (Rule Depo.)). Mr. Rule explained to Judge Rueter that the law did give deference to a judicially brokered settlement. (11 Tr. 2581 (Rule)). The law presumed that in brokering a settlement, a judge is acting in the public interest and would not approve a per se violation. (11 Tr. 2581 (Rule); CX 1525 at 29:1-12, 31:14-32:21 (Rule Depo.)). Mr. Rule told Judge Rueter that the law values settlements and therefore a judicially brokered settlement in particular would be given deference and analyzed under a rule of reason. (11 Tr. 2580-81, 2588 (Rule); CX 1525 at 29:1-12, 31:14-32:21 (Rule Depo.)).

Complaint Counsel's Response to Finding No. 2.29:

The proposed finding is misleading. Schering did not present an impartial brief of the antitrust issues in the Schering/AHP patent litigation to the magistrate judge.

See CPRF 2.24, 2.26. The proposed finding's suggestion that the magistrate or trial judge approved the agreement in principle is not supported by the evidence. *See* CPRF 2.28.

The proposed finding is irrelevant and improperly relies on attorney statements made in the course of negotiation to imply that the parties acted in accordance with the cited statements. Drawing inferences concerning how the client acted based on attorneys' statements, while simultaneously asserting privilege as to underlying communications between those attorneys and their client, is unfounded and impermissible. CPRF 2.17.

2.30. Notwithstanding the deference accorded to judicially brokered settlements, Mr. Rule explained that he was concerned about the nature of the ESI proposal, which demanded a payment from Schering to ESI. (11 Tr. 2581 (Rule); CX 1525 at 29:13-32:21 (Rule Depo.)). Mr. Rule told Judge Rueter that such a settlement raised antitrust concerns. (11 Tr. 2575, 2581-82 (Rule); CX 1525 at 29:13-32:21 (Rule Depo.)).

Complaint Counsel's Response to Finding No. 2.30:

The proposed finding is misleading. Schering did not present an impartial brief of the antitrust issues in the Schering/AHP patent litigation to the magistrate judge. *See* CPRF 2.24, 2.26.

The proposed finding is irrelevant and improperly relies on attorney statements made in the course of negotiation to imply that the parties acted in accordance with the cited statements. Drawing inferences concerning how the client acted based on attorneys' statements, while simultaneously asserting privilege as to underlying communications

between those attorneys and their client, is unfounded and impermissible. CPRF 2.17.

2.31. Judge Rueter left chambers and went to talk to the ESI contingent. (11 Tr. 2582 (Rule)). When the judge returned, he had a trade publication that indicated that there were other settlements involving the same type of payments to keep a potential generic competitor off the market. (11 Tr. 2582 (Rule); CX 1525 at 40:15-41:2 (Rule Depo.); SPX 1267 at 33:16-34:9 (Rule Depo.)). The judge specifically mentioned a settlement between Bayer and Barr. (11 Tr. 2582 (Rule); CX 1525 at 40:15-41:2 (Rule Depo.); SPX 1267 at 33:16-34:9 (Rule Depo.)). Mr. Rule told the judge that he was aware that there had been other such settlements, but that the fact that those settlements existed and were on the public record did not mean that they were lawful under the antitrust laws, or that the parties would not be subject to investigation or scrutiny. (11 Tr. 2582-83 (Rule); SPX 1267 at 33:16-34:9 (Rule Depo.)).

Complaint Counsel's Response to Finding No. 2.31:

The proposed finding is misleading and not relevant. Schering did not present an impartial brief of the antitrust issues in the Schering/AHP patent litigation to the magistrate judge. *See* CPRF 2.24, 2.26. The proposed finding's suggestion that the magistrate or trial judge approved the agreement in principle is not supported by the evidence. *See* CPRF 2.28.

The proposed finding is irrelevant and improperly relies on attorney statements made in the course of negotiation to imply that the parties acted in accordance with the cited statements. Drawing inferences concerning how the client acted based on attorneys'

statements, while simultaneously asserting privilege as to underlying communications between those attorneys and their client, is unfounded and impermissible. CPRF 2.17.

Mr. Rule's testimony that he was concerned about payment from Schering to AHP is contradicted by other evidence that prior to making such statements, Schering had agreed to pay Upsher $60 million to stay off the market, and had offered AHP money through Schering's proposal that AHP abandon its ANDA product and co-promote Schering's K-Dur 20. CPRF 2.17.

2.32. The judge continued to discuss a payment. (11 Tr. 2583 (Rule); CX 1525 at 34:10-35:6 (Rule Depo.); SPX 1260 at 131:18-132:9 (Wasserstein I.H.)). Mr. Rule told the judge that there were bases under which there could be a payment of money. (11 Tr. 2583 (Rule)). For example, there could be payments of reasonable attorneys' fees. (11 Tr. 2583 (Rule)). There could also be a payment associated with a separate, stand-alone co-promotion or licensing agreement between the parties. (11 Tr. 2583 (Rule)). It was troubling, however, for Schering to pay ESI some part of its potential lost profits. (11 Tr. 2583 (Rule), 2516 (Herman)). It was particularly troubling if the payment was based on Schering's potential lost profits, rather than the expected revenues of ESI. (11 Tr. 2584 (Rule); CX 1525 at 30:14-31:12 (Rule Depo.)).

Complaint Counsel's Response to Finding No. 2.32:

The proposed finding is misleading and not relevant. Schering did not present an impartial brief of the antitrust issues in the Schering/AHP patent litigation to the magistrate judge. *See* CPRF 2.24, 2.26. The proposed finding's suggestion that the

magistrate or trial judge approved the agreement in principle is not supported by the evidence. *See* CPRF 2.28.

The proposed finding is irrelevant and improperly relies on attorney statements made in the course of negotiation to imply that the parties acted in accordance with the cited statements. Drawing inferences concerning how the client acted based on attorneys' statements, while simultaneously asserting privilege as to underlying communications between those attorneys and their client, is unfounded and impermissible. CPRF 2.17.

Mr. Rule's testimony that he was concerned about payment from Schering to AHP is contradicted by other evidence that prior to making such statements, Schering had agreed to pay Upsher $60 million to stay off the market, and had offered AHP money through Schering's proposal that AHP abandon its ANDA product and co-promote Schering's K-Dur 20. CPRF 2.17.

2.33. Schering made it quite clear that, based on its view of the case and the antitrust issues, it was not prepared to settle in the manner proposed by ESI. (11 Tr. 2584 (Rule); SPX 1260 at 131:18-22 (Wasserstein I.H.)). Judge Rueter urged the parties to continue to talk to try to reach an agreement. (11 Tr. 2584 (Rule); SPX 1267 at 27:6-15, 27:23-28:4; 44:21-45:18 (Rule Depo.)).

Complaint Counsel's Response to Finding No. 2.33:

The proposed finding is irrelevant and improperly relies on attorney statements

made in the course of negotiation to imply that the parties acted in accordance with the cited statements. Drawing inferences concerning how the client acted based on attorneys' statements, while simultaneously asserting privilege as to underlying communications between those attorneys and their client, is unfounded and impermissible. CPRF 2.17.

The proposed finding is misleading, irrelevant, and not supported by the evidence to the extent it suggests or implies that the magistrate judge or the trial judge coerced Schering into its agreement with AHP, or that Schering acted on a belief that it was being threatened by these court officials. See CPRF 2.4. The proposed finding is misleading because Schering did not present an impartial brief of the antitrust issues in the Schering/AHP patent litigation to the magistrate judge. *See* CPRF 2.24.

The proposed finding is misleading and not relevant. Schering did not present an impartial brief of the antitrust issues in the Schering/AHP patent litigation to the magistrate judge. *See* CPRF 2.24, 2.26. The proposed finding's suggestion that the magistrate or trial judge approved the agreement in principle is not supported by the evidence. *See* CPRF 2.28.

2.34. Following the August 20, 1997 mediation session, on September 24, 1997, Mr. Heller sent a letter to Mr. Herman. (11 Tr. 2519 (Herman); SPX 94). That letter projected the amount of profits that ESI believed it would earn if it were to win the case. (11 Tr. 2519 (Herman); SPX 94, at SP 13 00004). ESI projected that, with the simultaneous launch of three generic versions of K-Dur 20, ESI's generic would earn over $15 million in sales in the first year on the market. (SPX 94, at SP 13 00004). ESI projected that its generic version of K-Dur 20 would earn over

$25 million in sales in its second year on the market, over $28 million in its third year on the market, over $24 million in its fourth year on the market, and over $23 million in its fifth year on the market. (SPX 94, at SP 13 00004).

Complaint Counsel's Response to Finding No. 2.34:

Complaint counsel has no specific response.

2.35. Schering was willing to discuss other opportunities that were mutually beneficial to the parties apart from an outright payment to ESI. (7 Tr. 1431 (Kapur I.H.); SPX 1242 at 125:18-127:19 (Kapur Depo.)). Mr. Driscoll discussed several such opportunities with ESI, including co-marketing Schering's products. (CX 1510 at 140:1-2, 140:7-14, 140:23-25 (Kapur I.H.); 7 Tr. 1431 (Kapur I.H.)).

Complaint Counsel's Response to Finding No. 2.35:

The proposed finding is misleading in that it suggests that Schering's other proposals were pro-competitive. In fact, Schering's proposal that AHP abandon its ANDA product and co-promote Schering's K-Dur 20 would have kept AHP's competing generic off the market permanently. *See* CPF 854-55.

2.36. On October 14, 1997, Mr. Dey wrote a letter to Mr. Kapur to discuss a proposal for ESI to license several products to Warrick for overseas sale. (11 Tr. 2519 (Herman); CX 465; CX 1482 at 121:1-4, 121:10-122:6, 122:25-123:9, 123:20-124:12 (Alaburda (I.H.). Those two

products were enalapril and buspirone. (11 Tr. 2519-20 (Herman); CX 1482 at 122:25-123:1-9, (Alaburda I.H.); SPX 1242 at 125:18-127:19 (Kapur Depo.)).

Complaint Counsel's Response to Finding No. 2.36:

Complaint counsel has no specific response.

E. The October 1997 Settlement Mediation Conference with Judge Rueter

2.37. The next mediation session was on October 27, 1997. (11 Tr. 2520 (Herman); 12 Tr. 2604 (J.F. Hoffman)). It occurred in Judge Rueter's chambers. (11 Tr. 2520 (Herman)). For Schering, Mr. Herman, Mr. Kapur, Ms. Lee, and Mr. Wasserstein were present, as was John Hoffman, Schering's Vice President and Associate General Counsel in charge of litigation, including antitrust. (11 Tr. 2520 (Herman); 12 Tr. 2603-04 (J.F. Hoffman)).

Complaint Counsel's Response to Finding No. 2.37:

Complaint counsel has no specific response.

2.38. Judge Rueter talked about settlement with one party in his chambers while the other party waited in the courtroom. (12 Tr. 2605 (J.F. Hoffman)). The judge then rotated the parties and discussed settlement options with the other party. (12 Tr. 2605 (J.F. Hoffman)). During the October 27, 1997 mediation session, Judge Rueter explained that Judge Dubois did not want to try the case. (12 Tr. 2605 (J.F. Hoffman)). Judge Rueter stated further that Schering should

settle the case, and that he believed Schering should consider paying a significant amount of money to settle. (12 Tr. 2605 (J.F. Hoffman), 2703-04 (Driscoll); 11 Tr. 2520 (Herman); CX 1510 at 138:3-13 (Kapur I.H.); 7 Tr. 1433-34 (Kapur I.H.)).

Complaint Counsel's Response to Finding No. 2.38:

The proposed finding is misleading, irrelevant, and not supported by the evidence to the extent it suggests or implies that the magistrate judge or the trial judge coerced Schering into its agreement with AHP, or that Schering acted on a belief that it was being threatened by these court officials. *See* CPRF 2.4.

Furthermore, there is no reliable evidence that Judge Rueter personally believed Schering should consider paying AHP to stay off the market, or that he asked Schering to do so. Of the five cites that Schering gives for this proposition, only one, Mr. Hoffman's trial testimony, supports the statement in the findings. The rest only refer generally to AHP's proposal, or that Magistrate Judge Rueter generally was encouraging settlement. Thus, of the several Schering personnel who were present at the meeting, only one asserted that Magistrate Judge Rueter made this kind of statement. Mr. Hoffman's testimony was offered and admitted on a limited basis and not for the truth of the matter asserted. *See* Tr. at 12:2605-09.

2.39. Mr. Hoffman told Judge Rueter that Schering had antitrust concerns with such a settlement. (12 Tr. 2605 (J.F. Hoffman); CX 1508 at 99:8-15 (J.F. Hoffman I.H.); SPX 1239 at

103:24-104:4 (J.F. Hoffman I.H.); 11 Tr. 2520 (Herman); CX 1510 at 138:1-13 (Kapur I.H.); 7 Tr. 1429-30 (Kapur I.H.); CX 1511 at 123:14-124:13 (Kapur Depo.)). In response, Judge Rueter showed Mr. Hoffman a news report about a patent settlement involving an exchange of money. (12 Tr. 2613 (J.F. Hoffman)). Judge Rueter suggested that other companies included payments in connection with patent settlements, and that Schering could do so in the ESI litigation. (12 Tr. 2613 (J.F. Hoffman)).

Complaint Counsel's Response to Finding No. 2.39:

The proposed finding is misleading, irrelevant, and not supported by the evidence to the extent it suggests or implies that the magistrate judge or the trial judge coerced Schering into its agreement with AHP, or that Schering acted on a belief that it was being threatened by these court officials. *See* CPRF 2.4.

Furthermore, of the seven cites Schering has given for this proposition, only two actually support the fact asserted – Mr. Hoffman's trial testimony, and the second cite to Mr. Hoffman's investigational hearing. Mr. Hoffman's testimony should be disregarded in light of the fact that it finds no support from other sources, and because Mr. Hoffman's interest as Schering's counsel in negotiating the best deal possible for Schering raises questions of the credibility of Mr. Hoffman's statements.

The proposed finding is irrelevant and improperly relies on attorney statements made in the course of negotiation to imply that the parties acted in accordance with the cited statements. Drawing inferences concerning how the client acted based on attorneys' statements, while simultaneously asserting privilege as to underlying communications

between those attorneys and their client, is unfounded and impermissible. CPRF 2.17.

2.40. Mr. Hoffman responded that Schering could not engage in such a settlement simply because others had. (12 Tr. 2613 (J.F. Hoffman). Indeed, Mr. Hoffman told Judge Rueter that "my mother had taught me that just because everyone else is doing it doesn't mean I can do it." (12 Tr. 2613 (J.F. Hoffman)). Mr. Hoffman told Judge Rueter that a settlement could not be done simply because it could be a good deal for both parties; it also had to be fair to consumers. (12 Tr. 2613 (J.F. Hoffman)). Mr. Hoffman stated further that Schering did not want to settle the case, but wanted to try it. (12 Tr. 2612 (J.F. Hoffman); CX 1510 at 139:1-5 (Kapur I.H.); 7 Tr. 1434-35 (Kapur I.H.).

Complaint Counsel's Response to Finding No. 2.40:

The proposed finding is irrelevant and improperly relies on attorney statements made in the course of negotiation to imply that the parties acted in accordance with the cited statements. Drawing inferences concerning how the client acted based on attorneys' statements, while simultaneously asserting privilege as to underlying communications between those attorneys and their client, is unfounded and impermissible. CPRF 2.17.

2.41. Finally, Mr. Hoffman told Judge Rueter that Schering doubted whether ESI's proposed product could obtain FDA approval, providing still another reason that it did not make sense to settle the case. (12 Tr. 2613 (J.F. Hoffman); 11 Tr. 2520-21 (Herman)). Schering told Judge Rueter that it did not appear that ESI's product could be approved, given the considerable length

of time that had passed since ESI submitted its ANDA to the FDA. (11 Tr. 2521 (Herman); 12 Tr. 2614 (J.F. Hoffman)).

Complaint Counsel's Response to Finding No. 2.41:

The proposed finding is irrelevant and improperly relies on attorney statements made in the course of negotiation to imply that the parties acted in accordance with the cited statements. Drawing inferences concerning how the client acted based on attorneys' statements, while simultaneously asserting privilege as to underlying communications between those attorneys and their client, is unfounded and impermissible. CPRF 2.17.

2.42. Mr. Hoffman stated, however, that if Schering was to settle the patent lawsuit against ESI, it would do so by splitting the remaining life of the K-Dur patent to roughly reflect the merits of the litigation. (12 Tr. 2614 (J.F. Hoffman); CX 1509 at 106:15-21 (J.F. Hoffman Depo.)).

Complaint Counsel's Response to Finding No. 2.42:

The proposed finding is irrelevant and not supported by the evidence. Because of privilege claims, complaint counsel has had no opportunity to test statements alleging that Schering attempted to settle the patent litigation by splitting the patent life to "reflect the merits of the litigation." Access to privileged communications and documents was necessary in order to determine whether Schering's internal estimates of its likelihood of

success in the patent litigation (if any) were in any way consistent with these assertions. As Your Honor has properly recognized, these statements cannot support an inference that Schering acted in accordance with these statements. See Tr. at 12:2617-18.

2.43. At the end of the October 27, 1997 mediation session, no settlement between the parties was reached. (12 Tr. 2618 (J.F. Hoffman); 11 Tr. 2520 (Herman)).

Complaint Counsel's Response to Finding No. 2.43:

Complaint counsel has no specific response.

2.44. Another settlement conference was scheduled for November 17, 1997. (CX 468). On November 12, 1997, Mr. Herman sent Judge Rueter a letter expressing Schering's position that it would be a waste of the Court's and the parties' time to proceed with the scheduled settlement conference. (11 Tr. 2521 (Herman); CX 468). At that point, ESI had told Schering that it was no longer interested in a co-promotion arrangement. (11 Tr. 2522 (Herman); CX 468). This was the last time the copromote concept was raised. (11 Tr. 2522 (Herman)). The letter informed Judge Rueter that ESI had stated it was unwilling to agree to Schering's copromote proposal because of antitrust concerns. (11 Tr. 2522 (Herman); CX 468). ESI responded that although ESI was not interested in a co-promote, the parties were considering separate licensing opportunities. (SPX 1195).

Complaint Counsel's Response to Finding No. 2.44:

The proposed finding is incomplete. Under Schering's co-promotion proposal, AHP would have to abandon its ANDA, which would have kept AHP's generic off the market permanently. *See* CPF 854-55.

2.45. Mr. Herman's letter also addressed Key's concerns that ESI lacked a potentially marketable product, informing Judge Rueter that Key was unwilling to make another settlement offer until ESI demonstrated that it has a bona fide 20 milliequivalent potassium chloride product that but for the lawsuit would receive FDA approval. (11 Tr. 2522 (Herman); CX 468).

Complaint Counsel's Response to Finding No. 2.45:

Complaint counsel has no specific response.

2.46. The proposed November 17, 1997 settlement conference was put off. (11 Tr. 2521 (Herman)).

Complaint Counsel's Response to Finding No. 2.46:

The proposed finding is not relevant. Otherwise, complaint counsel has no specific response.

2.47. ESI then provided Schering with information related to the current FDA approval status of ESI's proposed generic version of K-Dur. (11 Tr. 2523 (Herman); SPX 82). On December 15, 1997, Mr. Herman summarized this information in a letter to ESI's counsel, Mr. Heller and

Ms. Somerville. (11 Tr. 2523 (Herman); CX 469). Mr. Herman told Mr. Heller and Ms. Somerville that he intended to provide the summary to Schering's business people. (11 Tr. 2523 (Herman); CX 469).

Complaint Counsel's Response to Finding No. 2.47:

Complaint counsel has no specific response.

2.48. The December 15, 1997 summary noted the difficulties ESI had up to that point in trying to obtain FDA approval for its proposed generic version of K-Dur 20. (CX 469).

Complaint Counsel's Response to Finding No. 2.48:

Complaint counsel has no specific response.

2.49. As noted in the study, the first problem ESI had involved a study included in the ANDA designed to demonstrate ESI's proposed generic was bioequivalent to K-Dur 20. (CX 469; 11 Tr. 2523 (Herman)). The biocquivalence study was performed in 1989. (CX 469; 11 Tr. 2523-24 (Herman)). The FDA found five different deficiencies with regard to the study. (CX 469; 11 Tr. 2523-24 (Herman)). ESI did not respond to the FDA regarding the deficiencies until May 14, 1997. (CX 469; 11 Tr. 2524 (Herman)). On August 6, 1997, FDA rejected ESI's response to the five deficiencies in ESI's bioequivalence study. (CX 469; 11 Tr. 2524 (Herman)). ESI began a new bioequivalence study on December 8, 1997, a week before the December 15, 1997 summary. (CX 469; 11 Tr. Herman 2524 (Herman)).

Complaint Counsel's Response to Finding No. 2.49:

This proposed finding is incomplete to the extent that Schering implies it concluded AHP did have an approvable ANDA. In his November 12, 1997 letter to Judge Rueter, Mr. Herman had stated that "Key is unwilling to make another settlement offer until ESI demonstrates that it has a bona fide 20 mEq potassium chloride product that, but for this lawsuit, would receive FDA approval." See CX 468; Schering's proposed finding 2.45. Two days after Mr. Herman shared with Schering-Plough's negotiating committee the information he had received concerning AHP's ANDA, Schering did in fact make another settlement offer to AHP. Schering's proposed findings 2.50-2.53. The proper implication, then, is that Schering was satisfied that AHP had an approvable ANDA and, as a result of this belief, acted to prevent AHP from entering the market. *See* CPF 866-868.

Also, correspondence by Schering's counsel expressly states that, in reaching the January 1998 agreement in principle, Schering relied on AHP's representations that its ANDA was approvable. CX 474 at SP 13 00633. Schering's outside counsel, in a June 1998 letter, stated that "FDA approval . . . was an essential component of the principles of agreement, and the [graduated] payment schedule [in the agreement in principle] reflects the central importance of [AHP's] representations that AHP's generic was "approvable." CX 474 at SP 13 00633. In addition, Dr. Dey stated his belief that Schering would not have settled the litigation if it believed AHP did not have a product that could obtain FDA approval. CX 1492 at 68:9-68:13 (Dey IH). CPF 875.

The proposed finding is incomplete because it fails to point out that there were only two significant deficiencies in AHP's ANDA that must be corrected before the ANDA can be approvable. CX 469 at AHP 05 00176.

2.50. Two later, in a December 17, 1997 letter from Mr. Herman to ESI, Schering proposed to settle the lawsuit by providing ESI with a license to market its proposed generic version of K-Dur effective December 31, 2003. (12 Tr. 2638-39 (J.F. Hoffman); (11 Tr. 2525 (Herman); CX 470).

Complaint Counsel's Response to Finding No. 2.50:

Complaint counsel observes that this proposal would have kept AHP out of the market for approximately six years. Otherwise, complaint counsel has no specific response.

2.51. The letter stated:

> We propose to settle the case based on the following: One, Schering shall grant ESI a royalty-free license under the '743 patent to make, use, offer for sale and sell its Micro-K 20 potassium chloride product in the United States effective December 31, 2003. Until that date, ESI shall not make, use, offer for sale or sell its micro-K product.

(CX 470; 11 Tr. 2525 (Herman)).

Complaint Counsel's Response to Finding No. 2.51:

The proposed finding is incomplete. A far broader provision was added to the final settlement agreement reached in June, 1998, after the involvement of the magistrate had ended. CPF 881, 896. Under the terms in the final settlement agreement, AHP could not market any potassium chloride product that is "therapeutically equivalent or bioequivalent to, or otherwise substitutable on a generic basis for, K-Dur 10 or K-Dur 20" until January 1, 2004 (CX 479 ¶ 3.1(a)(iii), ¶ 1.2 "Referencing Product");

2.52. Schering further proposed that "ESI will acknowledge infringement and validity of the '743 patent in a consent judgment." (CX 470; 11 Tr. 2525-26 (Herman)).

Complaint Counsel's Response to Finding No. 2.52:

Complaint counsel has no specific response.

2.53. Schering also proposed that:

> As an additional matter, ESI shall grant Schering, including its designee, exclusive licenses for buspirone, enalapril, and three other products under development by ESI to be mutually agreed upon by the parties. . . . In exchange for the licenses described in the unnumbered paragraph above, Schering shall pay ESI an up-front payment of $5 million and a 5 percent royalty on annual sales for ten years post-approval."

(CX 470; 11 Tr. 2526 (Herman)).

Complaint Counsel's Response to Finding No. 2.53:

Complaint counsel has no specific response.

2.54. ESI responded to Schering's offer on December 22, 1997, accepting the December 31, 2003 entry date:

> The general structure of your December 17 proposal is acceptable with the following modifications. The effective date of the license under the '743 patent should be December 31, 2003, or whenever a generic is placed on the market, whichever occurs earlier.

(CX 473; 11 Tr. 2527 (Herman); 12 Tr. 2639 (J.F. Hoffman)). ESI also agreed to acknowledge validity and enforceability but not infringement, which Key had wanted ESI to acknowledge. (11 Tr. 2528 (Herman); CX 473).

Complaint Counsel's Response to Finding No. 2.54:

This proposed finding is incomplete, misleading, and not supported by the evidence. ESI's response actually appeared thus:

> The general structure of your December 17 proposal is acceptable, *with the following modifications*:
>
> The effective date of the license under the '743 Patent should be

> December 31, 2003, *or* whenever a generic is placed on the market, whichever occurs earlier. . . .
>
> ESI will be able to market in the United States if the '743 Patent is invalidated or rendered unenforceable by another party. . . . CX 473.

In no way does this indicate that ESI accepted the December 31, 2003 entry date. Not only was the acceptance of any date contingent upon Schering accepting the other modifications presented in AHP's counterproposal, but also the date was changed to *either* December 31, 2003 *or* the date that the first generic was placed on the market, whichever came first. Schering rejected AHP's counterproposal, since acceptance would lead to AHP entering the market at the same time as Upsher, on September 1, 2001, if Upsher did not have exclusivity, or March 2002, if Upsher did have exclusivity. Moreover, at the time of its counterproposal, AHP was aware that Schering had paid Upsher to stay off the market until September 1, 2001. *See* CPF 863-865. Thus, if AHP agreed to any date at this time, it agreed to a September 1, 2001, or a March 2002, entry date.

2.55. The date of December 31, 2003 referred to in the letters differs from the date for ESI's product entry in the final agreement by one day. (11 Tr. 2525 (Herman)); CX 470; CX 473; CX 479). In the final agreement, the date agreed upon was January 1, 2004. (11 Tr. 2525 (Herman)); CX 479).

Complaint Counsel's Response to Finding No. 2.55:

The proposed finding is not relevant. Because AHP did not agree to the entry date at the time of the letters, it is not relevant that the date agreed upon on January 23, 1998, differed from it by one day. *See* CPFR 2.54; 2.57.

2.56. ESI also agreed to grant licenses to Schering for buspirone, enalapril, and three other products to be agreed upon. (11 Tr. 2528 (Herman)); CX 473; CX 1509 at 70:17-22 (J.F. Hoffman Depo.)). ESI countered with an initial $5 million payment, to be followed by further payments upon the FDA's issuance of an approval letter and thereafter for a total of $55 million on an agreed-upon time schedule. (11 Tr. 2528 (J.F. Hoffman); CX 473). This represents a $50 million difference between Schering's offer. (11 Tr. 2528 (Herman); CX 470; CX 473). ESI also proposed a royalty rate of 50 percent of gross profit for the licenses to Schering, as opposed to Schering's proposal of 5 percent of annual sales. (11 Tr. 2528-29 (Herman); CX 473; CX 470).

Complaint Counsel's Response to Finding No. 2.56:

The proposed finding is incomplete and misleading. AHP's counter-proposal included a provision calling for $50 million in payments from Schering to AHP "upon the issuance by the FDA of an approvable letter for ESI Lederle's *ANDA* and thereafter, for a total of $55 million . . . ." CX 473; 471 (emphasis added). Mr. Alaburda of AHP testified that AHP "felt a payment of $50 million dollars was what they thought they would be disadvantaged" by entering with its generic K-Dur 20 at a later date and "that was the amount that we would like in order to make up for the loss of an income stream

time-wise." CX 1482[†] at 133:13-134:6 (Alaburda JH).

2.57. Between the time of the December 22, 1997 correspondence and January 23, 1998, the date Schering and ESI reached an agreement in principle to resolve the patent infringement lawsuit, Schering and ESI had agreed on a January 1, 2004 date of entry for ESI. (12 Tr. 2640, 2619-20, 2638 (J.F. Hoffman); CX 1509 at 70:4-16 (J.F. Hoffman Depo.); 11 Tr. 2532-33 (Herman)). Schering told ESI that January 1, 2004 was as far as Schering would go. (CX 1482 at 99:17-100:6 (Alaburda I.H.); SPX 1222 101:9-17 (Alaburda I.H.); CX 1492 at 136:16-137:4 (Dey I.H.)). Schering made it very clear to ESI that "that was it. That was as far as they would go, and there wouldn't be any further negotiating on that point." (CX 1482 at 99:17-100:6 (Alaburda I.H.); SPX 1222 at 101:9-17 (Alaburda I.H.)). Schering was clear that "if [ESI] wanted a settlement that was the date beyond which [Schering] wouldn't go any further." (SPX 1222 at 101:9-17 (Alaburda I.H.)).

Complaint Counsel's Response to Finding No. 2.57:

The proposed finding is not supported by the evidence and is incomplete. The proposed finding is not supported by the evidence because AHP and Schering did not agree to a delayed entry date until the January 23, 1998, meeting. *See* CPF 874; CPRF 2.54. Mr. Driscoll, a Schering executive, agreed under cross-examination that "prior to that Friday night," Schering and [AHP] had not agreed on the date AHP's generic could enter. Tr. at 12:2720-21 (Driscoll). Dr. Dey, an AHP executive, testified that the date when AHP would be allowed to enter the market was one of the "two basic issues being

discussed" on January 23rd. CX 1492† at 142:4-143:2, 136:9-138:5 (Dey IH).

Mr. Alaburda was equally clear on this point:

> My best recollection is there may have been a number of dates that may have been mentioned over a period of time, but at some point, and it may have been at the very end, Key made it clear to us that if we wanted to go forward from [the January 1, 2004] date, that was it.
>
> . . . . CX 1482† at 99:17-25 (Alaburda IH).
>
> Q. Did Key propose any dates other than January 2004?
>
> A. It's hard for me to recall who proposed what other than that was part of what the parties were discussing *at the end* until as I recall Key made it clear that that was it. There may be other points to negotiate, but if we wanted a settlement that was the date beyond which they wouldn't go any earlier.
>
> CX 1482† at 101:9-17 (Alaburda IH).

The proposed finding is incomplete because it fails to mention that a Schering payment to AHP was part of the agreement in principle. CPF 872.

2.58. Accordingly, the date of entry was not negotiated at all during the final settlement conference on January 23, 1998, although the entry date of ESI's product was referenced during the late-night conference call that occurred during the conference. (12 Tr. 2640 (J.F. Hoffman)).

Complaint Counsel's Response to Finding No.2.58:

The proposed finding is not supported by the evidence. AHP and Schering did not

agree to a delayed entry date until the January 23, 1998, meeting. *See* CPRF 2.57.

2.59. Mr. Driscoll testified that before January 23, 1998, the parties had not reached an agreement on the date that ESI would bring its proposed generic to market. (12 Tr. 2720-21 (Driscoll)). While no final settlement agreement had been reached, an agreement in principle on this point had been reached. (12 Tr. 2640, 2619-20, 2638 (J.F. Hoffman); 11 Tr. 2532-33 (Herman)). Mr. Driscoll was not involved in the ESI settlement negotiations on a day-to-day basis in late 1997 and early 1998. (CX 1494 at 109:22-110:8 (Driscoll I.H.); SPX 1260 at 130:14-19 (Wasserstein I.H.); 12 Tr. 2721, 2724 (Driscoll); CX 470; CX 473).

Complaint Counsel's Response to Finding No. 2.59:

Respondent Schering appears to be impeaching its own witness. However, the proposed finding is not supported by the evidence and is contrary to more reliable evidence. Mr. Driscoll's testimony that "prior to that Friday night," Schering and [AHP] had not agreed on the date AHP's generic could enter (Tr. at 12:2720-21 (Driscoll)) was corroborated by Dr. Dey and Mr. Alaburda. *See* CPRF 2.57.

F. The January 1998 Settlement Mediation Conferences with Judge Rueter

2.60. The final mediation sessions occurred on January 22 and 23, 1998, in conjunction with a Markman hearing held on January 21 and 22, 1998. (11 Tr. 2529 (Herman)). A Markman hearing is a hearing at which evidence is taken and argument is heard so that the Court can interpret the claims of the patent at issue in the lawsuit. (11 Tr. 2529 (Herman)).

Complaint Counsel's Response to Finding No. 2.60:

Complaint counsel has no specific response.

2.61. At the beginning of the Markman hearing, before any testimony was heard, U.S. District Judge DuBois noted that he had gotten "report after report" from Judge Rueter regarding the parties' settlement negotiations. (SPX 687, at ESI HRG 000164). Judge DuBois expressed "a bit of anger" at the fact that the parties had not yet settled the case, after spending a "tremendous amount" of the Court's time and the client's money on the case. (CX 1482 at 80:5-81:9 (Alaburda I.H.); SPX 1222 at 81:10-18 (Alaburda I.H.); SPX 687, at ESI HRG 000164). Judge DuBois stated:

> All you people have been doing is eating up time in this case.
>
> You have spent a tremendous number of hours exploring settlement. I have gotten report after report from Judge Rueter. I shudder at the thought of the amount of money that this case is costing your respective client[s].
>
> And I'm telling you, as I have told you before, we're going forward with this Markman hearing. I do not expect the case to settle from this point on. If you have been horsing around with respect to settlement up to this point, you have waited too long. I expect this case to go now. I have invested time, we're launched.
>
> And if it does settle, we're going to have the hearing to determine why it is so assumed, why it didn't settle before this tremendous investment of time, your time

and Court time with appropriate officers from your respective corporations present."

(SPX 687, at ESI HRG 000164).

Complaint Counsel's Response to Finding No. 2.61:

The proposed finding is not supported by the evidence. Schering offered the *Markman* hearing transcript (SPX 687) for the limited "nonhearsay purpose . . . solely to set forth what the parties' positions were [in the underlying patent cases] and . . . evidence they were relying on that they contended supported it." Tr. at 32:7793, 7795 (Shores). Schering is using the *Markman* hearing transcript for a purpose for which Schering did not offer it. Further, none of the quoted language has the judge saying Schering should make a payment for delay. CPRF 2.62, 2.64, 2.65, 2.66, 2.67.

Schering quotes the judge telling the parties that they were "going forward with the *Markman* hearing." The judge is not suggesting that he will not finish the *Markman* hearing or that he will refuse to try the case. *See* CPF 870, 871, 889.

The proposed finding is misleading, irrelevant, and not supported by the evidence to the extent it suggests or implies that the magistrate judge or the trial judge coerced Schering into its agreement with AHP, or that Schering acted on a belief that it was being threatened by these court officials. *See* CPRF 2.4.

2.62. On January 22, 1998, the second day of the Markman hearing, the Court finished hearing evidence at around 1 p.m. (SPX 687, at ESI HRG 000126-27). The parties had another

settlement conference with Judge Rueter scheduled for 2 p.m. (SPX 687, at ESI HRG 000126-27). Judge Dubois encouraged the parties to attend the settlement conference, stating that "I hope it works." (SPX 687, at ESI HRG 000126). Judge Dubois told the parties "to stay as long as you think you have to stay [with Judge Rueter], and I'll remain this evening as long as it takes to finish this matter." (SPX 687, at ESI HRG 000127).

Complaint Counsel's Response to Finding No. 2.62:

The proposed finding is not supported by the evidence. Schering offered the *Markman* hearing transcript (SPX 687) for the limited "nonhearsay purpose . . . solely to set forth what the parties' positions were [in the underlying patent cases] and . . . evidence they were relying on that they contended supported it." Tr. at 32:7793, 7795 (Shores). Schering is using the Markman hearing transcript for a purpose for which Schering did not offer it.

The proposed finding is misleading, irrelevant, and not supported by the evidence to the extent it suggests or implies that the magistrate judge or the trial judge coerced Schering into its agreement with AHP, or that Schering acted on a belief that it was being threatened by these court officials. *See* CPRF 2.4.

2.63. The parties spent about three and a half hours in the January 22, 1998 settlement conference with Judge Rueter. (SPX 687, at ESI HRG 000128).

Complaint Counsel's Response to Finding No. 2.63:

The proposed finding is not relevant.

2.64. On January 23, 1998, another settlement conference was scheduled with Judge Rueter at 2:30 p.m. Judge Dubois again urged the parties to settle the case:

> You can repay the Court for its indulgence and patience by focusing hard on compromising and narrowing whatever differences remain between you in getting this case settled. I want to know none of the details of the settlement, I only urge that you do whatever you think appropriate. Knowing full well that the Court, like the two jury's that we heard about in chambers, is just not predictable. (SPX 687, at ESI HRG 000138).

Complaint Counsel's Response to Finding No. 2.64:

The proposed finding is not supported by the evidence. Schering offered the *Markman* hearing transcript (SPX 687) for the limited "nonhearsay purpose . . . solely to set forth what the parties' positions were [in the underlying patent cases] and . . . evidence they were relying on that they contended supported it." Tr. at 32:7793, 7795 (Shores). Schering is using the Markman hearing transcript for a purpose for which Schering did not offer it.

The proposed finding is misleading, irrelevant, and not supported by the evidence to the extent it suggests or implies that the magistrate judge or the trial judge coerced Schering into its agreement with AHP, or that Schering acted on a belief that it was being

threatened by these court officials. *See* CPRF 2.4.

2.65. Judge DuBois explained that he wanted the parties to settle and that he did not want to have to try the patent case:

> I want you to take this business decision, and it is a business decision and decide it without any more help than you're getting from Judge Rueter. I don't want you to use the adjudicatory powers of the Court.
>
> We're talking about the conciliatory services that the Court offers, and that's what I want you to use to resolve the case. I don't want to have to adjudicate either this case or the two-week long or longer trial of this case. I want you to try to do it.

(SPX 687, at ESI HRG 000139).

Complaint Counsel's Response to Finding No. 2.65:

The proposed finding is not supported by the evidence. Schering offered the *Markman* hearing transcript (SPX 687) for the limited "nonhearsay purpose . . . solely to set forth what the parties' positions were [in the underlying patent cases] and . . . evidence they were relying on that they contended supported it." Tr. at 32:7793, 7795 (Shores). Schering is using the Markman hearing transcript for a purpose for which Schering did not offer it.

The proposed finding is misleading, irrelevant, and not supported by the evidence to the extent it suggests or implies that the magistrate judge or the trial judge coerced Schering into its agreement with AHP, or that Schering acted on a belief that it was being

threatened by these court officials. *See* CPRF 2.4. Judge DuBois, in the quotation stated above, described the Court's role as merely "conciliatory."

2.66. Judge DuBois explained that the parties could craft a settlement that was in both parties interests, that the Court did not have the power to order:

> I think that's the best way to resolve a dispute of this kind, particularly since I think you can craft a settlement among yourselves. It is beyond the power of the Court to craft.
>
> You could do things based on possible relationship between the two companies and do other things, . . . but when you look to what the Court can do with respect to relief, you can do more because you're not limited by what the statutes say.
>
> You can do whatever is best suited to the parties on which you reach agreement.

(SPX 687, at ESI HRG 000139).

Complaint Counsel's Response to Finding No. 2.66:

The proposed finding is not supported by the evidence. Schering offered the *Markman* hearing transcript (SPX 687) for the limited "nonhearsay purpose . . . solely to set forth what the parties' positions were [in the underlying patent cases] and . . . evidence they were relying on that they contended supported it." Tr. at 32:7793, 7795 (Shores). Schering is using the Markman hearing transcript for a purpose for which Schering did not offer it.

The proposed finding is misleading, irrelevant, and not supported by the evidence

to the extent it suggests or implies that the magistrate judge or the trial judge coerced Schering into its agreement with AHP, or that Schering acted on a belief that it was being threatened by these court officials. *See* CPRF 2.4; CPF 888-890.

2.67. Judge DuBois ended the session by ordering the parties to report to him on their progress in settling the case. (SPX 687, at ESI HRG 000140).

Complaint Counsel's Response to Finding No. 2.67:

The proposed finding is not supported by the evidence. Schering offered the *Markman* hearing transcript (SPX 687) for the limited "nonhearsay purpose . . . solely to set forth what the parties' positions were [in the underlying patent cases] and . . . evidence they were relying on that they contended supported it." Tr. at 32:7793, 7795 (Shores). Schering is using the Markman hearing transcript for a purpose for which Schering did not offer it.

The proposed finding is misleading, irrelevant, and not supported by the evidence to the extent it suggests or implies that the magistrate judge or the trial judge coerced Schering into its agreement with AHP, or that Schering acted on a belief that it was being threatened by these court officials. *See* CPRF 2.4; CPF 888-890. At this time, the judge encouraged the settlement efforts, but stated that "I want to know none of the details of the settlement, I only urge you do whatever you think appropriate." Tr. at 11:2553 (Herman); *see also* CPF 871.

The proposed finding is misleading. The Markman hearing had not ended. On

January 22nd, the judge agreed to put off the closing arguments until the next day, Friday, or the day after. Tr. at 11:2554 (Herman); *see also* Tr. at 11:2548 (Herman).

2.68. After the Markman hearing, Judge DuBois summoned Mr. Heller and Mr. Herman to chambers and said that he wanted them to go see Judge Rueter and settle the case. (11 Tr. 2530 (Herman); SPX 1266 at 129:8-130:8 (Herman Depo.); CX 1492 at 136:9-15 (Dey I.H.)). Judge DuBois stated that the parties were to go see Judge Rueter and to stay in the courthouse until the case was settled. (11 Tr. 2530 (Herman); SPX 1266 at 129:8-130:8 (Herman Depo.)).

Complaint Counsel's Response to Finding No. 2.68:

The proposed finding is irrelevant, hearsay, and not supported by the evidence. Testimony regarding statements allegedly made by the magistrate and the trial judge was the subject of numerous objections at trial, and was admitted only on a limited basis and not for the truth of the matters asserted. See CPRF 2.17.

The proposed finding is misleading, irrelevant, and not supported by the evidence to the extent it suggests or implies that the magistrate judge or the trial judge coerced Schering into its agreement with AHP, or that Schering acted on a belief that it was being threatened by these court officials. *See* CPRF 2.4.

The proposed finding is also misleading. The *Markman* hearing had not ended. On January 22nd, the judge simply agreed to put off the closing arguments until the next day, Friday, or the day after. Tr. at 11:2554 (Herman); *see also* Tr. at 11:2548 (Herman).

The judge encouraged the settlement efforts, but stated that "I want to know none of the details of the settlement, I only urge you do whatever you think appropriate." Tr. at 11:2553 (Herman).

2.69. As scheduled, on January 23, 1998, the parties had another settlement conference with Judge Rueter. (11 Tr. 2529 (Herman)). The session concluded about 11:30 pm, when an agreement in principle was reached. (11 Tr. 2529, 2531-32 (Herman)).

Complaint Counsel's Response to Finding No. 2.69:

The proposed finding is unclear and incomplete. The mediation conference was held separate from the Markman hearing and there is no transcript of the mediation conference. The Markman hearing had not concluded. Judge DuBois, who did not attend any mediation conferences had told the parties he would hold closing arguments on Saturday. CPRF 2.4, 2.67.

2.70. At the January 23, 1998 meeting, in addition to Judge Rueter, were Mr. Herman and Ms. Lee for Schering, and Mr. Heller, and Dr. Dey for ESI. (11 Tr. 2532 (Herman). During the evening, there were also calls between Judge Rueter and John Hoffman of Schering, who was at home. (12 Tr. 2603, 2618-19, 2629 (J.F. Hoffman)). There were also telephone calls between Judge Rueter and Mr. Driscoll, who was on his cellular phone at a New Jersey Nets basketball game with his sons. (11 Tr. 2532 (Herman); 12 Tr. 2619-20 (J.F. Hoffman), 2706 (Driscoll)). Mr. Driscoll was told to take his cell phone to the game, because Judge Rueter was probably

going to want to talk to him because he wanted to find a settlement in the case. (12 Tr. 2706-07 (Driscoll); SPX 1231 at 104:17-25 (Driscoll I.H.)).

Complaint Counsel's Response to Finding No. 2.70:

The proposed finding is misleading, irrelevant, and not supported by the evidence to the extent it suggests or implies that the magistrate judge or the trial judge coerced Schering into its agreement with AHP, or that Schering acted on a belief that it was being threatened by these court officials. *See* CPRF 2.4.

The proposed finding's implication that the magistrate judge or the trial judge approved the agreement in principle is not supported by the evidence. Furthermore, several anticompetitive terms were added to the final settlement agreement after the magistrate's involvement had ended. CPRF 2.28, 2.84; *see* CPF 881.

2.71. Before the January 23, 1998 mediation conference, the date of market entry for ESI's generic product had been agreed to in principle as January 1, 2004. (12 Tr. 2640, 2619-20, 2638 (J.F. Hoffman); 11 Tr. 2532-33 (Herman)). The parties had also agreed in principle that Schering would license generic enalapril and buspirone from ESI for $15 million. (11 Tr. 2532 (Herman); 12 Tr. 2620 (J.F. Hoffman)).

Complaint Counsel's Response to Finding No. 2.71:

The proposed finding is not supported by the evidence. Mr. Driscoll agreed under cross-examination that "prior to that Friday night," Schering and [AHP] had not agreed

on the amount Schering would pay AHP, on the date AHP's generic could enter, or to settle the case. *See* Tr. at 12:2720-21 (Driscoll); CPF 874. Dr. Dey testified that the "two basic issues being discussed" on January 23rd were the date when AHP would be allowed to enter the market and the amount of money Schering would pay AHP. CX 1492[t] at 142:4-43:2, 136:9-138:5 (Dey IH). Furthermore, correspondence between Schering and AHP reflect that the date was not agreed to before January 23rd. *See* CPRF 2.54.

2.72. During the meeting, ESI insisted on additional payments. (11 Tr. 2533 (Herman)). Mr. Herman took the position that Schering was not going to pay any more money, and that it wanted to try the case. (11 Tr. 2533 (Herman)). Judge Rueter suggested that Schering pay ESI $5 million, which he characterized as "nothing more than legal fees." (11 Tr. 2533 (Herman); SPX 1266 at 125:15-126:7 (Herman Depo.)). When Mr. Herman rejected that idea, Judge Rueter asked permission to call Mr. Driscoll and Mr. Hoffman. (11 Tr. 2533 (Herman)).

Complaint Counsel's Response to Finding No. 2.72:

The proposed finding is misleading, irrelevant, and not supported by the evidence to the extent it suggests or implies that the magistrate judge or the trial judge coerced Schering into its agreement with AHP, or that Schering acted on a belief that it was being threatened by these court officials. *See* CPRF 2.4.

The proposed finding is irrelevant and improperly relies on attorney statements made in the course of negotiation to imply that the parties acted in accordance with the cited statements. Drawing inferences concerning how the client acted based on attorneys'

statements, while simultaneously asserting privilege as to underlying communications between those attorneys and their client, is unfounded and impermissible. CPRF 2.17. In fact, prior to making such statements, Schering had agreed to pay Upsher $60 million to stay off the market, and had offered AHP money through Schering's proposal that AHP abandon its ANDA product and co-promote Schering's K-Dur 20. Moreover, in the end Schering entered into a written agreement with AHP which on its face shows payments of $15 million to be made by Schering in consideration for AHP's promise to stay off the market.

The $5 million up-front payment in ¶ 4.1(a) in the final settlement agreement was not for attorney fees. Neither the agreement in principle nor the final settlement agreement designated any payments as consideration for attorneys' fees. *See* CX 472; CX 479. Mr. Herman did not characterize the $5 million payment as legal fees. *See* Tr. at 11:2533 (Herman). Schering did not know how much AHP had spent on legal fees. *See* Tr. at 12:2643-44 (John Hoffman) (testified that AHP did not propose the $5 million dollar figure and Schering had no basis for knowing AHP's attorney's fees.); *see also* CPF 892; CPRF 2.75.

The proposed finding is irrelevant, hearsay, and not supported by the evidence. Testimony regarding statements allegedly made by the magistrate and the trial judge was the subject of numerous objections at trial, and was admitted only on a limited basis and not for the truth of the matters asserted. See CPRF 2.17.

2.73. Judge Rueter called Mr. Driscoll during the second quarter of the basketball game. (12

Tr. 2707 (Driscoll); CX 1494 at 105:1-2 (Driscoll I.H.)). The judge told him that there had been a hearing that day in the case, and that Schering had "a good day," but that he had been instructed by the district court judge to get a settlement that night. (12 Tr. 2707 (Driscoll); SPX 1231 at 105:10-16 (Driscoll I.H.); SPX 1239 at 112:20-113:3 (J.F. Hoffman I.H.)). Judge Rueter stated that the district court judge was not going to be happy with Mr. Driscoll if there was no settlement that night. (12 Tr. 2707-09 (Driscoll)). Judge Rueter asked Mr. Driscoll why he could not arrive at a settlement. (12 Tr. 2709 (Driscoll)). Judge Rueter stated that Schering should have no difficulty offering ESI some compensation to settle. (12 Tr. 2710 (Driscoll)). Judge Rueter further stated that if there was no settlement, the parties should be in Judge DuBois' courtroom at 8:00 a.m. the next morning, Saturday. (12 Tr. 2707-09 (Driscoll); SPX 1231 at 105:10-16 (Driscoll I.H.); SPX 1239 at 113:12-18; 114:23-115:4 (J.F. Hoffman I.H.)).

Complaint Counsel's Response to Finding No. 2.73:

The proposed finding is misleading, irrelevant, and not supported by the evidence to the extent it suggests or implies that the magistrate judge or the trial judge coerced Schering into its agreement with AHP, or that Schering acted on a belief that it was being threatened by these court officials. *See* CPRF 2.4.

The proposed finding is irrelevant, hearsay, and not supported by the evidence. Testimony regarding statements allegedly made by the magistrate and the trial judge was the subject of numerous objections at trial, and was admitted only on a limited basis and not for the truth of the matters asserted. See CPRF 2.17.

2.74. Mr. Driscoll told Judge Rueter that he did not want to settle at all, and that he did not want to be on the phone talking about settlement. (12 Tr. 2708-10 (Driscoll)). Mr. Driscoll told Judge Rueter that Schering would not pay ESI to end the litigation. (CX 1494 at 109:14-18 (Driscoll I.H.)). Moreover, Mr. Driscoll explained that he did not think ESI even had a viable ANDA. . (12 Tr. 2710 (Driscoll); CX 1494 at 105:21-106:3 (Driscoll I.H.). Accordingly, there was no point in settling. (12 Tr. 2710 (Driscoll); CX 1492 at 156:14-23 (Dey I.H.)).

Complaint Counsel's Response to Finding No. 2.74:

The proposed finding is misleading, irrelevant, and not supported by the evidence to the extent it suggests or implies that the magistrate judge or the trial judge coerced Schering into its agreement with AHP, or that Schering acted on a belief that it was being threatened by these court officials. *See* CPRF 2.4; *see* CPF 888-890.

The proposed finding is contradicted by more reliable evidence. Schering's statements and actions during the negotiations demonstrated that Schering expected FDA approval of AHP's generic. *See* CPF 866-868; CPRF 2.49. Mr. Driscoll testified that his asserted belief that AHP could not get approval was merely "my assumption" based on AHP's behavior during negotiations. CX 1494 at 127:23-128:10 (Driscoll IH).

2.75. Judge Rueter also called Mr. Hoffman at home. (12 Tr. 2618 (J.F. Hoffman)). Judge Rueter again asked Schering to pay ESI money. (12 Tr. 2620 (J.F. Hoffman)). After Schering continued to refuse, Judge Rueter told Mr. Hoffman that Schering could "at least" pay ESI legal fees in the amount of $5 million. (12 Tr. 2620 (J.F. Hoffman)). Judge Rueter characterized the

$5 million payment as legal fees. (12 Tr. 2644 (J.F. Hoffman)). Schering eventually agreed to the $5 million payment. (12 Tr. 2620 (J.F. Hoffman); 12 Tr. 2534 (Herman)).

Complaint Counsel's Response to Finding No. 2.75:

The proposed finding is misleading, irrelevant, and not supported by the evidence to the extent it suggests or implies that the magistrate judge or the trial judge coerced Schering into its agreement with AHP, or that Schering acted on a belief that it was being threatened by these court officials. *See* CPRF 2.4.

The proposed finding is irrelevant, hearsay, and not supported by the evidence. Testimony regarding statements allegedly made by the magistrate and the trial judge was the subject of numerous objections at trial, and was admitted only on a limited basis and not for the truth of the matters asserted. See CPRF 2.17.

Mr. Hoffman declined to characterize the $5 million payment as legal fees, and stated that Schering had no information from AHP that its legal fees amounted to $5 million. Tr. at 12:2643-44 (John Hoffman); *see also* CPF 891-892. There is no evidence to support Schering's attorneys' testimony that Judge Rueter suggested Schering's payment of legal fees in the amount of $5 million. *See* CPF 891-892; CPRF 2.72.

2.76. ESI continued to insist on another $10 million. (11 Tr. 2535 (Herman)). Judge Rueter called Mr. Driscoll again. (12 Tr. 2710 (Driscoll); CX 1494 at 106:8-14 (Driscoll I.H.)). Judge Rueter emphasized that there had to be a settlement and expressed his view that the parties could come to a mutually agreeable position. (12 Tr. 2711 (Driscoll)). Judge Rueter emphasized that

there could be some "middle ground." (12 Tr. 2711 (Driscoll)). Mr. Driscoll again expressed doubts that ESI had a product. (12 Tr. 2711 (Driscoll); CX 1482 at 109:20-23 (Alaburda I.H.); SPX 1222 at 111:9-16 (Alaburda I.H.); CX 1492 at 156:16-23 (Dey I.H.)).

Complaint Counsel's Response to Finding No. 2.76:

The proposed finding is misleading, irrelevant, and not supported by the evidence to the extent it suggests or implies that the magistrate judge or the trial judge coerced Schering into its agreement with AHP, or that Schering acted on a belief that it was being threatened by these court officials. *See* CPRF 2.4.

The proposed finding is irrelevant, hearsay, and not supported by the evidence. Testimony regarding statements allegedly made by the magistrate and the trial judge was the subject of numerous objections at trial, and was admitted only on a limited basis and not for the truth of the matters asserted. *See* CPRF 2.17.

The proposed finding is contradicted by more reliable evidence. Schering's statements and actions during the negotiations demonstrated that Schering expected FDA approval of AHP's generic. *See* CPF 866-868; CPRF 2.49. Mr. Driscoll testified that his asserted belief that AHP could not get approval was merely "my assumption" based on AHP's behavior during negotiations. CX 1494 at 127:23-128:10 (Driscoll IH).

2.77. Mr. Driscoll and Judge Rueter explored ways to settle. (12 Tr. 2712 (Driscoll), 2620-21 (J.F. Hoffman)). Mr. Driscoll testified that he came up with a concept under which Schering would not have to pay ESI any money if ESI could not obtain approval of its ANDA product. If

ESI received approval for its ANDA by a date certain, Schering would make a certain payment. (12 Tr. 2712 (Driscoll); CX 1494 at 110:9-17 (Driscoll I.H.); 12 Tr. 2620-21 (J.F. Hoffman); CX 1492 at 156:14-157:2 (Dey I.H.)). If the date was later, it would be a lesser payment. (12 Tr. 2712 (Driscoll); CX 1494 at 110:9-17 (Driscoll I.H.); 12 Tr. 2620-21 (J.F. Hoffman). Mr. Driscoll ultimately agreed that Schering could make certain payments, consisting of $10 million if ESI's ANDA were approved by July, $5 million if it were approved 6 months later, with further decreasing payments. (12 Tr. 2712 (Driscoll).

Complaint Counsel's Response to Finding No. 2.77:

The proposed finding is ambiguous in that Schering does not clearly state that Mr. Driscoll admitted that Mr. Driscoll, not the magistrate, came up with the concept of a graduated payment clause linking the payment of money to AHP obtaining FDA approval. *See* Tr. at 12:2723-4 (Driscoll); *see also* CX 1482[†] at 74:10-75:10, 110:21-25, 111:5-8 (Alaburda IH) (recalling the provision as Schering's idea and recalling no terms that were suggested by the magistrate).

Schering's suggestion that the payment terms came from the magistrate judge are contrary to more reliable evidence. The evidence shows that: (1) AHP proposed tying a payment (AHP asked for $50 million) to FDA approval in a December 1997 letter to Schering counsel (CX 471 at SP 06 00049); (2) Mr. Driscoll testified that the concept of a declining payment based on the date that AHP's product was deemed approvable was his idea Tr. 12:2724; (3) neither the agreement in principle nor the final settlement agreement designated any payments as consideration for attorneys' fees (CX 472; CX

479); and (4) no witness testified that the $5 million payment was to reimburse AHP's attorneys' fees. *See* CPRF 2.72, 2.75. The record thus does not support the proposed finding. CPF 891.

This proposed finding is also irrelevant. Even if the magistrate had some involvement in the settlement terms, this would not suggest that Schering's agreement with AHP is not anticompetitive. His role was to facilitate a settlement, not to represent consumers or conduct an antitrust review. Any opinion he may have expressed in favor of the settlement is irrelevant to the assessment of competitive effects in this case.

2.78. When Mr. Driscoll made this commitment, he was certain that Schering would not have to pay it. (12 Tr. 2713, 2722 (Driscoll); CX 1509 at 104:4-21 (J.F. Hoffman Depo.); CX 1482 at 109:20-23 (Alaburda I.H.)).

Complaint Counsel's Response to Finding No. 2.78:

The proposed finding is not relevant and is contradicted by more reliable evidence. Schering's statements and actions during the negotiations demonstrated that Schering expected FDA approval of AHP's generic. *See* CPF 866-868; CPRF 2.49.

2.79. Judge Rueter then called Mr. Hoffman and discussed this settlement proposal, which has been described as a bet. (12 Tr. 2620-21 (J.F. Hoffman); SPX 1239 at 114:23-115:10 (J.F. Hoffman I.H.); CX 1509 at 70:23-71:14 (J.F. Hoffman Depo); 11 Tr. 2535 (Herman)). Mr. Hoffman asked why Schering should pay any more money when ESI did not even have a

product. (11 Tr. 2535 (Herman)).

Complaint Counsel's Response to Finding No. 2.79:

The proposed finding is incomplete. It fails to state that Mr. Driscoll, a Schering representative, suggested the payment term that Mr. Hoffman later named "the bet." *See* CPRF 2.77.

The proposed finding is contradicted by more reliable evidence. Schering's statements and actions during the negotiations demonstrated that Schering expected FDA approval of AHP's generic. *See* CPF 866-868; CPRF 2.49. The implication from Mr. Hoffman's statement is that he was bolstering his client's negotiating position.

The proposed finding is misleading, irrelevant, and not supported by the evidence to the extent it suggests or implies that the magistrate judge or the trial judge coerced Schering into its agreement with AHP, or that Schering acted on a belief that it was being threatened by these court officials. *See* CPRF 2.4.

The proposed finding is irrelevant and improperly relies on attorney statements made in the course of negotiation to imply that the parties acted in accordance with the cited statements. Drawing inferences concerning how the client acted based on attorneys' statements, while simultaneously asserting privilege as to underlying communications between those attorneys and their client, is unfounded and impermissible. CPRF 2.17.

2.80. Judge Rueter told Mr. Hoffman that he wanted Schering to "put [its] money where [its] mouth [was]" regarding Schering's doubts about ESI's ability to gain FDA approval for its

product. (12 Tr. 2620 (J.F. Hoffman); SPX 1239 at 114:19-25 (J.F. Hoffman I.H.);11 Tr. 2535 (Herman)). Judge Rueter stated that if Schering was right about HSI's inability to get FDA approval, "this won't cost you anything." (12 Tr. 2620 (J.F. Hoffman); 11 Tr. 2535 (Herman)).

Complaint Counsel's Response to Finding No. 2.80:

The proposed finding is irrelevant, hearsay, and not supported by the evidence. Testimony regarding statements allegedly made by the magistrate and the trial judge was the subject of numerous objections at trial, and was admitted only on a limited basis and not for the truth of the matters asserted. See CPRF 2.17.

The proposed finding is misleading, irrelevant, and not supported by the evidence to the extent it suggests or implies that the magistrate judge or the trial judge coerced Schering into its agreement with AHP, or that Schering acted on a belief that it was being threatened by these court officials. *See* CPRF 2.4.

The proposed finding is ambiguous in that it implies that Judge Rueter suggested the graduated payment when, in fact, Mr. Driscoll admitted that he himself came up with the idea. CPRF 2.77, 2.88.

2.81. At Judge Rueter's urging, Schering eventually agreed to this term. (11 Tr. 2537 (Herman)). At this point, there was an agreement in principle. (11 Tr. 2537 (Herman); 12 Tr. 2621 (J.F. Hoffman)).

Complaint Counsel's Response to Finding No. 2.81:

The proposed finding is misleading, irrelevant, and not supported by the evidence to the extent it suggests or implies that the magistrate judge or the trial judge coerced Schering into its agreement with AHP, or that Schering acted on a belief that it was being threatened by these court officials. *See* CPRF 2.4.

2.82. Judge Rueter called all the parties together in his chambers and on the phone, and he congratulated them. (12 Tr. 2621 (J.F. Hoffman)).

Complaint Counsel's Response to Finding No. 2.82:

The proposed finding is not relevant and is incomplete. While the agreement in principle settled the lawsuit, the final settlement agreement reached in June, 1998 contained several anticompetitive terms added after the agreement in principle was reached. CPF 881; CPRF 2.84.

2.83. Judge Rueter asked the parties to write up the terms and initial or sign them that night. (12 Tr. 2621 (J.F. Hoffman)). In the secretarial area of Judge Rueter's chambers, Mr. Heller, counsel for ESI, hand wrote out the settlement principles with Schering's representatives and Judge Rueter "sort of clustered around him." (11 Tr. 2537, 2488 (Herman); CX 472).

Complaint Counsel's Response to Finding No. 2.83:

The proposed finding's implication that Judge Rueter – by "clustering" – approved the agreement in principle is not supported by the evidence. CPRF 2.28.

Furthermore, several anticompetitive terms were added to the final settlement agreement after the magistrate's involvement had ended. *See* CPF 881; CPRF 2.84.

The proposed finding is irrelevant, hearsay, and not supported by the evidence. Testimony regarding statements allegedly made by the magistrate and the trial judge was the subject of numerous objections at trial, and was admitted only on a limited basis and not for the truth of the matters asserted. *See* CPRF 2.17.

2.84. The two-page handwritten agreement in principle, dated January 23, 1996, was signed by Mr. Heller and Susan Lee, who was the director of patent litigation for Schering. (11 Tr. 2488-89 (Herman); CX 472). Judge Rueter was present at the preparation and signing, looking over the shoulder of Mr. Heller as he prepared it in the secretarial area of the judge's chambers. (11 Tr. 2489 (Herman)).

Complaint Counsel's Response to Finding No. 2.84:

The proposed finding's implication that the Judge Rueter – by "looking over the shoulder" of Mr. Heller – approved the agreement in principle, is not supported by the evidence. *See* CPRF 2.28. Furthermore, several anticompetitive terms were added to the final settlement agreement after the magistrate's involvement had ended, including: a bar on entry before 2004 with *any* generic version of K-Dur 20; a bar on entry with more than one generic product between 2004 and 2006, regardless of whether the product infringed; a prohibition on AHP conducting or supporting any studies on the bioequivalence of a generic product to K-Dur 20; and a prohibition on AHP transferring

its ANDA. *See* CPF 881.

2.85. The January 23, 1998 handwritten agreement in principle states, among other things, that Schering would grant ESI a license under its K-Dur patent beginning on January 1, 2004. (CX 472). The January 1, 2004 entry date reasonably reflects the parties' respective positions in the patent case. (15 Tr. 3369, 3371 (Miller); SPX 1222 at 105:10-106:12 (Alaburda I.H.); CX 1509 at 106:8-21 (J.F. Hoffman Depo.); CX 1508 at 116:1-12 (J.F. Hoffman I.H.)). At the time ESI agreed to the January 1, 2004 entry date, ESI had "considerably less " than a 50/50 chance of prevailing in the patent litigation. (SPX 1222 at 105:17-106:12 (Alaburda I.H.); CX 1492 at 137:5-12, 138:6-20 (Dey I.H.)). ESI felt it was at risk of losing the patent case on the issues of both literal infringement and infringement under the doctrine of equivalence. (SPX 1222 at 104:1-8 (Alaburda I.H.)). ESI had to win on both of those issues to prevail. (SPX 1222 at 104:1-106:12 (Alaburda I.H.)). ESI had at most a 25% chance of prevailing, and also faced a considerable risk of losing the case and looking badly before senior management if it lost rather than settled. (SPX 1222 at 105:17-106:12 (Alaburda I.H.)). Moreover, ESI believed it was blocked from the market by the Upsher settlement until March 2002. (CX 1482 88:4-22 (Alaburda I.H.); SPX 1222 at 93:8-94:19 (Alaburda I.H.)).

Complaint Counsel's Response to Finding No. 2.85:

The proposed finding is irrelevant and contradicted by other evidence. There was a reasonable probability that AHP would have won the patent case. *See* CPF 821-840. Schering itself acknowledged that there was a chance that AHP could win the litigation.

See CPF 839-840. Indeed, Schering's technical expert, Dr. Banker, testified that during the Markman hearing the district judge stated that Schering did not have a "slam dunk case". *See* Tr. 14:3038-39 (Banker). *See also* CPRF 3.47, 3.554-3.562. The proposed finding is also incomplete in that it omits any reference to AHP's affirmative defenses relating to the invalidity and unenforceability of the '743 patent, even though success on either defense by AHP provided a complete defense to infringement. *See* CPRF 3.480-3.482.

To the extent that Schering relies upon Mr. Miller's estimate of its likelihood of success, the proposed finding is irrelevant and unsupported by the evidence. Mr. Miller is not a technical expert and therefore cannot opine on technical issues dispositive to the resolution of the underlying patent case. *See* Tr. at 15:3287, 3392-3393 (Miller). And Mr. Miller cannot rely on such an opinion by Dr. Banker, Schering's technical expert in the underlying litigation, because Dr. Banker admitted that he could not assess the probability of the court deciding in Schering's favor. *See* Tr. at 14:3253-56 (Banker). Accordingly, any estimate of success by Mr. Miller is irrelevant and unsupported by the evidence. *See CPRF 3.563-3.564, 3.566.*

The proposed finding is irrelevant and not supported by the evidence. Because of privilege claims, complaint counsel has had no opportunity to test statements alleging that Schering attempted to settle the patent litigation by splitting the patent life to "reflect the merits of the litigation." Access to privileged communications and documents was necessary in order to determine whether Schering's internal estimates of its likelihood of success in the patent litigation (if any) were in any way consistent with these assertions.

As Your Honor has properly recognized, these statements cannot support an inference that Schering acted in accordance with these statements. See Tr. at 12:2617-18.

The proposed finding is also incomplete. First, at the time of the Schering/AHP settlement in January, there was uncertainty about whether Upsher would be entitled to the 180-day exclusivity. CPF 842, 911-15. If Upsher was not entitled to the180-day exclusivity period, AHP would be free to launch its generic K-Dur product after a victory in the Schering-AHP litigation or the end of the 30-month period, and FDA approval. CPF 22, 26. If Upsher did hold the 180-day exclusivity, there was a substantial possibility, as of January 23, 1998 (the date Schering and AHP agreed to a settlement in principle), that a decision in favor of AHP would trigger Upsher's 180-day exclusivity period. See CPF 842, 916-922. Once the exclusivity period was triggered and had run its course, the FDA could grant final approval for AHP's generic K-Dur. CPF 22, 27. Second, while the January 23, 1998 agreement in principle settled the lawsuit, the final settlement agreement reached in June, 1998 contained several anticompetitive terms added after the agreement in principle was reached. CPF 881; CPRF 2.84.

2.86. By contrast, Schering regularly expressed the view during the settlement discussions that it had a very strong case. (SPX 1222 at 64:7-14 (Alaburda I.H.); 11 Tr. 2511 (Herman); SPX 1240 at 86:15-88:7 (J.F. Hoffman Depo.)). Schering was very likely to win the patent case. (15 Tr. 3323, 3351, 3361, 3367-68 (Miller)).

Complaint Counsel's Response to Finding No. 2.86:

The proposed finding is irrelevant and unsupported by the evidence to the extent that it relies upon Mr. Miller's estimate of Schering's likelihood of success in the case. Mr. Miller is not a technical expert and therefore cannot opine on technical issues dispositive to the resolution of the underlying patent case. Tr. at 15:3287, 3392-3393 (Miller). And Mr. Miller cannot rely on such an opinion by Dr. Banker, Schering's technical expert in the underlying litigation, because Dr. Banker admitted that he could not assess the probability of the court deciding in Schering's favor. Tr. at 14:3253-56 (Banker). Accordingly, any estimate of success by Miller is irrelevant and unsupported by the evidence. *See CPRF 3.563-3.564, 3.566.*

Furthermore, the proposed finding is incomplete and misleading in that it omits reference to contrary opinions as to the strength of Schering's case. For example, Schering's technical expert, Dr. Banker, testified that during the *Markman* hearing in the underlying litigation, the district judge stated that Schering did not have a "slam dunk case". Tr. at 14:3038-39 (Banker). *See also* CPF 838 (Magistrate Judge Reuter told AHP that he thought AHP had somewhat the better of the infringement case.). Schering itself acknowledged that there was a chance that AHP could win the litigation. *See* CPF 839-840.

The proposed finding is irrelevant and improperly relies on attorney statements made in the course of negotiation to imply that the parties acted in accordance with the cited statements. Drawing inferences concerning how the client acted based on attorneys' statements, while simultaneously asserting privilege as to underlying communications between those attorneys and their client, is unfounded and impermissible. CPRF 2.17.

2.87. The handwritten agreement in principle also states that ESI grants to Schering the right to market ESI's generic versions of enalapril and buspirone in Europe. (CX 472). The handwritten agreement in principle also states that Schering would provide $10 million to ESI upon the signing of the settlement agreement, and $10 million split into equal monthly installments to be paid over seven and a half years. (CX 472). In addition, the handwritten agreement in principle states that Schering would pay ESI an amount between $625,000 and $10 million, depending on the date of FDA approval of ESI's generic version of K-Dur 20. (CX 472).

Complaint Counsel's Response to Finding No. 2.87:

The proposed finding is incomplete. It fails to state that several anticompetitive terms were added to the final settlement agreement after the magistrate's involvement had ended. *See* CPF 881; CPRF 2.84.

2.88. Judge Rueter was keenly aware of all the terms in the January 23, 1998 handwritten agreement in principle, and proposed several of the terms. (11 Tr. 2489 (Herman); CX 1506 at 156:19-157:1 (Herman Depo)).

Complaint Counsel's Response to Finding No. 2.88:

The proposed finding is not supported by the evidence to the extent it suggests that the magistrate or trial judge approved the agreement in principle. There was no court approval of either the January 1998 settlement terms, or the June 1998 final agreement.

See CPF 893-900. Neither agreement was submitted for approval, embodied in any court order, or subjected to any approval process. *See* CPF 893-900. Furthermore, the June 1998 final agreement contains additional terms not contained in the January 1998 agreement in principle that further reflect the anticompetitive nature of the parties' agreement. *See* CPF 881; CPRF 2.84.

The proposed finding is contrary to more reliable evidence showing that the payment terms did not come from the magistrate judge. The evidence shows that: (1) AHP proposed tying a payment (AHP asked for $50 million) to FDA approval in a December 1997 letter to Schering counsel (CX 471 at SP 06 00049); (2) Mr. Driscoll testified that the concept of a declining payment based on the date that AHP's product was deemed approvable was his idea Tr. 12:2724; (3) neither the agreement in principle nor the final settlement agreement designated any payments as consideration for attorneys' fees (CX 472; CX 479); and (4) no witness testified that the $5 million payment was to reimburse AHP's attorneys' fees. *See* CPRF 2.72, 2.75. The record thus does not support the proposed finding. CPF 891.

This proposed finding is also irrelevant. Even if the magistrate had some involvement in the settlement terms, this would not suggest that Schering's agreement with AHP is not anticompetitive. His role was to facilitate a settlement, not to represent consumers or conduct an antitrust review. Any opinion he may have expressed in favor of the settlement is irrelevant to the assessment of competitive effects in this case.

There is no evidence to support Mr. Hoffman's testimony that Judge Rueter suggested Schering's payment of legal fees in the amount of $5 million. *See* CPF 892;

CPRF 2.72.

2.89. Judge Rueter had told the parties that he was going to apprise Judge DuBois of the terms of the settlement, as he had apprised Judge DuBois in detail during the course of the settlement negotiations during the 15 month mediation process. (11 Tr. 2490 (Herman); SPX 687, at ESI HRG 000164); *see also* 11 Tr. 2514-15 (Herman); CX 462; SPX 1196; SPX 1198).

Complaint Counsel's Response to Finding No. 2.89:

The proposed finding is not supported by the evidence to the extent it suggests that the magistrate or trial judge approved the agreement in principle. There is no evidence Judge Rueter told Judge DuBois – who specifically stated he did not want to know any of the details of the settlement -- the terms of the settlement. *See* CPF 893. There was no court approval of either the January 1998 settlement terms or the June 1998 final agreement. *See* CPF 893-900. Neither agreement was submitted for approval, embodied in any court order, or subjected to any approval process. *See* CPF 893-900. Furthermore, the June 1998 final agreement contains additional terms not contained in the January 1998 agreement in principle that further reflect the anticompetitive nature of the parties' agreement. *See* CPF 881; CPRF 2.84. There is no evidence that the magistrate or the trial judge saw the final settlement agreement. *See* CPF 897.

The proposed finding is irrelevant, hearsay, and not supported by the evidence. Testimony regarding statements allegedly made by the magistrate and the trial judge was the subject of numerous objections at trial, and was admitted only on a limited basis and

not for the truth of the matters asserted. See CPRF 2.17.

2.90. In a later dated January 26, 1998, Judge DuBois congratulated counsel on settling the case. (CX 491). Judge DuBois wrote:

> "Congratulations on getting this case settled. As you know, the settlement resulted in a resolution of the dispute that accommodated the interests of the parties but could not have been awarded by the Court at trial. It represents a job well done."

(CX 491; 11 Tr. 2489-90 (Herman)).

Complaint Counsel's Response to Finding No. 2.90:

The proposed finding is not relevant. There is no evidence that Judge DuBois approved the agreement in principle is not supported by the evidence. CPRF 2.89. The January 26th letter does not support the finding's implication that Judge DuBois – who specifically stated he did not want to know any of the details of the settlement – knew or approved the terms of the January agreement in principle. CPRF 2.89.

2.91. Immediately after the agreement in principle was reached on January 23, 1998, the district judge conditionally dismissed the case. (12 Tr. 2651-52 (J.F. Hoffman)).

Complaint Counsel's Response to Finding No. 2.91:

The proposed finding is not relevant. Otherwise, complaint counsel has no

specific response.

2.92. The January 23, 1998 agreement at CX 472 is not complete in that it does not allocate the monetary payments as between the license agreement for buspirone and enalapril and the $5 million payment. (11 Tr. 2538 (Herman); SPX 1266 at 177:23-25, 178:1-6 (Herman Depo.); CX 472).

Complaint Counsel's Response to Finding No. 2.92:

The proposed finding is incomplete. Several anticompetitive terms were added after the agreement in principle was reached and the magistrate judge's involvement had ended. See CPF 881; CPRF 2.84.

II. DRAFTING THE FINAL AGREEMENT

2.93. Ms. Somerville later sent a more formal draft agreement to Mr. Herman, accompanied by a transmittal letter. (11 Tr. 2538 (Herman); CX 478). That initial draft does not accurately reflect what the parties agreed to that evening with Judge Rueter. (11 Tr. 2539 (Herman); SPX 1266 at 181:15-25, 182:1-19; CX 478). Paragraph 16 of the draft characterizes all the payments as royalty payments, when only $15 million of the $30 million were royalty payments. (11 Tr. 2539 (Herman); CX 478).

Complaint Counsel's Response to Finding No. 2.93:

The proposed finding is incomplete. The other $15 million payment was for AHP's agreement to delay entering the market. Also, several anticomptitive terms were added after agreement in principle was reached and the magistrate judge's involvement had ended. *See* CPF 881; CPRF 2.84.

2.94. This error was corrected in the final drafts of the agreements. (11 Tr. 2539 (Herman); CX 479; CX 480). The final drafts of the agreements were prepared by Covington & Burling. (11 Tr. 2539 (Herman)). The final agreement was reached in June 1998. (11 Tr. 2539 (Herman); 12 Tr. 2652 (J.F. Hoffman); CX 479).

Complaint Counsel's Response to Finding No. 2.94:

The proposed finding is incomplete. Several anticompetitive terms were added after agreement in principle was reached and the magistrate judge's involvement had

ended. *See* CPF 881; CPRF 2.84.

2.95. Under the final settlement agreement, Schering paid ESI a $5 million noncontingent payment and an additional $10 million contingent on ESI's FDA approval. (12 Tr. 2643 (J.F. Hoffman); CX 479).

Complaint Counsel's Response to Finding No. 2.95:

The proposed finding is incomplete. Schering's $15 million in payments to AHP were in exchange for AHP not entering the market until January 2004.

2.96. Shortly before the June 1999 $10 million payment deadline, ESI received approval from the FDA. (12 Tr. 2646 (J.F. Hoffman)). Accordingly, Schering paid ESI $10 million. (12 Tr. 2646 (J.F. Hoffman)).

Complaint Counsel's Response to Finding No. 2.96:

The proposed finding is incomplete. Schering also paid AHP $5 million ten days after the execution and delivery of the June 19, 1998, final settlement agreement. Schering Answer ¶ 59. As of February 28, 2002, AHP had not entered the K-Dur 20 market. Tr. at 28:7023-26 (Safir).

2.97. The total amount of the payment, $15 million, is about 2 percent of the $606 million in

profits Schering anticipated from K-Dur sales from the date of the settlement until January 1, 2004, when ESI's product could enter the market under the agreement. (CX 134 at SP 004672).

Complaint Counsel's Response to Finding No. 2.97:

The proposed finding is not relevant because the issue is whether Schering's payment to ESI was sufficient to induce ESI to agree to stay off the market with its generic product. Schering's payment was clearly sufficient because ESI, in fact, did agree to stay off the market.

III. SETTLEMENT LANGUAGE RELATED TO OTHER PRODUCTS

2.98. The inclusion of clauses in the settlement agreements that affected ESI's exploitation of products similar to K-Dur 20 for a period of time prevent ESI from making minor, insubstantial modifications to its product and filing another ANDA with an infringing product. (SPX 1228 159:9-160:2 (Dey I.H.)).

Complaint Counsel's Response to Finding No. 2.98:

The proposed finding is incomplete and not supported by the evidence. First, the changes alluded to in the finding were were added after agreement in principle was reached and the magistrate judge's involvement had ended. *See* CPRF 2.88. Furthermore, the June 1998 final agreement contains additional terms not contained in the January 1998 agreement in principle that further reflect the anticompetitive nature of the parties' agreement: a bar on entry before 2004 with *any* generic version of K-Dur 20; a bar on entry with more than one generic product between 2004 and 2006, regardless of whether the product infringed; a prohibition on AHP conducting or supporting any studies on the bioequivalence of a generic product to K-Dur 20; and a prohibition on AHP transferring its ANDA. CPF 881.

2.99. The inclusion of clauses in the settlement agreements that affected ESI's exploitation of products similar to K-Dur 20 for a period of time are ancillary restraints that are necessary for a pro-competitive agreement to be feasible and viable. (24 Tr. 5798 (Addanki)).

Complaint Counsel's Response to Finding No. 2.99:

The proposed finding is incomplete and not supported by the evidence. CPRF 2.98.

2.100. Professor Bresnahan conceded that "if the settlement was otherwise pro-competitive," such a settlement term would not be anticompetitive. (5 Tr. 987-88, 990-91 (Bresnahan)).

Complaint Counsel's Response to Finding No. 2.100:

Complaint counsel has no specific response.

IV. ESI EXITED THE GENERICS BUSINESS

2.101. ESI exited the solid oral generics business. (CX 1548 45:21-25 (Dey Depo.)). ESI announced its intention to do so in July 2001. (January 16, 2002 Stipulation).

Complaint Counsel's Response to Finding No. 2.101:

The proposed finding is incomplete. Under the June 1998 final settlement agreement, AHP is prohibited from transferring its ANDA. CPF 881. This anticompetitive term was added after the agreement in principle was reached and the magistrate's involvement had ended. CPF 881.

CERTIFICATE OF SERVICE

I, Pamela L. Timus, hereby certify that on May 14, 2002, I caused two copies of the "Public Version" of the following:

- Complaint Counsel's Reply to Schering-Plough's Proposed Findings of Fact Relating to the Settlement with ESI-Lederle
- Complaint Counsel's Reply to Schering-Plough's Proposed Findings Relating to the Underlying Patent Cases
- Complaint Counsel's Reply to Schering-Plough's Proposed Findings of Fact Relating to the Settlement with Upsher-Smith (Volumes 1 & 2)
- Complaint Counsel's Reply Brief
- Complaint Counsel's Reply to Schering-Plough's Proposed Economic and Policy Findings
- Complaint Counsel's Reply to Upsher-Smith's Proposed Findings of Facts (Volumes1 thru 3)

to be served by hand delivery upon:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

and one copy upon the following persons via Federal Express:

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