

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION



In the Matter of)
)
Schering-Plough Corporation,)
a corporation,)
)
Upsher-Smith Laboratories, Inc.,)
a corporation,)
)
and)
)
American Home Products Corporation,)
a corporation.)

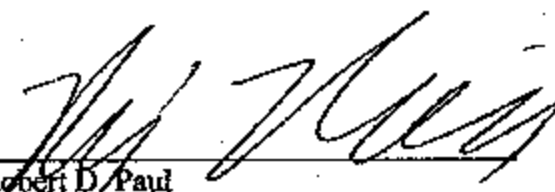
Docket No. 9297
PUBLIC VERSION

**UPSHER-SMITH'S MOTION TO BAR COMPLAINT COUNSEL
FROM ASSERTING THAT SCHERING-PLOUGH MADE
"A \$60 MILLION NONCONTINGENT PAYMENT"**

Upsher-Smith moves for an order barring Complaint Counsel from asserting that Schering-Plough made a "\$60 million noncontingent payment" to Upsher-Smith. The bases of this motion are contained in the accompanying memorandum in support.

Dated: January 3, 2002

Respectfully submitted,

By: 
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FEDERAL TRADE COMMISSION

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a corporation,

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**UPSHER-SMITH'S MEMORANDUM IN SUPPORT OF ITS MOTION TO BAR
COMPLAINT COUNSEL FROM ASSERTING THAT SCHERING MADE
"A \$60 MILLION NONCONTINGENT PAYMENT"**

[

] Despite these bold assertions, this testimony is not only inaccurate, it is neither reliable, nor properly the subject of expert testimony. As a matter of law, the record in this case, and basic principles of law, finance and economics, [

, are legal conclusions to be made by Your Honor.

[

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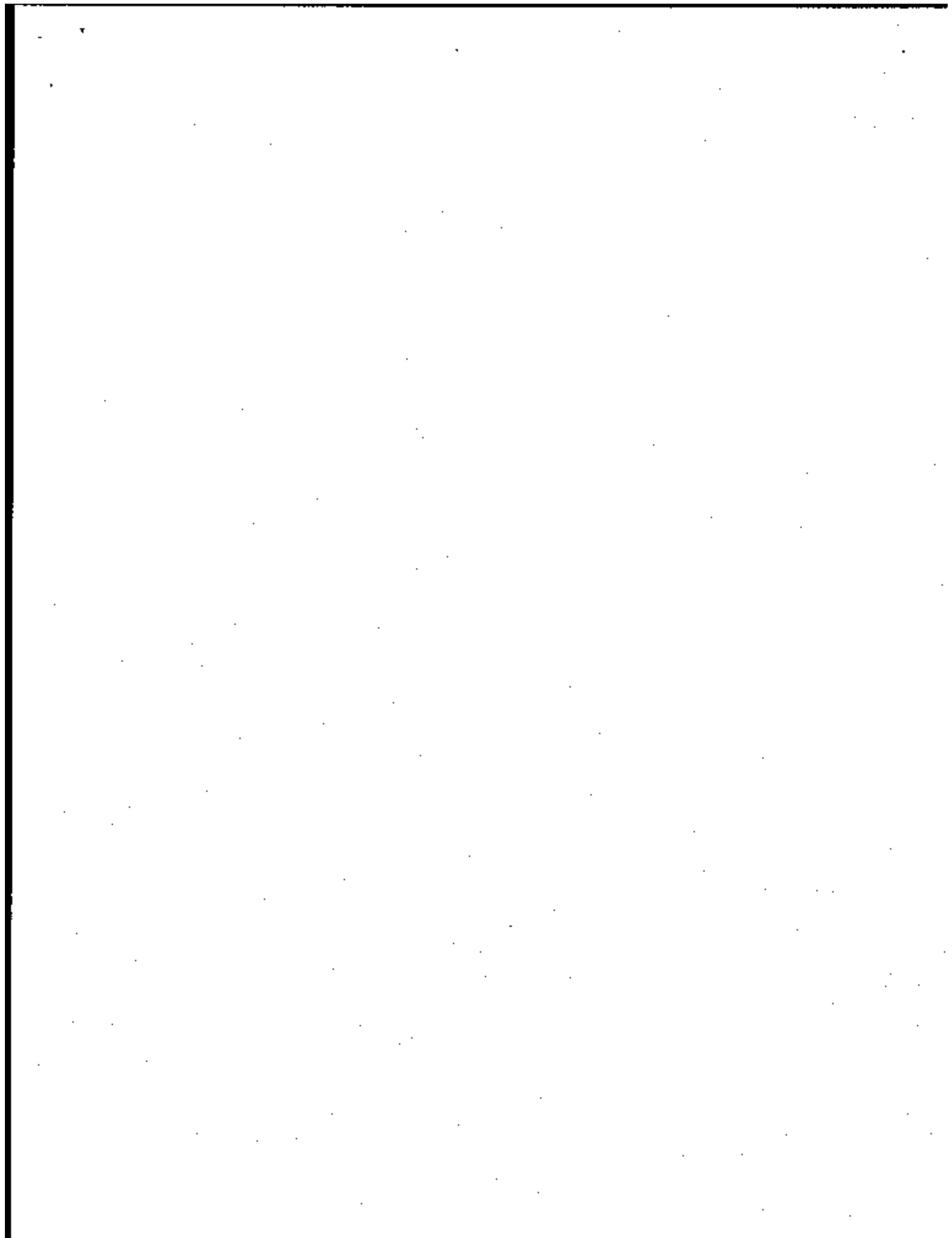
ARGUMENT

A. [

]

Throughout the discovery phase of this case, Complaint Counsel have repeatedly referred to, and elicited from their expert witnesses, testimony to the effect that there was a single "\$60 million non-contingent payment" made to Upsher-Smith. *See, e.g.*, Complaint ¶ 45 ("The \$60 million payment from Schering to Upsher-Smith was unrelated to the value of the products Upsher-Smith licensed to Schering"); Complaint Counsel's Statement of the Case at 2 ("In the case of Upsher-Smith, Schering's \$60 million payment for delayed entry was disguised as a fee to license certain products held by Upsher-Smith."); [

¹ In order to avoid unnecessary duplication, Complaint Counsel's experts' reports and deposition transcripts are attached to the respective motions in limine that Upsher-Smith is filing that pertain to a particular expert and are therefore not contained herein as attachments.



]

Furthermore, Complaint Counsel's experts are not qualified to opine on whether any of the Schering payments were conditional. [

]

See, e.g., II Farnsworth on Contracts § 8.9 (Constructive Conditions of Exchange at 449-63 (2d ed. 1998) (describing conditions implied as a matter of law in bilateral contracts). A breach by Upsher-Smith of the June 1997 Agreement could well have led to the suspension of performance by Schering. *See, id.*, § 8.16 (Material Breach and Suspension) at 495 ("In order for a breach to justify the injured party's suspension of performance the breach must be significant enough to amount to the nonoccurrence of a constructive conditions of exchange. Such a breach is termed 'material'").

The construction of the June 1997 Agreement, including the consideration exchanged, and whether or not these promises to pay were contingent upon Upsher-Smith's proper performance of its obligations over time, are questions of law for Your Honor to determine. Expert testimony as to an ultimate legal issue is not allowed. *See Andrews v. Metro North Commuter R. Co.*, 882 F.2d 705, 709-10 (2d. Cir. 1989) (engineer could not testify that defendant was negligent because not clear what legal standards expert applied); *In re Initial Public Offering Securities Litigation*, No. 21 MC 92 (SAS), 2001 U.S. Dist. LEXIS 18116, at *7-

8 (S.D.N.Y. Nov. 7, 2001) ("[E]very circuit has explicitly held that experts may not invade the court's province by testifying on issues of law."). Indeed, as a number of courts have explained, every courtroom already has an expert on the law: the judge. See, e.g., *Burkhart v. Washington Metro. Area Transit Auth.*, 112 F.3d 1207, 1213 (D.C. Cir. 1997). Expert testimony as to legal conclusions are therefore not allowed, and all of Complaint Counsel's experts' proposed testimony characterizing [

]

Furthermore, as a matter of fact, the promise to pay a stream of payments over time is not equal to the arithmetic sum of the payments in nominal dollars over time. Simply adding up the three payments over two years ignores the time value of money. The time value of money is a fundamental concept in the fields of business, finance and economics. [

] The time value of money is a term used to describe the concept that the present value of a stream of payments over time is worth less than the nominal, arithmetic total of the payments. It is not controverted that the value of a stream of payments paid over a two-year time

² [

period is not \$60 million as of June 1997. [

CONCLUSION

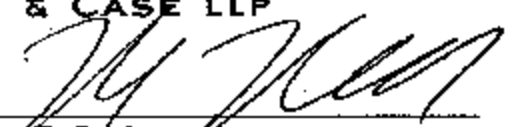
For the foregoing reasons, the Court should bar Complaint Counsel and its experts from asserting that Schering made a \$60 million noncontingent payment to Upsher-Smith.

Dated: January 4, 2002

Respectfully submitted,

WHITE & CASE LLP

By: _____



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ATTACHMENT A

REDACTED

ATTACHMENT B

REDACTED

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of January 2002, I caused copies of the public version of Upsher-Smith's Motion To Bar Complaint Counsel From Asserting That Schering Made A "\$60 Million Noncontingent Payment" to be filed with the Secretary of the Commission, and that two paper copies were served by hand upon:

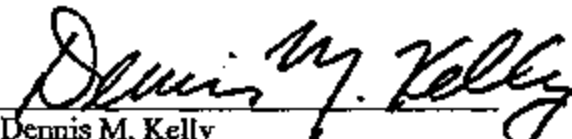
Honorable D. Michael Chappell
Administrative Law Judge
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