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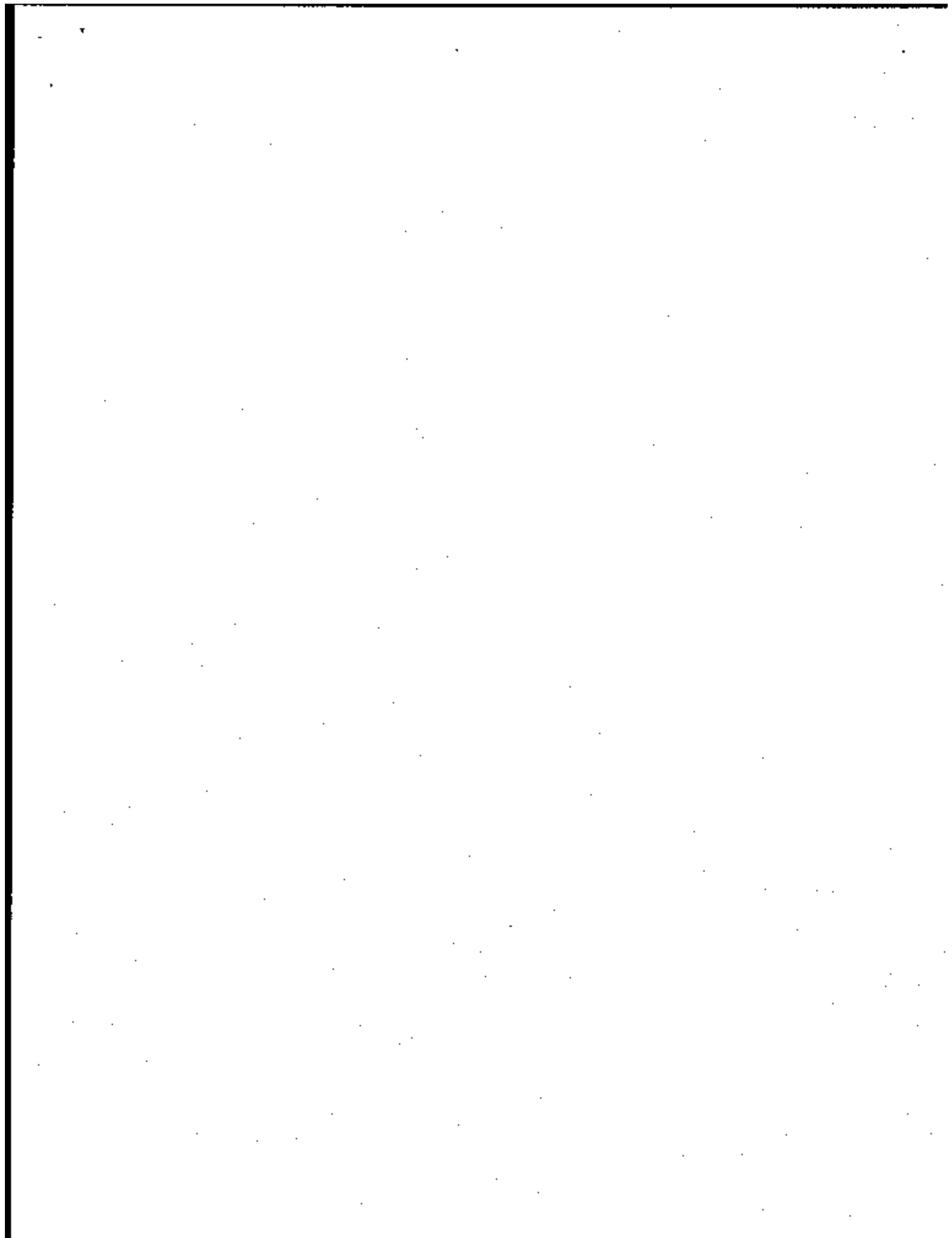
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ARGUMENT

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."); [



]

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

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

CONCLUSION

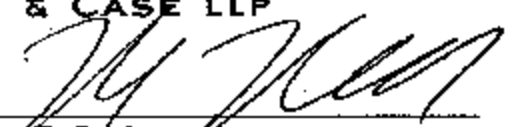
For the foregoing reasons, the Court should bar Complaint Counsel and its experts from asserting that Schering made a \$60 million noncontingent payment to Upsher-Smith.

Dated: January 4, 2002

Respectfully submitted,

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ATTACHMENT A

REDACTED

ATTACHMENT B

REDACTED

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that the foregoing is a true and correct copy of the original as the same appears in the records of the court.

Clerk of the Court

Attorney at Law

Witness my hand and seal of office this _____ day of _____, 20____.

Clerk of the Court

Attorney at Law

Witness my hand and seal of office this _____ day of _____, 20____.

Clerk of the Court

Attorney at Law

Witness my hand and seal of office this _____ day of _____, 20____.

Clerk of the Court

Attorney at Law