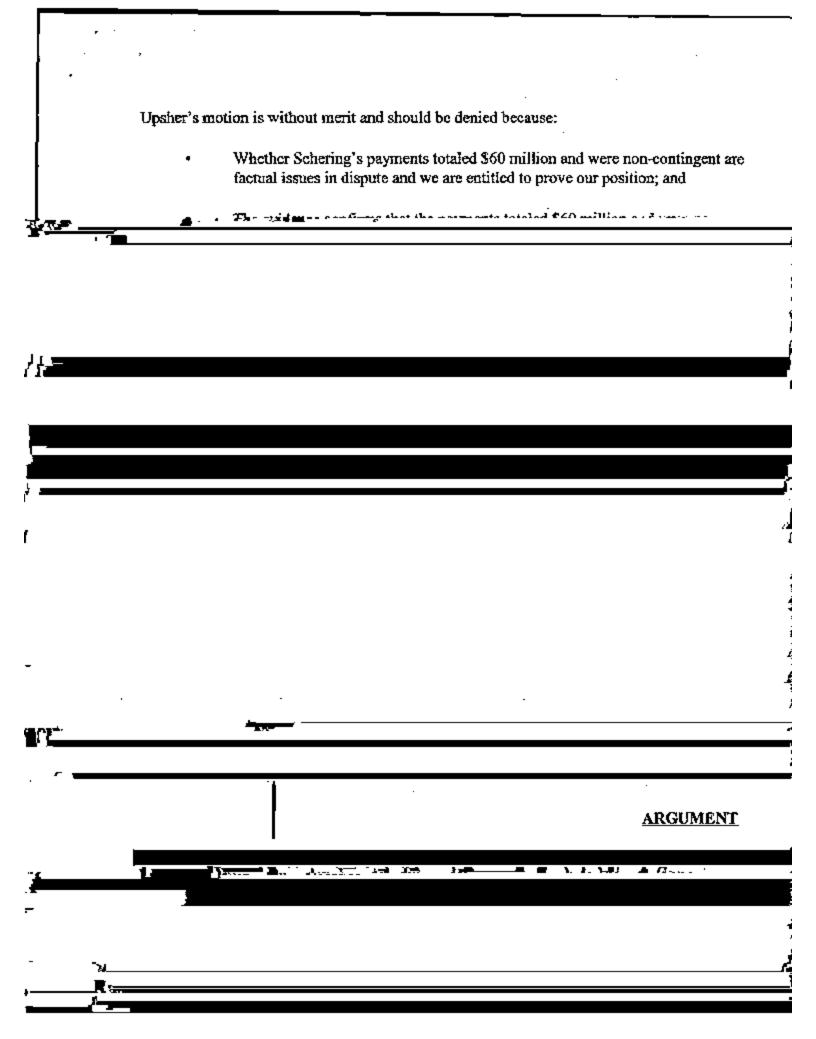
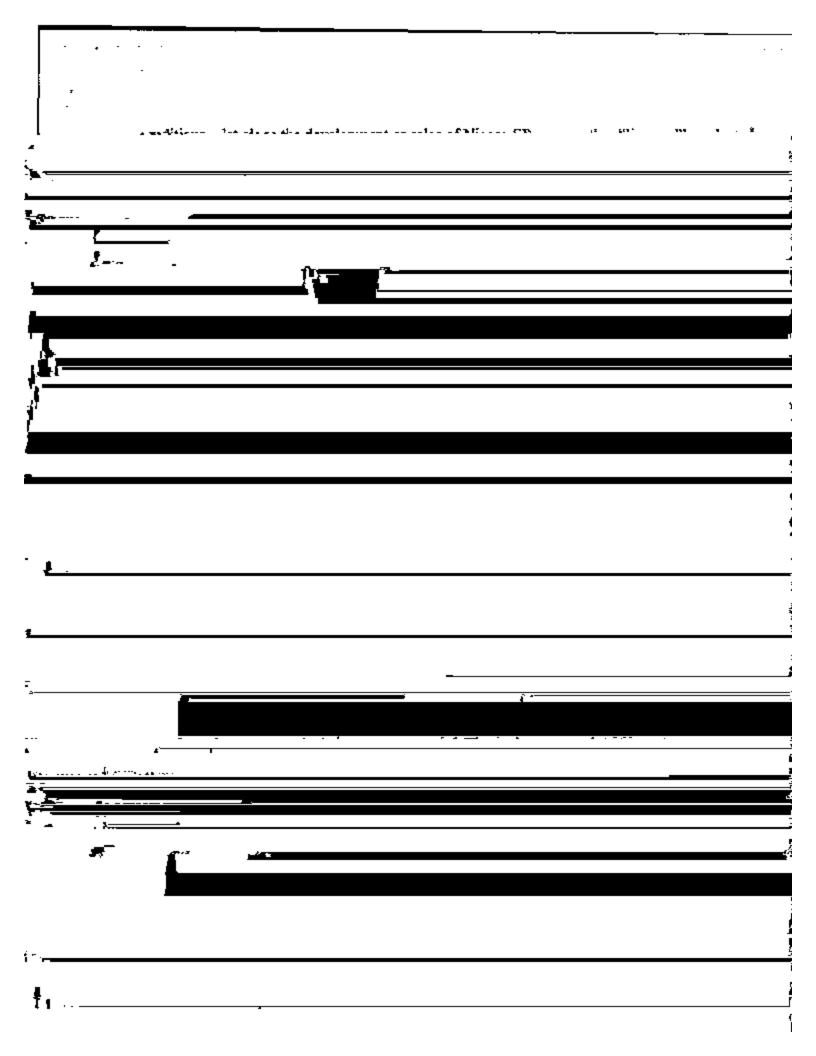
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	experts should be precluded from asserting that Schering made "\$60 million in non-contingent
	payments" because based on "the record in this case" and "as a matter of fact," we are wrong.3
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even if Upsher "did not inform Schering" that it had done so. 12 In fact, Schering admits that continued to pay installments on the \$60 million despite making virtually no sales of the	t <b>i</b> t
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During his testimony, Schering's chairman and chief
executive officer, Richard Kogan, made it perfectly clear that the \$60 million in payments were
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4+44+4+4 <sup>20</sup>

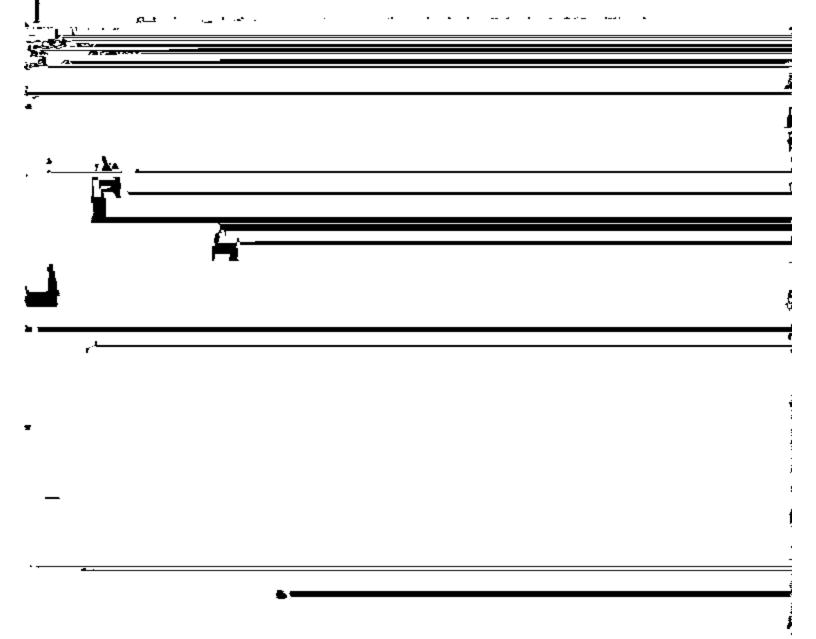
Expert Witness Testimony. Each of the five licensing expert witnesses in this case conclude that the payments totaled \$60 million and were non-contingent. Not even Upsher's own experts deny these obvious facts. One of Upsher's licensing experts testified that the

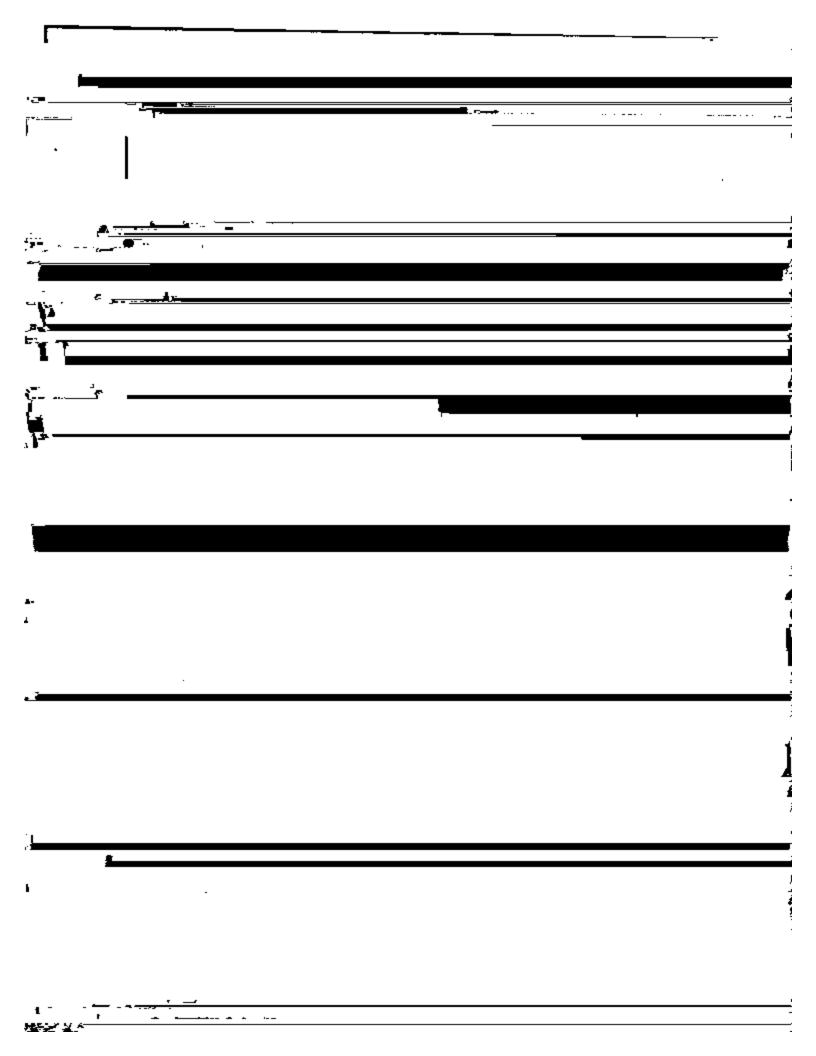
	to make the \$60 million payments non-contingent and that
	•=•ba <sup>24</sup> ·
	Complaint counsel's licensing expert corroborates the testimony of respondents' exp
	Dr. Nelson Levy, based on his two decades of pharmaceutical industry experience, analyzed
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a minimum, it shows that there is a material dispute of fact as to these issues, which "cannot be determined on a motion in limine."28

### III. Upsher's Factual Arguments are Unpersuasive

Upsher throws out various explanations for why the payments did not total \$60 million or were contingent. These explanations are either irrelevant or unpersuasive. First, Upsher disputes what it perceives is our characterization of a single \$60 million payment, on the basis that Schering actually made the payments in three installments. Upsher misses the point. Whether





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	15-december 15-december 22-d december 2002 I second a second file formation
	I hereby certify that this 22ud day of January, 2002, I caused a copy of the foregoing
	Public Version of Memorandum in Opposition to Upsher-Smith's Motion to Bar Complaint
	Counsel from Asserting that Schering-Plough Made "A \$60 Million Non-Contingent Payment
	to be served upon the following person by hand delivery:
	Honorable D. Michael Chappell
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£ <del>-</del> -	Fig. 2

### ATTACHMENT A

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# ATTACHMENT B

### UNITED STATES OF AMERICA BEFORE FEDERAL TRADE COMMISSION

In the Matter of	)
Schering-Plough Corporation,	Ś
a corporation,	)
Upsher-Smith Laboratories,	) Docket No. 9297
a corporation,	)
and	) .
	)
American Home Products Corporation,	)
a corporation.	<i></i>

### RESPONDENT SCHERING-PLOUGH CORPORATION'S OBJECTIONS AND RESPONSES TO COMPLAINT COUNSEL'S REVISED SECOND REQUEST FOR ADMISSIONS

Pursuant to Federal Trade Commission ("FTC") Rule of Practice Section 3.32, respondent Schering-Plough Corporation ("Schering") submits these objections and

and the Communication Description of Construct Description Ass. A 1 . . .

.*	Reguest No. 70:	Under the Schering/Unsher Agreement, if Unsher abandoned
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Request No. 82: Since June 1997, Schering has made no sales of KLOR CON products pursuant to the license obtained in the Schering/Upsher Agreement.

Answer:

Admitted.

Request No. 83: Schering had no intention, as of September 2001, to sell the KLOR CON products pursuant to the license obtained in the Schering/Upsher Agreement.

Answer:

Schering admits that, by September 2001, it no longer had

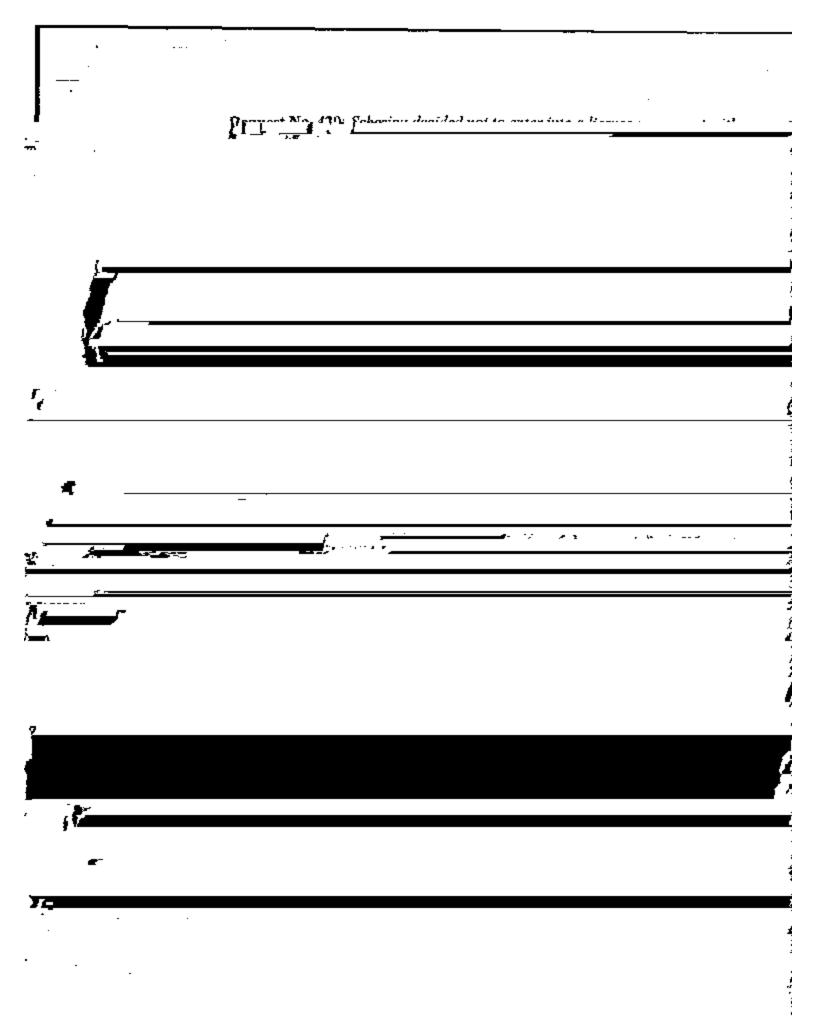
plans to sell Klor-Con products.

Request No. 84: Since June 1997, Schering has made no sales of Niacor-SR pursuant to the license obtained in the Schering/Upsher Agreement.

Answer:

Admitted.

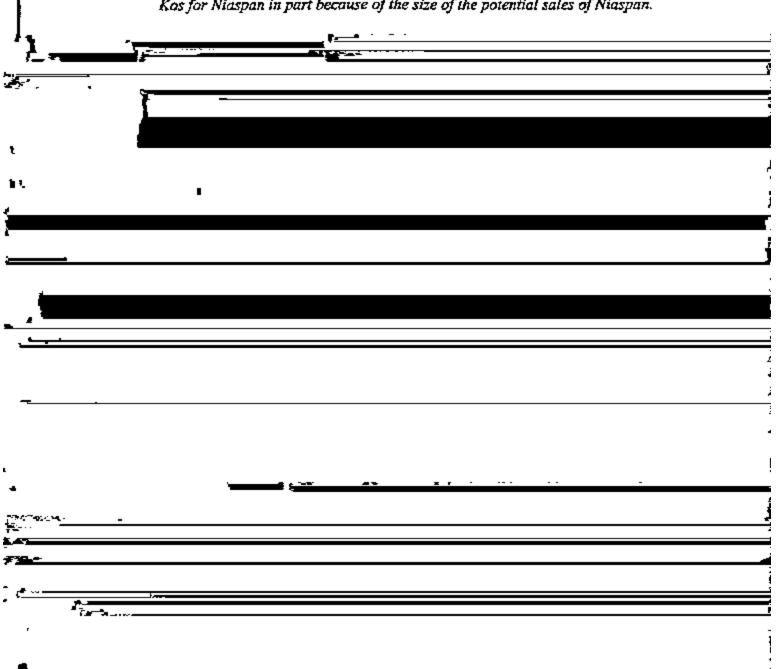
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Request No. 418: Schering decided not to enter into a license agreement with Kos for Niaspan in part because of clinical data demonstrating a flushing side effect resulting from taking Niaspan.

Answer: Denied. Schering never sought to enter into a license agreement with Kos for Niaspan. However, Schering did consider a proposal to enter into a co-marketing/detailing agreement with Kos for Niaspan.

Request No. 420: Schering decided not to enter into a license agreement with Kos for Niaspan in part because of the size of the potential sales of Niaspan.



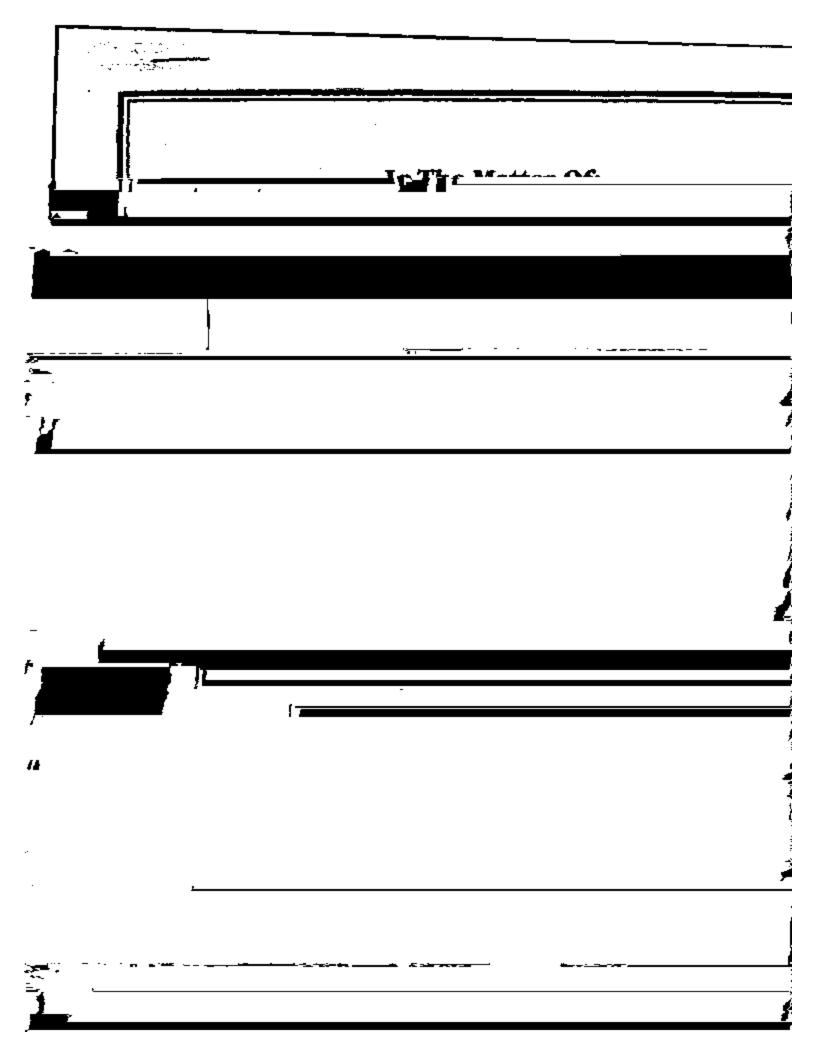
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# ATTACHMENT D

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### ATTACHMENT E



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### ATTACHMENT F

### In The Matter Of:

### SCHERING-PLOUGH CORP., UPSHER-SMITH LABORATORIES AND AMERICAN HOME PRODUCTS COR

PATRICIA A. RUSSO August 21, 2001

For The Record, Inc.

Court Reporting and Litigation Support

603 Post Office Road

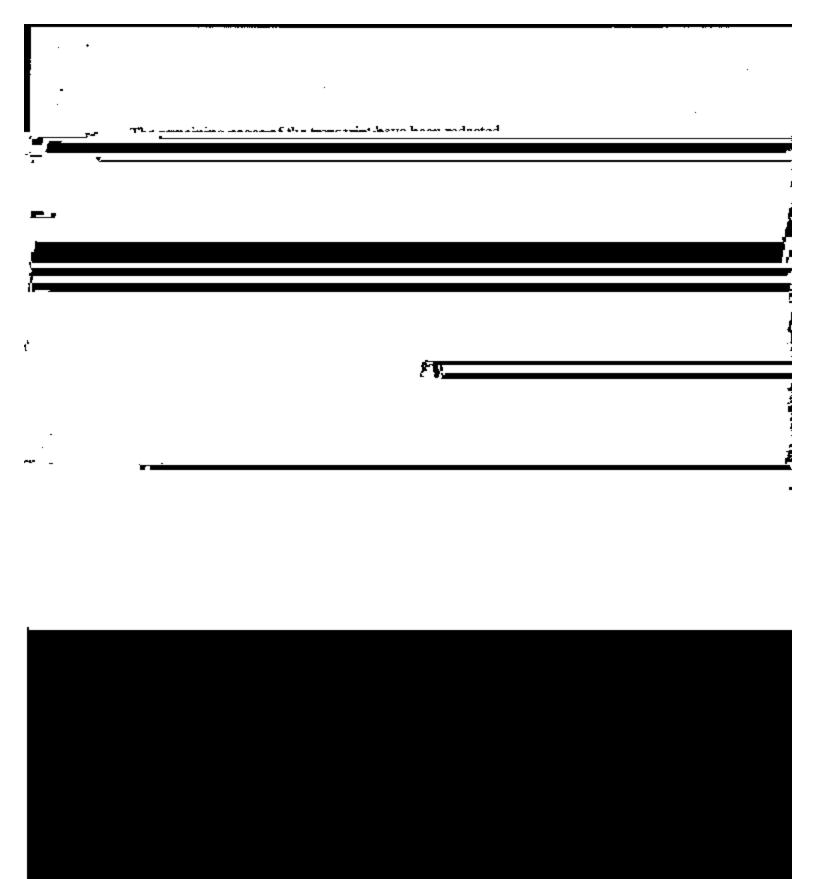
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Waldorf, MD USA 20602

(301) 870-8025 FAX: (301) 870-8333

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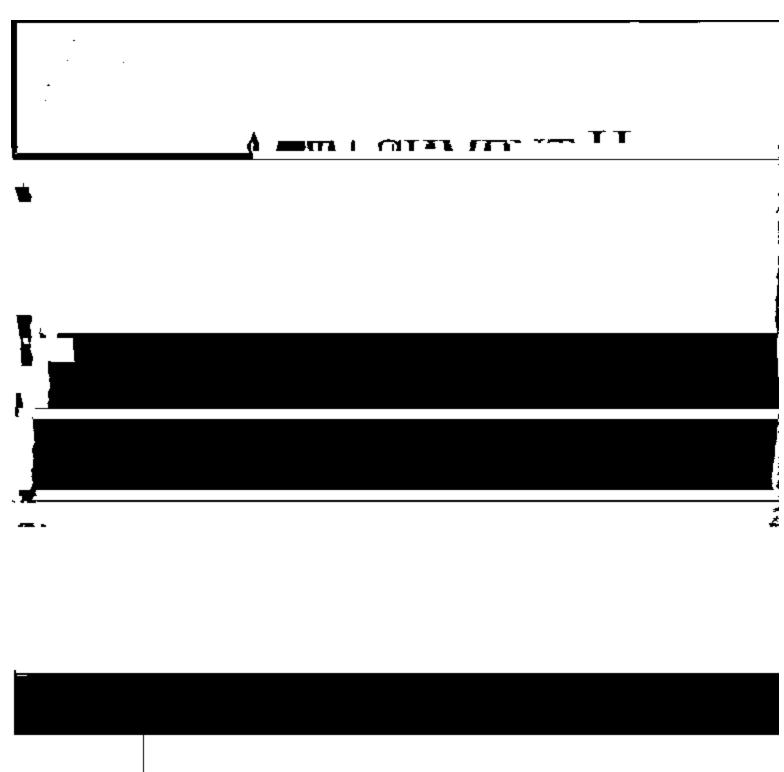
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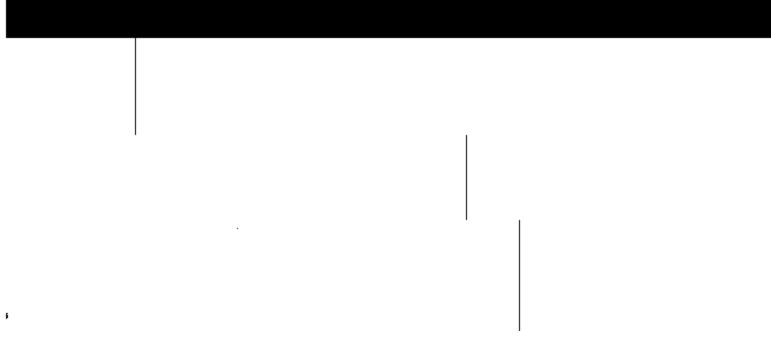


# ATTACHMENT G

# In The Matter Of:

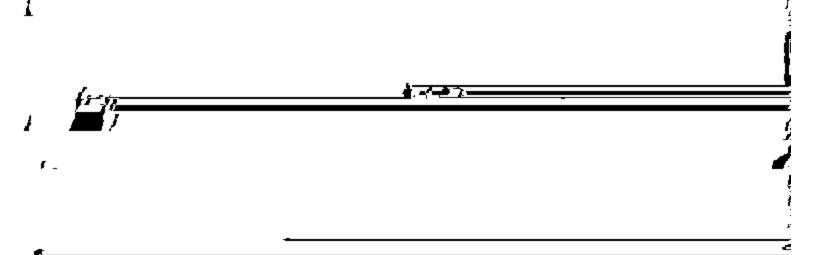
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### In The Matter Of:

SCHERING-PLOUGH & UPSHER-SMITH MATTER NO. D09297



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### ATTACHMENT I

# In The Matter Of: SCHERING-PLOUGH CORP. & UPSHER-SMITH LABS MATTER NO. D09297

RICHARD L. DiCICCO November 27, 2001

CONFIDENTIAL

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# ATTACHMENT J

### In The Matter Of:

SCHEDING BLOUCH & HIDSHED STATE

The remaining pages of the transcript have been redacted.

# ATTACHMENT K

### In The Matter Of:

SCHERING-PLOUGH CORP. & UPSHER-SMITH LABS

MATTER NO. D09297

ZOLA P. HOROVITZ November 14, 2001

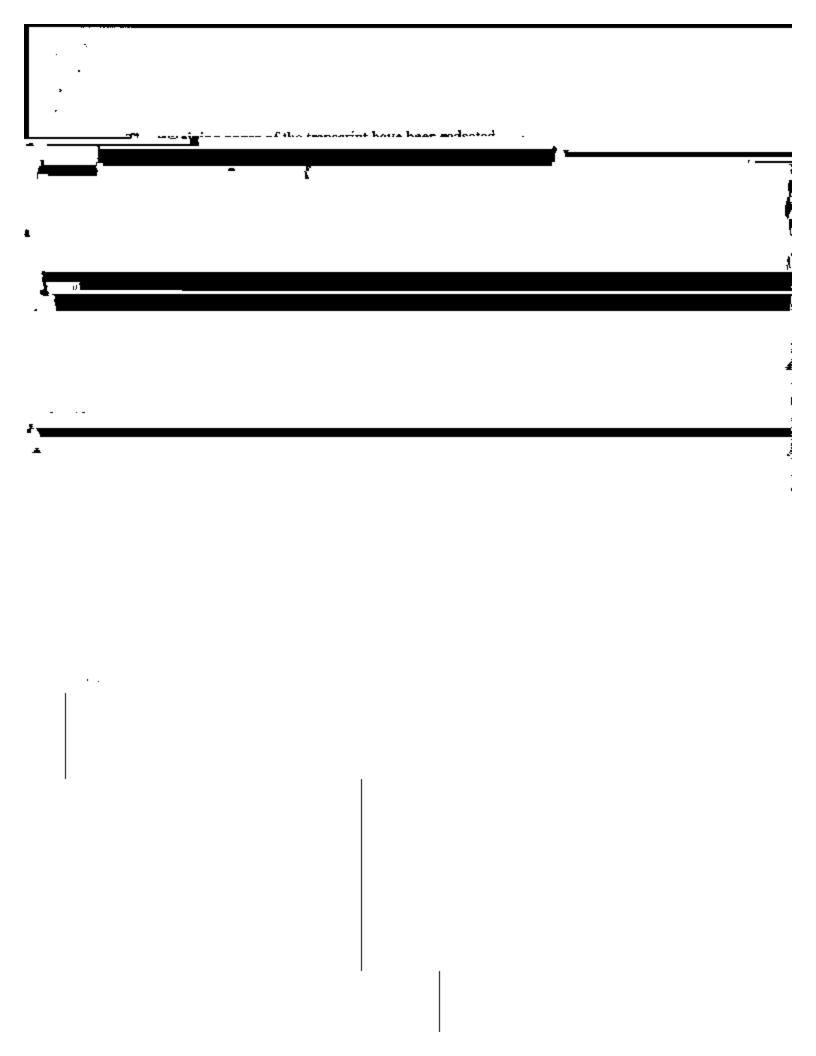
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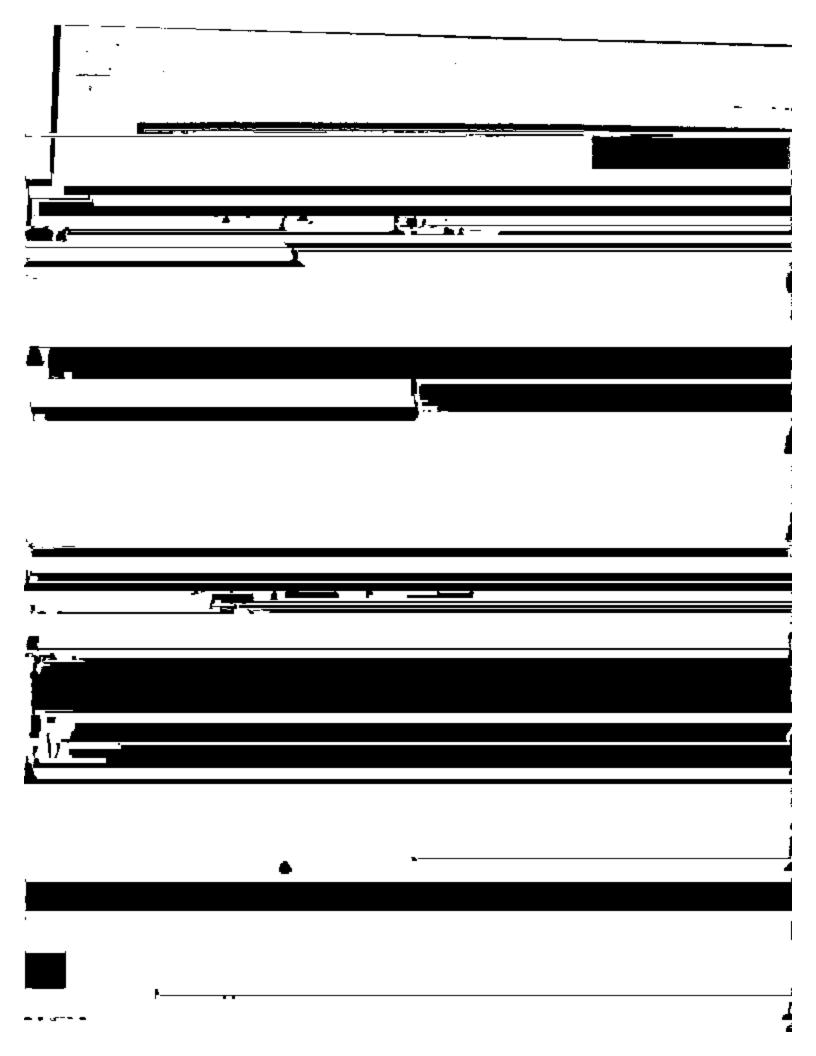
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# ATTACHMENT M

### In The Matter Of:

### SCHERING-PLOUGH & UPSHER-SMITH MATTER NO. 9910256

IAN TROUP May 25, 2000

For The Record, Inc.

Court Reporting and Litigation Support
603 Post Office Road
Suite 309

Waldorf, MD USA 20602
(301) 870-8025 FAX: (301) 870-8333

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