

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

In re: K-DUR ANTITRUST LITIGATION	:	
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This Document Relates to:	:	Civil Action No. 01-1652 (JAG, Jr.)
	:	
Louisiana Wholesale Drug Company, Inc.	:	MDL Docket No. 1419
	:	
v.	:	01-CV-2869
Schering-Plough Corporation, <i>et al.</i>	:	

**NOTICE OF PENDING CLASS ACTION, PROPOSED PARTIAL SETTLEMENT
AND HEARING REGARDING SETTLEMENT**

TO: ALL PERSONS WHO HAVE PURCHASED K-DUR 20 DIRECTLY FROM SCHERING-PLOUGH CORPORATION AT ANY TIME DURING THE PERIOD NOVEMBER 20, 1998 THROUGH SEPTEMBER 23, 2004, EXCLUDING: (1) FEDERAL GOVERNMENTAL ENTITIES; (2) PLAINTIFFS AND THEIR ASSIGNED CLAIMS IN *WALGREEN ET AL. v. SCHERING-PLOUGH CORP., INC. ET AL.*, NO. 01-CV-4524 (JAG); AND (3) PLAINTIFFS IN *COMMONWEALTH OF PENNSYLVANIA v. SCHERING-PLOUGH CORP., INC. ET AL.*, NO. 328E. ALSO EXCLUDED ARE DEFENDANTS AND THEIR OFFICERS, DIRECTORS, MANAGEMENT AND EMPLOYEES, SUBSIDIARIES AND AFFILIATES.

PLEASE READ THIS NOTICE CAREFULLY AND IN ITS ENTIRETY. A SETTLEMENT HAS BEEN PROPOSED IN PENDING CLASS ACTION LITIGATION THAT MAY AFFECT YOUR RIGHTS.

I. PURPOSE OF NOTICE

Pending in this Court is a case brought by Louisiana Wholesale Drug Company, Inc. ("Louisiana Wholesale" or "Plaintiff") under the federal antitrust laws on behalf of itself and a class of similarly situated entities, against Defendants Schering-Plough Corporation ("Schering"), Upsher-Smith Laboratories ("Upsher"), and Wyeth (formerly American Home Products Corporation) alleging a conspiracy to violate the federal antitrust laws. On September 30, 2004, the Court certified, for settlement purposes only, a class of the following:

all persons who have purchased K-Dur 20 directly from Schering at any time during the period November 20, 1998, through September 23, 2004. The class excludes: (1) federal governmental entities; (2) plaintiffs and their assigned claims in *Walgreen et al. v. Schering-Plough Corp., Inc. et al.*, No. 01-CV-4524 (JAG); and (3) plaintiffs in *Commonwealth of Pennsylvania v. Schering-Plough Corp., Inc. et al.*, No. 328E. Also excluded are defendants and their officers, directors, management and employees, subsidiaries and affiliates (the "Settlement Class").

This Notice is given pursuant to Rule 23 of the Federal Rules of Civil Procedure and by Order of the United States District Court for the District of New Jersey for the purpose of informing you of your rights with regard to:

- a) the Settlement Class;
- b) a proposed partial settlement of the above-referenced litigation on behalf of the Settlement Class in exchange for a payment by Defendant Wyeth of \$2,100,000.00 ("Settlement Fund") and other benefits as described below; and
- c) a hearing scheduled to be held on JANUARY 24, 2005 at 2:00 P.M. before The Honorable Joseph A. Greenaway, Jr., United States District Judge for the District of New Jersey, Martin Luther King Building & U.S. Courthouse, 50 Walnut Street, Newark, New Jersey (the "Fairness Hearing").

Settlement Class members are also hereby advised of their right to elect to exclude themselves from the Settlement Class, as detailed below.

The purpose of the Fairness Hearing will be to consider whether to approve the proposed settlement between the Settlement Class and Defendant Wyeth as fair, reasonable, adequate, and in the best interests of the Settlement Class. The Court may continue or reschedule the hearing without further notice. Whether or not the settlement with Wyeth is approved, the litigation will continue against the non-settling defendants, Schering and Upsher.

Class members also are hereby advised of their right to object or appear at the Fairness Hearing, as explained below.

II. THE LITIGATION

A. Class Representatives' Claims

Plaintiff's action arises out of alleged agreements to restrain trade which Schering entered into with Upsher and Wyeth (the "Agreements"). Plaintiff alleges that Schering entered into an agreement with Wyeth in or about January 1998, settling patent infringement litigation filed by Schering against Wyeth in the United States District Court for the Eastern District of Pennsylvania. Plaintiff alleges that, pursuant to this settlement, Schering agreed to pay Wyeth \$30

million in return for Wyeth's agreement to drop its patent challenge and delay marketing its generic version of K-Dur 20 for approximately seven years.¹ Plaintiff has alleged that the agreements between (a) Schering and Upsher, and (b) Schering and Wyeth, were unreasonable restraints of trade in violation of the federal antitrust laws, which had the purpose and effect of delaying the entry of generic versions of K-Dur 20 into the market. Plaintiff has alleged that the actions taken by Defendants, which allegedly delayed the entry of less expensive generic versions of K-Dur 20, have harmed Plaintiff and other direct purchasers by causing them to pay higher prices for 20 milliequivalent extended-release potassium chloride tablets.

B. Wyeth's Denial of Liability

Wyeth and the other Defendants vigorously dispute Plaintiff's claims that the Agreements were illegal. Wyeth argues that, under the settlement of the patent infringement litigation between Schering and Wyeth, which concerned Schering's patent related to a potassium chloride supplement called K-Dur 20, Schering and Wyeth agreed that a generic version of K-Dur made by ESI Lederle, Inc. (a former subsidiary of Wyeth), could be marketed beginning January 1, 2004 (thirty-two months before expiration of Schering's K-Dur patent), Wyeth agreed to license Schering the rights to certain of Wyeth's products, Schering agreed to pay Wyeth up to \$30 million, and Schering and Wyeth agreed that the patent litigation would be dismissed. Wyeth also denies Plaintiff's claims that its agreement with Schering caused Plaintiff and members of the Class any harm. Wyeth asserts, among other defenses, that its agreement was pro-competitive, legal, and that in any event, the agreement did not cause any injury to direct purchasers because it did not delay any cheaper generic 20 milliequivalent extended-release potassium chloride tablets from entering the market.

C. Status of the Litigation

The Court has appointed the law firms of Garwin, Bronzaft, Gerstein & Fisher, L.L.P. and Berger & Montague, P.C. as Co-Lead Counsel for the Direct Purchaser Class cases. Since that time, Co-Lead Counsel and lawyers working at their direction have prosecuted this lawsuit on behalf of the Class.

Fact discovery has been proceeding in this case. Class counsel have reviewed hundreds of thousands of documents from a related investigation by the Federal Trade Commission (FTC) and numerous transcripts from the FTC proceedings, and conducted their own independent investigation. As a result of their intensive investigation, Co-Lead Counsel have obtained significant knowledge regarding the strengths and weaknesses of the claims and defenses in this case before entering into settlement negotiations with Wyeth.

All defendants, including Wyeth, have made motions to dismiss Plaintiff's claims. These motions were fully briefed, and oral argument occurred before the Court in November 2002. These motions were denied by Order dated September 29, 2004.

THE COURT HAS NOT RULED ON THE MERITS OF ANY OF THE CLAIMS OR DEFENSES ASSERTED BY THE PARTIES. THIS NOTICE IS NOT TO BE UNDERSTOOD AS AN EXPRESSION OF ANY OPINION BY THIS COURT AS TO THE MERITS OF ANY OF THE CLAIMS OR DEFENSES ASSERTED BY EITHER SIDE.

III. SUMMARY OF THE PROPOSED SETTLEMENT

Subject to the terms and conditions of the proposed settlement agreement with Wyeth dated March 12, 2004, which is on file with the Court as Exhibit "A" to the Certification of Rebekah R. Conroy, Esq., dated July 23, 2004 (a copy is available at www.gbgf-law.com or www.bergermontague.com), Wyeth has made a cash payment of \$2,100,000.00 into an escrow account for the benefit of the Settlement Class. Wyeth has also agreed to provide, under certain circumstances, specific cooperation with Plaintiff in its continuing litigation against the non-settling defendants, Schering and Upsher, in the event that (a) a Final Judgment approving the Settlement is entered; and (b) any litigation or government investigation involving the same subject matter is settled as to Wyeth. Wyeth does not admit any wrongdoing or liability on its part. The proposed settlement with Wyeth is a compromise of disputed claims and does not mean that it or any other defendant in this action has been found liable for the claims made by Plaintiff. If approved, the settlement funds may be used to pay the costs and expenses of continued litigation against the non-settling defendants.

If the Settlement is approved by the Court, Wyeth and its present and former parents, subsidiaries, divisions, departments, affiliates, stockholders, officers, directors, employees, agents and any of their legal representatives (and the predecessors, heirs, executors, administrators, successors and assigns of each of the foregoing) (the "Released Parties") shall be released and forever discharged from any and all claims that have been brought, or that could have been brought, by Plaintiff or by any member of the Settlement Class based on the conduct alleged in the Complaint, or based on the conduct alleged in the Amended Complaint filed by Plaintiff on December 23, 2003, and for any claim of fraudulent inducement to enter the Settlement Agreement (the "Released Claims"). Each member of the Settlement Class covenants and agrees that it shall not seek to establish liability against any Released Party based, in whole or in part, upon any of the Released Claims.

Any disputes arising under or relating to the Settlement Agreement, including, but not limited to, the releases in the Settlement Agreement, will be resolved in the United States District Court for the District of New Jersey. Neither Schering nor Upsher will be released under this Settlement Agreement.

The above is only a summary of the settlement with Wyeth. A full copy of the Settlement Agreement, including the release, is attached as Exhibit "A" to the Certification of Rebekah R. Conroy, Esq., dated July 23, 2004, on public file with the United States District Court for the District of New Jersey, Martin Luther King Building & U.S. Courthouse, 50 Walnut Street, Newark, New Jersey, and is also available at www.gbgf-law.com or www.bergermontague.com.

¹Wyeth disputes Plaintiff's characterization of the Schering/Wyeth agreement, as well as Plaintiff's claim that the agreement is illegal.

Certain individual direct purchasers have brought their own lawsuits against defendants. These individual plaintiffs will not participate in the proposed settlement with the Class.

The Court preliminarily approved the proposed settlement with Wyeth on September 30, 2004. The Court found the proposed settlement, upon preliminary review, to be within the range of reasonableness.

Accordingly, the Court has set a Fairness Hearing in order to determine whether the proposed settlement with Wyeth should finally be approved as described in section VII, below.

IV. COSTS AND EXPENSES

If the Settlement is approved, and the conditions described above for the release of the Settlement Fund from the escrow account are met, Class Counsel may apply to the Court for permission to seek reimbursement from the Settlement Fund for costs and expenses incurred in prosecuting this litigation. Class Counsel will not seek any attorneys' fees from the Settlement Fund. **NO CLASS MEMBER WILL BE RESPONSIBLE FOR PAYING ANY OF THE COSTS OR EXPENSES OF THIS SUIT, OR ANY ATTORNEYS' FEES, IN CONNECTION WITH THE PROPOSED SETTLEMENT.**

V. HOW TO PARTICIPATE IN THIS SETTLEMENT

If you wish to remain a member of the Settlement Class, you need not do anything at this time. All members of the Settlement Class will be entitled to benefit from the settlement as described above and according to the terms of the Settlement Agreement if it is finally approved by the Court, and all members of the Settlement Class will be bound by the final judgment and release of claims against Wyeth entered by the Court. Co-Lead Counsel that have been appointed by the Court will represent the Settlement Class on your behalf.

In addition, any member who does not request exclusion from the Settlement Class may also enter an appearance through their own counsel at their own expense.

VI. HOW TO BE EXCLUDED FROM THE SETTLEMENT CLASS

If you wish to be excluded from the Settlement Class, you may do so by mailing a written request for exclusion which must be received on December 17, 2004, or no later than forty-five days after the date this Notice was mailed, whichever date is later, by the administrator, Heffler, Radetich & Saitta L.L.P., at the following address:

K-Dur Antitrust Litigation
c/o Heffler, Radetich & Saitta L.L.P.
P.O. Box 59089
Philadelphia, PA 19102-9089
(800) 528-7199

The request for exclusion must: (1) clearly state your name, address, and the name of the case (*In re: K-Dur Antitrust Litigation*), and (2) clearly state that you wish to be excluded from the Settlement Class. You need not state the reason for this request.

If you follow this procedure to exclude yourself from the Settlement Class, you will not be entitled to appear at the Fairness Hearing, or to share in the benefits of the settlement with Wyeth, and you will not be bound by the release of Wyeth.

VII. THE FAIRNESS HEARING

Pursuant to an Order of the Court, a hearing will be held at 2:00 P.M. on Monday, January 24, 2005, in the courtroom of the Honorable Joseph A. Greenaway, Jr., Martin Luther King Building & U.S. Courthouse, 50 Walnut Street, Newark, New Jersey, for the purpose of determining whether the Court should approve the proposed settlement between the Settlement Class and Wyeth as fair, reasonable, adequate, and in the best interests of the Settlement Class. You are entitled to appear and be heard at this hearing. The time and date of the hearing may be continued or rescheduled without further notice. If you do not wish to object to the settlement with Wyeth, it is not necessary to appear at the hearing or take any action at this time.

VIII. OBJECTIONS TO THE PROPOSED SETTLEMENT

Any member of the Settlement Class who does not exclude itself from the Settlement Class may appear at the Fairness Hearing in person or by duly authorized attorney and show cause why the Settlement should not be approved as fair, reasonable and adequate, provided that no person shall be heard at the Fairness Hearing, and no paper or brief submitted by any such person shall be received or considered by the Court, unless you have sent a *Notice of Intention to Appear* and a *Summary Statement* outlining the position(s) to be asserted and the grounds therefore, together with copies of any supporting papers or briefs, by first-class mail, postage prepaid, postmarked on or before January 10, 2005, to: (1) William T. Walsh, Clerk, Office of the Clerk, United States District Court, District of New Jersey, Martin Luther King Building and U.S. Courthouse, 50 Walnut Street, Newark, NJ 07101 and (2) one or both of the Co-Lead Counsel for the Settlement Class, whose addresses are listed below. Your notice and any accompanying papers or briefs must include in a prominent location the name of the case, *In re: K-Dur Antitrust Litigation*, the MDL case number (MDL No. 1419), and the Judge's name (Hon. Joseph A. Greenaway, Jr.).

Except as provided herein, no person shall be entitled to contest the terms and conditions of the proposed settlement or to appear in person at the hearing, and persons who fail to object or to file a notice of intent to appear as provided herein shall be deemed to have waived and shall be foreclosed forever from raising any such objections and will not be heard in person at the hearing.

IX. FURTHER PROCEEDINGS

Whether or not the proposed settlement with Wyeth is approved by the Court, the litigation will continue against Schering and Upsher. Schering and Upsher deny the allegations made against them, and the Court has not determined the merits of these claims or any defenses thereto.

X. ADDITIONAL INFORMATION

The pleadings and other records in this litigation may be examined and copied during regular hours at the Office of the Clerk, United States District Court for the District of New Jersey. Copies of the Motion for Preliminary Approval of the Settlement, this Notice, and Motion for Final Approval will also be available at www.gbfg-law.com or www.bergermontague.com.

Any questions which you have concerning the matters contained in this notice may be directed in writing to the Co-Lead Counsel for the Class:

Barry Taus, Esq.
Joseph Opper, Esq.
Garwin, Bronzaft, Gerstein & Fisher, L.L.P.
1501 Broadway, Suite 1416
New York, NY 10036
(212) 398-0055

Daniel Berger, Esq.
David F. Sorensen, Esq.
Berger & Montague, P.C.
1622 Locust Street
Philadelphia, PA 19103-6365
(215) 875-3000

PLEASE DO NOT ADDRESS ANY INQUIRIES TO THE COURT.

Dated: November 2, 2004

BY ORDER OF THE COURT,
United States District Court
District of New Jersey

K-Dur Antitrust Litigation
c/o Heffler, Radetich & Saitta L.L.P.
P.O. Box 59089
Philadelphia, PA 19102-9089

FIRST-CLASS MAIL

PLEASE FORWARD—IMPORTANT LEGAL NOTICE