

# **EXHIBIT 2**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY**

*In re K-Dur Antitrust Litigation*

This document relates to:

All Direct Purchaser Actions

Civil Action No. 01-cv-1652(SRC)(CLW)  
MDL Docket No. 1419

**AFFIDAVIT OF MICHAEL ROSENBAUM REGARDING  
MAILING OF NOTICE OF SETTLEMENT**

I, Michael Rosenbaum, under penalty of perjury under the laws of the United States of America, declare as follows:

1. I am Managing Director of Berdon Claims Administration LLC (“Berdon”), Court-approved Directed Escrow Agent concerning the settlement between the Direct Purchaser Class Plaintiffs (“DPCPs”) and the Defendants in the above-captioned litigation. As such, I am personally fully familiar with the facts described herein.

2. This affidavit is submitted to describe the procedures employed by Berdon to ensure that all members of the class were given timely notice of the proposed settlement of the litigation between DPCPs and Defendants.

3. Pursuant to Paragraph 5 of the Court’s order dated May 23, 2017, written notice to class members of the proposed settlement between DPCPs and Defendants, annexed hereto as Exhibit 1, was effected by Berdon by first-class mail on June 7, 2017. A total of 41 notices were sent to class members.

4. Of the 41 notices mailed, 4 notices were returned to Berdon as undeliverable.

Berdon obtained forwarding information for all 4 notices and promptly re-mailed them.

The foregoing statements are true and correct to the best of my knowledge, information and belief.



MICHAEL ROSENBAUM

Sworn to before me this 12 day of July, 2017



NOTARY PUBLIC

ANIBAL DASTAS  
NOTARY PUBLIC, State of New York  
01DA6084268  
Qualified in Queens County  
Commission Expires December 2, 2018

# EXHIBIT 1

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

**If you bought K-Dur 20 directly from Schering-Plough Corporation, a class action lawsuit could affect your rights.**

*A federal court authorized this notice. It is not a solicitation from a lawyer.*

- The purpose of this notice is to alert you about a proposed settlement of a Class Action Lawsuit (the “Lawsuit”) brought by Direct Purchasers of the prescription pharmaceutical K-Dur 20 (potassium chloride) (“Direct Purchaser Class Plaintiffs”). The Lawsuit asserts that Defendants Schering-Plough Corporation (now known as Merck & Co., Inc.) (“Schering”) and Upsher-Smith Laboratories, Inc. (“Upsher-Smith”) (collectively, “Defendants”) violated antitrust laws relating to the sale of K-Dur 20 in connection with a settlement of patent infringement litigation in 1997. All Defendants have denied any wrongdoing and assert that their settlement constituted a procompetitive and bona fide compromise of contentious patent litigation.
- Your legal rights are affected whether you act or do not act, so please read this notice carefully.
- The Court previously determined that the Lawsuit between Direct Purchaser Class Plaintiffs and Defendants can proceed as a class action. The class (hereinafter, the “Direct Purchaser Class,” or the “Class”) includes the following:

All persons or entities who have purchased K-Dur 20 directly from Schering at any time during the period November 20, 1998, through September 1, 2001.

Excluded from the class are all defendants and their officers, directors, management and employees, subsidiaries and affiliates, as well as federal government entities. Also excluded are persons or entities who have not purchased generic versions of K-Dur 20 after the introduction of generic versions of K-Dur 20.

Further excluded from the Class are: CVS Pharmacy, Inc., Rite Aid Corporation, Walgreen Co., Eckerd Corporation, The Kroger Co., Albertson’s, Inc., Safeway, Inc., Hy-Vee, Inc., and Maxi Drug, Inc., and their officers, directors, management and employees, predecessors, successors, subsidiaries and affiliates, in their own right and as assignees from putative members of this class.

- The Court has preliminarily approved the proposed settlement of the Lawsuit between the Direct Purchaser Class and Defendants. The proposed settlement will provide for the payment of \$60,200,000.00 (Sixty Million, Two Hundred Thousand dollars and no/100) into an escrow account (the “Settlement Fund”) for

allocation to the members of the Class after payment of Direct Purchaser Class Counsel’s attorneys’ fees, costs, and incentive award to the Class Representative out of the Settlement Fund, as approved by the Court. The full text of the proposed settlement (“Settlement Agreement”), which is dated May 15, 2017 is available for your review at [www.bergermontague.com](http://www.bergermontague.com) and [www.garwingerstein.com](http://www.garwingerstein.com).

- The Court has scheduled a hearing on Final Approval of the proposed settlement, the plan for allocating the Settlement Fund to members of the Class (summarized in Question 12 below), and Direct Purchaser Class Counsel’s request for reimbursement of costs and payment of attorneys’ fees out of the Settlement Fund. That hearing is scheduled for October 5, 2017, at 10 a.m., before Senior U.S. District Court Judge Stanley R. Chesler in Courtroom No. 2 at the United States District Court for the District of New Jersey, Martin Luther King Building and U.S. Courthouse, Newark, New Jersey 07101.

YOUR LEGAL RIGHTS AND OPTIONS	
<b>When You Receive A Claim Form, Promptly Complete And Return It</b>	You do not need to do anything now to seek a share of the proposed settlement. If the Court decides to give the proposed settlement Final Approval and you are a Class Member, then you will need to complete, sign and return a Claim Form (which will be mailed to you) to obtain a share of the proposed settlement.
<b>Stay In The Lawsuit But Object To The Settlement</b>	If you object to all or any part of the proposed settlement, write to the Court about why you do not like the proposed settlement.

- These rights and options – **and the deadlines to exercise them** – are explained in this notice.
- The Court in charge of this case still has to decide whether to give Final Approval to the proposed settlement with Defendants. If the Court does not finally approve the proposed settlement for any reason other than that the settlement is not fair, reasonable, and/or adequate, as part of the agreement Direct Purchaser Class Counsel negotiated on your behalf, Defendants have nevertheless agreed to offer you in exchange for a full release of your claims your *pro rata* share of the Settlement Fund (subject to 40% of your proportionate share being placed into escrow while the Court reviews Direct Purchaser Class Counsel’s petition for attorney’s fees, costs and expenses, and incentive award to the Class Representative. The proportionate amount above the amount approved by the Court will be paid to you).

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## BASIC INFORMATION

### 1. Why did I get this notice?

You received this notice because according to Schering's sales records, you may have purchased K-Dur 20 directly from Schering at some point between November 20, 1998 and September 1, 2001, and therefore you may be a member of the Class that was certified by the Court for purposes of a lawsuit against Defendants.

### 2. What is this lawsuit about?

The Direct Purchaser Class Plaintiffs commenced this litigation in 2001, alleging that Schering, the brand manufacturer of K-Dur 20, entered into an unlawful anticompetitive settlement agreement with its prospective generic competitor, Upsher-Smith, to delay or block the market entry of less expensive, generic versions of K-Dur 20. Specifically, the Direct Purchaser Class Plaintiffs allege that Schering agreed to pay Upsher in exchange for Upsher-Smith's agreement to delay selling its generic versions of K-Dur 20, thereby reducing competition from less expensive generic versions of K-Dur 20. Direct Purchaser Class Plaintiffs further allege that they and the other members of the Class were injured by being overcharged because of delay in the availability of less expensive, generic versions of K-Dur 20. A copy of the operative Direct Purchaser Class Plaintiffs' First Amended Class Action Complaint of December 23, 2003 (the "Complaint") is available at either [www.bergermontague.com](http://www.bergermontague.com) or [www.garwingerstein.com](http://www.garwingerstein.com).

Defendants deny Direct Purchaser Class Plaintiffs' allegations, and they deny that any Class member is entitled to damages or other relief. Defendants also deny that their conduct violated any applicable law or regulation. Specifically, Defendants assert that their settlement agreement constituted a bona fide resolution of patent litigation, and that Defendants' agreed upon entry date for generic entry was a reasonable and lawful procompetitive compromise. Defendants also assert that the branded manufacturer's payment to the generic manufacturer was not for delayed generic entry, but consideration for valuable intellectual property from the generic manufacturer to the branded manufacturer. Defendants deny that Direct Purchaser Class Plaintiffs have sustained any injury or damages as a result of Defendants' conduct.

No trial has been held in this Lawsuit.

THE COURT HAS NOT DECIDED WHETHER ANY DEFENDANT VIOLATED ANY LAWS. THIS NOTICE IS NOT AN EXPRESSION OF ANY OPINION BY THE COURT AS TO THE MERITS OF DIRECT PURCHASER CLASS PLAINTIFFS' CLAIMS AGAINST ANY DEFENDANT, OR THE DEFENSES ASSERTED BY ANY DEFENDANT.

The Lawsuit is known as *In re K-Dur Antitrust Litigation*, Civ. A. No. 01-1652 (D.N.J.). Judge Stanley R. Chesler of the United States District Court for the District of New Jersey is overseeing this Lawsuit.

### 3. Why is this lawsuit a class action?

In a class action, one or more entities called “Class Representatives” sue on behalf of other entities with similar claims. In this case, the Class Representative is Louisiana Wholesale Drug Company, Inc. (“LWD”).

The Class Representative and the entities on whose behalf it has sued together constitute the “Class” or “Class Members.” They are also called the “Direct Purchaser Class Plaintiffs” or “Plaintiffs.” Their attorneys are called “Plaintiffs’ Counsel” or “Class Counsel.”

In a class action lawsuit, one court resolves the issues for everyone in the class, except for those class members who exclude themselves (i.e., “opt out”) from the class. The Court has determined that the Lawsuit by Direct Purchaser Class Plaintiffs against Defendants can proceed as a class action. A copy of the Court’s order may be found at [www.bergmontague.com](http://www.bergmontague.com) or [www.garwingerstein.com](http://www.garwingerstein.com).

Specifically, the Court has found that:

- The number of Class members is so numerous that joining them all into one suit is impractical.
- Members of the Class share common legal or factual issues relating to the claims in this case.
- The claims of the Class Representative are typical of the claims of the rest of the Class.
- The Class Representative and the lawyers representing the Class will fairly and adequately protect the Class’s interests.
- The common legal questions and facts predominate over any questions affecting only individual members of the Class, and this class action will be more efficient than individual lawsuits.

### 4. Has the Court identified Class Claims, Issues, or Defenses?

The Court has identified the following classwide issues:

(a) Whether Defendants’ agreement challenged by the Class as anticompetitive in the Complaint violated Section 1 of the Sherman Act, 15 U.S.C. § 1;

(b) Whether the agreement delayed the entry of generic versions of K-Dur 20; and

(c) Whether Defendants' alleged conduct caused the Class to pay more for K-Dur 20 than they would have absent the alleged conduct.

The amount of any overcharge damages owed to the Class in the aggregate under Section 4 of the Clayton Act, 15 U.S.C. § 4, similarly presents a classwide issue.

5. Why is there a settlement with Defendants?

The Direct Purchaser Class Plaintiffs and Defendants were preparing to proceed with the litigation and to go to trial, but they have now agreed to a proposed settlement. By settling, both the Direct Purchaser Class Plaintiffs and Defendants avoid having to litigate the case to trial and incur the continued costs and delays of litigation. The Class Representative and Class Counsel believe that the proposed settlement is fair, adequate, and reasonable and in the best interests of the Class.

### WHO IS IN THE CLASS AND SETTLEMENT

6. Am I part of the Class and the settlement?

The proceeds of this settlement will be allocated only to members of the Class on a *pro rata* basis, and then only according to a Plan of Allocation that Class Counsel will submit to the Court for approval.

You are in the Class if you are an individual or entity in the United States that purchased K-Dur 20 directly from Schering at any time November 20, 1998 through September 1, 2001 (the "Class") and do not meet one of the exclusions.

Excluded from the Class are Defendants, and their officers, directors, management, employees, subsidiaries, and affiliates, and all federal government entities. Also excluded are persons or entities who have not purchased generic versions of K-Dur 20 after the introduction of generic versions of K-Dur 20. Further excluded from the Class are: CVS Pharmacy, Inc., Rite Aid Corporation, Walgreen Co., Eckerd Corporation, The Kroger Co., Albertson's, Inc., Safeway, Inc., Hy-Vee, Inc., and Maxi Drug, Inc., and their officers, directors, management and employees, predecessors, successors, subsidiaries and affiliates, in their own right and as assignees from putative members of this class.

If you are not sure whether you are included, you may call or write to the lawyers in this case at the telephone numbers or addresses listed in Question 7 below.

## THE LAWYERS REPRESENTING YOU

### 7. Do I have a lawyer in this case?

The attorneys and law firms listed below are serving as Co-Lead Class Counsel by appointment of the Court. Co-Lead Class Counsel are experienced in handling similar cases against other companies. Co-Lead Class Counsel are:

BERGER & MONTAGUE, P.C.  
David F. Sorensen  
Daniel C. Simons  
1622 Locust Street  
Philadelphia, PA 19103  
Tel: (215) 875-3000  
Fax: (215) 875-4604

GARWIN GERSTEIN & FISHER LLP  
Bruce E. Gerstein  
Joseph Opper  
Kimberly Hennings  
Wall Street Plaza  
88 Pine Street, 10th Floor  
New York, NY 10005  
Tel: (212) 398-0055  
Fax: (212) 764-6620

### 8. Should I get my own lawyer?

You do not need to hire your own lawyer because Co-Lead Class Counsel are working on your behalf. However, if you wish to do so, you may retain your own lawyer at your own expense.

### 9. How will the lawyers be paid?

The Court will be asked to approve reasonable attorney's fees, as well as reimbursement of expenses Class Counsel have advanced on behalf of the Class. If the Court grants Class Counsel's requests, fees and expenses would be deducted from any money obtained for the Class. Members of the Class will not have to pay any attorney's fees or expenses.

## THE SETTLEMENT BENEFITS – WHAT YOU GET

### 10. What does the settlement with Defendants provide?

Defendants have agreed to pay \$60,200,000.00 in cash into the Settlement Fund (which will include any interest that accrues). Direct Purchaser Class Plaintiffs' Counsel will apply to the Court for an award of attorneys' fees (up to one-third of the Settlement Fund) and expenses, and an incentive award to Class Representative LWD of \$100,000.00 for its services to the Class, and payment for costs of administering the settlement from the Settlement Fund. The remainder (the "Net Settlement Fund") will be divided among Class Members pursuant to the Plan of Allocation outlined below. The proposed settlement also provides that, in the event the Court does not approve the settlement for any reason other than that the settlement is not fair, reasonable, and/or adequate, Defendants nevertheless

agree to offer you your *pro rata* share of the Settlement Fund (subject to 40% of your proportionate share being placed into escrow while the Court reviews Direct Purchaser Class Counsel's petition for attorney's fees, costs and incentive award to the Class Representative). In exchange for the consideration described above, the litigation between the Direct Purchaser Plaintiffs and Defendants will be dismissed with prejudice and Defendants will be released by Direct Purchaser Class Plaintiffs from certain claims, including all claims asserted in the litigation. The full text of the Settlement Agreement is available at [www.bergermontague.com](http://www.bergermontague.com) and [www.garwingerstein.com](http://www.garwingerstein.com).

11. How much will my payment be?

Your share of the Net Settlement Fund will be calculated pursuant to the Plan of Allocation, which Class Counsel will submit to the Court for approval. The proposed Plan of Allocation provides that the Net Settlement Fund shall be distributed to eligible Class members making claims ("Claimants") in proportion to each Claimant's actual purchases of branded K-Dur 20 during the period from January 1, 1999 through March 31, 2002, which is the time period used by Plaintiff's expert economist, Dr. Jeffrey J. Leitzinger, to calculate damages. To calculate the *pro rata* share for each Claimant of the Net Settlement Fund, the Claims Administrator, working with Dr. Leitzinger, will (1) take the total net purchases of K-Dur for each Claimant (net of any returns and assignments to the retailers mentioned in Question 6 above (specifically, CVS Pharmacy, Inc., Rite Aid Corporation, Walgreen Co., Eckerd Corporation, The Kroger Co., Albertson's, Inc., Safeway, Inc., Hy-Vee, Inc., and Maxi Drug, Inc.)); and (2) divide it by the total purchases of branded K-Dur 20 for all Claimants. If any Class member fails to submit a claim or documents and submits an alternative amount of purchases (based on the Claimant's own data) that is approved by the Claims Administrator, the shares will be re-calculated accordingly. The final calculations will then be applied to the Net Settlement Fund to determine each Claimant's allocated share.

Because your *pro rata* share of the Net Settlement Fund will depend on the amount of K-Dur 20 you directly purchased from Schering between January 1, 1999 and March 31, 2002, those who purchased more K-Dur 20 during that period will get a greater recovery.

In addition, your share of the Net Settlement Fund will depend on the number of valid claim forms that Class members submit. If less than 100% of the Class sends in a claim form, you could get a larger *pro rata* share.

12. How can I get a payment?

If the Court grants Final Approval to the settlement, then you will receive a Claim Form in the mail by which you can request your *pro rata* share of the Settlement Fund. (See Question 11 above). You may be asked to verify the accuracy of the

information in the Claim Form. For instance, you may be requested to confirm that the Claim Form accurately reports the amount of your qualifying purchases of K-Dur 20, and, if you believe it does not, to supply data you believe to be correct. The Claim Form will also include directions for you to sign and return the form. If the Court does not give Final Approval to the settlement for any reason other than that the settlement is not fair, reasonable, and/or adequate, Defendants must still offer you in exchange for a full release of your claims your *pro rata* share of the Settlement Fund (subject to 40% of your proportionate share being placed into escrow while the Court reviews Direct Purchaser Class Counsel's petition for attorney's fees, costs and incentive award to the Class Representative).

13. When would I get my payment?

When you get your payment depends on several matters, including whether the Court decides to give Final Approval to the settlement and any appeal of that Final Approval. The Net Settlement Fund will be allocated to Class Members as soon as possible after Final Approval and approval for distribution have been obtained for the proposed settlement. If the proposed settlement is given Final Approval, but there is an appeal of the Final Approval, the appeal could take several years to resolve. Any accrued interest on the Settlement Fund will be added, *pro rata*, to the amount paid to the Class Members pursuant to the Plan of Allocation.

### OBJECTING TO THE SETTLEMENT

You can tell the Court that you do not agree with all or any part of the proposed settlement, and/or the application for attorneys' fees, costs, and expenses, and/or incentive award to the Class Representative.

14. How do I tell the Court that I do not like the settlement?

If you are a Class Member, you can object to all or any part of the proposed settlement if you do not like all or any part of it, and you can give reasons why you think the Court should not approve it. You can also object to Class Counsel's application for attorneys' fees, costs and expenses and/or incentive award to the Class Representative, which will be filed with the Court and available for public viewing no later than July 17, 2017 and posted on [www.bergermontague.com](http://www.bergermontague.com) and [www.garwingerstein.com](http://www.garwingerstein.com). The Court will consider your views. To object, you must send a letter via first class U.S. mail stating your objection(s) in the Direct Purchaser Class Action in *In re K-Dur Antitrust Litigation*, Civ. A. No. 01-1652 (D.N.J.). Be sure to include your name, address, telephone number, your signature, and the reasons you object to the settlement. Mail the objection to the Clerk of the United States District Court for the District of New Jersey, United States District Court for the District of New Jersey, Martin Luther King Building and U.S. Courthouse, Courtroom No. 2, Newark, New Jersey 07101, with copies to all of the following:

BERGER & MONTAGUE, P.C.  
David F. Sorensen  
Daniel C. Simons  
1622 Locust Street  
Philadelphia, PA 19103  
Tel: (215) 875-3000  
Fax: (215) 875-4604

GARWIN GERSTEIN & FISHER LLP  
Bruce E. Gerstein  
Joseph Oppen  
Kimberly Hennings  
Wall Street Plaza  
88 Pine Street, 10th Floor  
New York, NY 10005  
Tel: (212) 398-0055  
Fax: (212) 764-6620

COVINGTON & BURLING LLP  
John W. Niels, Jr.  
One City Center  
850 Tenth Street, NW  
Washington, DC 20001-4956  
Tel: (202) 662-6000

WHITE & CASE LLP  
Jaime M. Crowe  
701 Thirteenth Street, NW  
Washington, DC 20005-3807  
Tel: (202) 626-3600  
Fax: (202) 639-9355

MORGAN LEWIS & BOCKIUS LLP  
J. Gordon Cooney, Jr.  
Steven A. Reed  
R. Brendan Fee  
1701 Market Street  
Philadelphia, PA 19103-2921  
Tel: (215) 963-4806

**Your objection must be post-marked no later than August 7, 2017.**

### **THE COURT'S FAIRNESS HEARING**

15. When and where will the Court decide whether to approve the settlement?

The Court will hold a Fairness Hearing at 10 a.m. on October 5, 2017, in Courtroom No. 2 at the United States District Court for the District of New Jersey, Martin Luther King Building and U.S. Courthouse, Newark, New Jersey 07101. At this hearing, the Court will consider whether the settlement is fair, reasonable and adequate. If there are objections, the Court will consider them. After the hearing, the Court will decide whether to give Final Approval the settlement. We do not know how long the decision will take.

16. Do I have to come to the hearing?

No. Class Counsel will answer questions that the Court may have. But, you are welcome to come at your own expense. If you send an objection, you do not have to

come to Court to talk about it. So long as you mail your written objection on time, the Court will consider it. You may also pay your own lawyer to attend, but it is not necessary. Moreover, attendance is not necessary to receive a *pro rata* share of the Net Settlement Fund.

17. May I speak at the hearing?

You may ask the Court for permission to speak at the Fairness Hearing. To do so, you must send a letter via first class U.S. mail saying that it is your “Notice of Intention to Appear in *In re K-Dur Antitrust Litigation*, Civ. A. No. 01-1652 (D.N.J.)” Be sure to include your name, address, telephone number, and your signature. Your Notice of Intention to Appear must be postmarked no later than August 7, 2017, and must be sent to the Clerk of the Court, Class Counsel and Defendants’ counsel, at the addresses set forth in the response to Question 14. You cannot speak at the hearing if you do not send a notice of intention to appear.

### IF YOU DO NOTHING

18. What happens if I do nothing at all?

If you are a Class Member and you do nothing, you will be eligible to participate in the settlement as described in this notice, if the settlement is approved. However, you will need to complete, sign and return the Claim Form (once it is sent to you) in order to obtain a payment.

### GETTING MORE INFORMATION

19. How do I get more information?

If you have questions about this case or want to get additional information, you may call or write to the lawyers listed in answer to Question 7 or visit the websites [www.bergermontague.com](http://www.bergermontague.com) or [www.garwingerstein.com](http://www.garwingerstein.com). This notice is only a summary of the proposed settlement and is qualified in its entirety by the terms of the actual Settlement Agreement. A copy of the Settlement Agreement is 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, NJ 07101 during normal business hours and is also available for download and/or viewing at [www.bergermontague.com](http://www.bergermontague.com) and [www.garwingerstein.com](http://www.garwingerstein.com).

**PLEASE DO NOT WRITE OR CALL THE COURT OR THE CLERK’S OFFICE FOR INFORMATION.**

DATE: June 7, 2017

BY THE COURT

Honorable Stanley R. Chesler  
Senior United States District Judge