

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**IN RE LORAZEPAM & CLORAZEPATE
ANTITRUST LITIGATION**

**MDL Docket No. 1290 (TFH)
Misc. No. 99ms276 (TFH)**

This Opinion applies to:

DOROTHY KENDRICK, et al.,

Plaintiffs,

v.

MYLAN LABORATORIES, INC. et al.,

Defendants.

Civ. No. 03-1650 (TFH)

MEMORANDUM OPINION

Pending before the Court is Defendants' Motion for Judgment on the Pleadings ("Motion"). Upon careful review of Defendant's motion, the related filings, and the entire record herein, the Court will grant the motion.

I. BACKGROUND

Plaintiffs initially filed this action in the Circuit Court for Hinds County, Mississippi on December 31, 2002. The case was removed to federal court on May 5, 2003, and the instant motion was filed on June 4, 2003 in the United States District Court for the Southern District of Mississippi under Civil Number 03-626. By Order effective July 30, 2003, the Multidistrict

Litigation Panel transferred Kendrick v. Mylan to the United States District Court for the District of Columbia.

II. DISCUSSION

Defendants argue that Plaintiffs' claim is not actionable under Mississippi law, that the action is time-barred because Plaintiffs failed to file their Complaint within the three year limitations period applicable to antitrust actions in Mississippi, and that the Court lacks jurisdiction over the defendants since the defendants do not have minimal contacts with Mississippi. As discussed below, the Court finds that Plaintiffs' action is time-barred and therefore the case must be dismissed; accordingly, the Court need not reach Defendants' other arguments.

Plaintiffs allege that they were injured by agreements allegedly entered into in late 1997, see Am. Compl. ¶¶ 24–30, and price increases that went into effect in March 1998. Id. ¶ 33. Plaintiffs' initial complaint was filed on December 31, 2002, nearly five years after those price increases. Since the Mississippi Antitrust Act does not specify a limitations period, see Miss. Code Ann. § 75-21-9, et seq., the state's three year "catch-all" statute of limitations governs. See Miss. Code Ann. § 15-1-49. Plaintiffs concede this point, see Opp'n at 4, but argue that "Defendants' actions included an active concealment of their acts [and so] any otherwise applicable statute of limitations would be tolled or extended . . . until Plaintiffs knew or should have known of Defendants' actions." Id. at 4–5 (citations omitted). Plaintiffs' Amended Complaint, however, supports this assertion of fraudulent concealment with just one sentence: "Any and all applicable statute of limitations have been tolled by Defendants' acts of fraudulent

concealment of their aforesaid unlawful practices” Am. Compl. ¶ 53. While fraudulent concealment need not be pled with particularity, see Anderson v. Equitable Life Assurance Soc., 248 F. Supp. 2d 584, 593 (S.D. Miss. 2003), “[u]nder Mississippi law, a showing of fraudulent concealment such as will toll the statute of limitations requires ‘some act or conduct of an affirmative nature designed to prevent and which does prevent discovery of the claim.’” Id. at 590 (additional internal quotation marks omitted) (quoting Robinson v. Cobb, 763 So. 2d 883, 887 (Miss. 2000)). As Plaintiffs have not alleged even a single act of concealment, tolling does not apply.

Even if Plaintiffs had alleged one or more act of concealment, “the rule of concealed fraud cannot apply to matters of public record.” O’Neal Steel, Inc. v. Millette, 797 So. 2d 869 (Miss. 2001) (citations omitted). Here, the FTC and thirty-three states filed lawsuits against Defendants in December 1998 based on the same conduct alleged in Plaintiffs’ Amended Complaint, and these lawsuits were matters of public record. See FTC v. Mylan Labs., Inc., 1:98-cv-31114 (D.D.C.); Connecticut v. Mylan Labs., Inc., 1:98-cv-31115 (D.D.C.) (“State AG Action”).¹ Further, Plaintiffs “must be able to show that [they] used due diligence to discover the fraud but [were] unable to do so.” Anderson, 248 F. Supp. 2d at 590 (quoting Robinson, 763 So.

¹ The Court may take judicial notice of these complaints as matters of public record pursuant to Federal Rule of Evidence 201, and the Court’s consideration of judicially noticed facts does not transform a motion for judgment on the pleadings into one for summary judgment. See, e.g., Armbruster Products, Inc. v. Wilson, 35 F.3d 555 (unpublished table opinion), 1994 WL 489983 at *2 (4th Cir. Sept. 12, 1994) (“the court may take judicial notice of matters of public record”); United States v. Wood, 925 F.2d 1580, 1582 (7th Cir. 1991) (same); In re Mailman Steam Carpet Cleaning Corp., 196 F.3d 1, 6 n.2 (1st Cir. 1999) (citing, *inter alia*, Fed. R. Evid. 201 and Cinel v. Connick, 15 F.3d 1338, 1343 n.6 (5th Cir. 1994) (“In deciding a 12(b)(6) motion to dismiss, a court may permissibly refer to matters of public record. Accordingly, the consideration of the [matter within the public record] does not convert this motion into one for summary judgment.”) (citations omitted)).

2d at 887); see also Miss. Code Ann. § 15-1-67 (“If a person liable to any personal action shall fraudulently conceal the cause of action from the knowledge of the person entitled thereto, the cause of action shall be deemed to have first accrued at, and not before, the time at which such fraud shall be, or with reasonable diligence might have been, first known or discovered.”). Since every major newspaper in the country carried stories in December 1998 of the lawsuits against Defendants,² even minimal diligence would have revealed the existence of Plaintiffs’ cause of action.³ Therefore, even if the Court were to find that Plaintiffs were not made aware of Defendants’ actions in March 1998 when the massive price increases took effect, Plaintiffs must surely have known, or have had reason to have known, of Defendants actions by at least December 1998.

Additionally, while no cases involving “information regarding one sort of antitrust violation by a defendant have been held, as a matter of law, to constitute notice of all other possible violations. . . , widely publicized earlier investigations of *exactly the same* antitrust violations were held to constitute adequate notice to others of their possible claims.” Morton’s

² See, e.g., Sara Nathan & Jayne O’Donnell, FTC: Drugmaker Fixed Prices, Owes Refund, USA Today, Dec. 22, 1998, at B1; Keith Perine & Thomas M. Burton, Mylan Faces Charges of Trade Restraint, Wall Street Journal, Dec. 22, 1998, at A3; David Segal, FTC Sues Drugmaker, Alleging Price-Gouging, Washington Post, Dec. 22, 1998, at C1; Robert Pear, U.S. Will Sue Drug Maker Over Pricing, N.Y. Times, Dec. 22, 1998, at C5.

³ The Court may also take judicial notice of newspaper articles. See Logan v. Denny’s, Inc., 259 F.3d 558, 578 n.9 (6th Cir. 2001) (citing Ieradi v. Mylan Labs., Inc., 230 F.3d 594, 598 n.2 (3d Cir. 2000)); see also Heliotrope Gen., Inc. v. Ford Motor Co., 189 F.3d 971, 981 n.18 (9th Cir. 1999) (“We take judicial notice that the [stock] market was aware of the information contained in news articles submitted by the defendants.”) (citations omitted); Washington Post v. Robinson, 935 F.2d 282, 291 (D.C. Cir. 1991) (“This court may take judicial notice of the existence of newspaper articles in the Washington, D.C., area that publicized the ongoing criminal investigation of the [Mayor Marion] Barry case . . .”).

Market, Inc. v. Gustafson's Dairy, Inc., 198 F.3d 823, 833 (11th Cir. 1999) (citing cases)

(emphasis added). In the case at hand, Plaintiffs allege that Defendants engaged in the very same conduct which resulted in well-publicized lawsuits being filed in December 1998.

Plaintiffs also claim that “[a]ny and all applicable statutes of limitations have been tolled by . . . the pendency of class actions.” Am. Compl. ¶ 53. Unlike the Federal Rules, however, the Mississippi Rules of Civil Procedure do not permit class actions, and no Mississippi court has ever permitted “cross-jurisdictional tolling” (i.e., the pendency of a class action in a foreign jurisdiction to toll a state statute of limitations). Even if Mississippi did recognize cross-jurisdictional tolling, such tolling would not save Plaintiffs’ claim. Plaintiffs’ allege injury arising out of massive price increases that took effect in March 1998. Assuming the statute of limitations did not begin to run until December 1998, when the highly publicized FTC and state lawsuits were filed, the three year statute of limitations would have expired in December 2001. The Mississippi Attorney General joined the State AG Action as a plaintiff on February 1, 2001. See Third Am. Compl., Connecticut v. Mylan Labs., Inc. 1:98-cv-3115 (D.D.C.). The Court approved a settlement notice to all Mississippi consumers shortly thereafter with an opt-out deadline of August 31, 2001. See In re Lorazepam and Clorazepate Litig., 205 F.R.D. 369, 405 (D.D.C. 2002). Thus, almost seven full months passed between February 1, 2001 and August 31, 2001. Had tolling occurred during that time — which the Court does not find — such tolling would extend the expiration of the statute of limitations from December 2001 until only July 2002. This is still at least five months before Plaintiffs filed their Complaint in December 2002. Further, even if Plaintiffs were putative members of other class actions, “[t]he Fifth Circuit has held that putative class members may not piggyback one class action onto another and thereby

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ORDER

Pending before the Court is Defendant's Motion for Judgment on the Pleadings.¹ For the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that the motion is **GRANTED**. It is therefore

ORDERED that judgment is entered for the Defendant and Civil Action Number 03-1650 is **DISMISSED WITH PREJUDICE**. This is a final appealable Order pursuant to Federal Rule

¹ This motion was originally filed on June 4, 2003 in the United States District Court for the Southern District of Mississippi under Civil Number 03-626. By Order effective July 30, 2003, the Multidistrict Litigation Panel transferred Kendrick v. Mylan to the United States District Court for the District of Columbia. The instant motion has not been assigned a docket entry number in this Court.

of Appellate Procedure 4(a).

SO ORDERED.

May 18, 2004

/s/
Thomas F. Hogan
Chief Judge