

172, 195 (D. Mass. 2003). Merck initially was named in that case, but, following dismissal of the complaint, was omitted from the amended class complaint.

The State also ignores the dispositive significance of the judicially-noticeable facts concerning the single Merck drug mentioned in the Complaint. Merck was only added to this action in the Amended Complaint filed November 1, 2004. The three-year statute of limitations on the State's DTPA claims thus bars actions against Merck for conduct prior to November 1, 2001. The only Merck drug identified in the Complaint and exhibits-famotidine-was available from *multiple sources* beginning in April 2001. See Merck Separate Memo at 2 (citing FDA Orange Book). As pleaded in the Amended Complaint, and as conceded in the State's brief (Opposition Memo at 29-30), the State's claims "do not even purport to apply" to these multiple source drugs for which a different reimbursement system, not based on a particular AWP, was in effect. This fact disposes of any possible claim against Merck based on famotidine, the only Merck product identified.

For these reasons, and those stated in the defendants' joint motion and in Merck's principal brief, the Amended Complaint should be dismissed as to Merck.

Dated: April 18, 2005

Respectfully submitted,



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