CASE NOS. 17-1452 and 17-2215

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RUSSELL HALBROOK, *et al*., and MINNIETTE BURRESS, *et al*.,
Plaintiffs/Appellants,
v.
MALLINCKRODT LLC and COTTER CORPORATION,
Defendants/Appellees.

Appeal from the U.S. District Court for the Eastern District of Missouri
Honorable Audrey G. Fleissig
United States District Judge
District Court Case Nos.: 14-cv-00668 and 4:17-cv-01384

BRIEF OF DEFENDANT/APPELLEE MALLINCKRODT LLC

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

Plaintiffs appeal the proper dismissal of their untimely wrongful death claims. The sole cause of action against defendant Mallinckrodt LLC was based on the Price-Anderson Act ("PAA"), 42 U.S.C. § 2011 *et seq*. (Pls.' App. 149–54). The PAA provides a federal cause of action for injuries allegedly caused by exposure to radioactive material. 42 U.S.C. § 2014(w), (hh). The PAA's federal cause of action derives its rules for decision from state substantive law, unless the state law is inconsistent with the PAA. 42 U.S.C. § 2014(hh).

Mallinckrodt and Cotter Corporation (N.S.L.) moved to dismiss Plaintiffs' claims that were barred by the Missouri wrongful death statutes' three year statute of limitations. Mo. Rev. Stat. § 537.100. Under the statute, a cause of action must be brought within three years after the decedent's death. After analyzing the pertinent statutes and decisional law, the District Court ruled the accrual and limitations period of the Missouri statute were substantive law and applied in PAA actions. Accordingly, the District Court dismissed all wrongful death claims that were filed more than three years after the decedent's death. This ruling should be affirmed.

Mallinckrodt believes oral argument would be helpful to answer any questions the Court may have and respectfully requests 20 minutes.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and U.S. Court of Appeals for the Eighth Circuit Local Rule 26.1A, Counsel of Record for Defendant Mallinckrodt LLC hereby discloses the following corporate interests: Mallinckrodt LLC is an indirect subsidiary of Mallinckrodt plc, a publicly owned corporation.

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JURISDICTIONAL STATEMENT

Mallinckrodt concurs with the contents of Plaintiffs' Jurisdictional Statement.

STATEMENT OF THE ISSUES

I. Whether the District Court erred in applying the Missouri wrongful death statute's accrual and limitations period, Missouri Revised Statute § 537.100, to Plaintiffs' Price-Anderson Act claims for wrongful death?

Lujan v. Regents of University of California, 69 F.3d 1511(10th Cir. 1995)

Crenshaw v. Great Central, Inc., 527 S.W.2d 1 (Mo. Ct. App. 1975)

42 U.S.C. § 2014(hh)

Missouri Revised Statute § 537.100

II. Whether the District Court erred in declining to apply the discovery rule for *state* causes of action provided at 42 U.S.C. § 9658 as part of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") to Plaintiffs' *federal* cause of action provided by the Price-Anderson Act?

Lujan v. Regents of University of California, 69 F.3d 1511 (10th Cir. 1993).

42 U.S.C. § 2014(hh)

42 U.S.C. § 9658

III. Whether the District Court erred in declining to apply "federal common law" to delay the accrual of Plaintiffs' wrongful death claims filed more than three years after the decedents' death?

Lujan v. Regents of University of California, 69 F.3d 1511 (10th Cir. 1995)

42 U.S.C. § 2014(hh)

IV. Whether the District Court erred in declining to equitably estop Mallinckrodt from asserting the statute of limitations defense based on Plaintiffs' unpleaded allegation of fraudulent concealment?

Boland v. St. Luke's Health Systems, Inc., 471 S.W.3d 703 (Mo. banc 2015)

Missouri Revised Statute § 537.100

STATEMENT OF THE CASE

Plaintiffs' Statement of the Case is based primarily on allegations pleaded in their operative Complaints. While the Court must take these allegations as true for purposes of this appeal, Mallinckrodt disputes many of these unproven allegations. Mallinckrodt offers the following Statement of the Case to supplement Plaintiffs' statement.

Underlying Action

Plaintiffs allege their decedents' deaths from sundry diseases and illnesses were caused by exposure to radioactive material. (Pls. App. 136–39, ¶ 24). They trace the origin of this case back six decades, during World War II, when high ranking military commanders specifically requested Mallinckrodt to serve the country as part of the top secret Manhattan Project at a time when the outcome of the war was seriously in doubt. Under this critical military program, the United States government contracted with Mallinckrodt's corporate predecessors to process uranium for the war effort. (Pls.' App. 139, ¶ 25; 140, ¶ 26–27; 142, ¶ 33). Plaintiffs expressly allege Mallinckrodt's activities were limited to the time frame between 1942 and 1957. (Pls.' App. 144–45, ¶ 45). Accordingly, Mallinckrodt's alleged involvement with the radioactive material at issue ceased during the early years of the Cold War, more than five decades before these actions were brought.

Critical to the legal arguments below, all of Plaintiffs' allegations against Mallinckrodt relate to activity Mallinckrodt purportedly conducted in the state of Missouri. (Pls.' App. 141, ¶ 31). They allege Mallinckrodt refined Government-owned uranium at its facility in downtown St. Louis, Missouri. (Pls.' App. 133, ¶ 6). They further allege Mallinckrodt transported and disposed of radioactive material at a Government-owned location near the St. Louis Airport in northern St. Louis County, Missouri. (Pls.' App. 133, ¶ 8; 140–41, ¶ 28). They also contend Mallinckrodt caused the release of radioactive material on roads in northern St. Louis County, Missouri. (Pls.' App. 133, ¶ 10). Plaintiffs allege these actions in Missouri caused their decedents' deaths. (Pls.' App. 134, ¶¶ 11–12; 136–39, ¶ 24).

Plaintiffs' Complaints, however, are not limited to the time period from 1942 to 1957 or Mallinckrodt's activities. Plaintiffs allege the Government sold the radioactive material to Contemporary Metals Corporation ("CMM") in the 1960s. (Pls.' App. 145, ¶ 48). A subsidiary of CMM allegedly hauled the material to another location in north St. Louis County. (Pls.' App. 143–44, ¶ 41; 145, ¶ 48). In 1969, defendant Cotter Corporation purchased the radioactive material. (Pls.' App. 135, ¶ 16). Similar to the allegations against Mallinckrodt, Plaintiffs assert Cotter's acts and omissions between 1969 and 1973 in northern St. Louis County caused the release of radioactive material. (Pls.' App. 135, ¶ 17). They allege their decedents were exposed to the radioactive material released by Cotter, and

this exposure caused their decedents' deaths. (Pls.' App. 135, ¶¶18–19; 136–39, ¶ 24).

Based on these allegations, Plaintiffs filed numerous Complaints attempting to state a cause of action under the Price-Anderson Act.[1] (Pls.' App. 131–94). Separate cases brought by the several Plaintiffs were consolidated into a Lead Case. (Pls.' App. 2). The Plaintiffs in this appeal are 75 individuals seeking recovery for the alleged wrongful death of their decedent allegedly caused by exposure to radioactive material. (Pls.' App. 131–32, ¶ 1; Defs.' J. App. 82). The representative Complaint in Plaintiffs' Appendix states claims related to three of the 75 decedents. (Pls.' App. 136–139, ¶¶ 24.A.1–A.3). Each of the three decedents died in the 1970s, nearly—and in the case of decedent Halbrook over—four decades before the wrongful death claims were filed in 2014. (Pls.' App. 136–39, ¶¶ 24.A.1–A.3). Plaintiffs concede, like the three decedents in the representative Complaint, the claims for the remaining 72 decedents were **not** commenced within three years after their deaths. (Pls.' Brief, p. 7; Defs.' J. App. 75–81).

[1] Initially, Plaintiffs pleaded a claim under the PAA and additional state law causes of action. (Defs.' J. App. 1). The District Court held the state law claims were preempted by the PAA and dismissed the claims. (Defs'. J. App. 2, 13). Accordingly, the only causes of action at issue in this appeal are public liability actions arising under the PAA.

Procedural History

Defendants Mallinckrodt and Cotter filed initial motions to dismiss the collective Complaints on various grounds, including that wrongful death actions filed more than three years after the decedent's death were time barred by Missouri law. (Defs.' J. App. 44, 51). Plaintiffs opposed the statute of limitations motion by arguing federal common law determines the accrual of the cause of action and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601–9675 preempts Missouri state law accrual rules. (Defs.' J. App. 39–42). Plaintiffs argued under either federal common law or CERCLA the statute of limitations would not accrue until the Plaintiff knew or reasonably should have known the cause of their decedent's death. (Defs.' J. App. 39–42). This is a so-called "discovery rule." Plaintiffs, however, never disputed that the Missouri statute of limitations for wrongful death or its accrual were substantive (not procedural) rules of decision that apply in a PAA action.

In the District Court's first order ruling on the statute of limitations issue, it noted that Plaintiffs' Complaints stated the date of death for some of their decedents, but Plaintiffs also alleged they "neither knew nor reasonably should have known that the decedent's death was caused or contributed to by exposure to radiation until less than three years before commencement of this action." (Defs.' J. App. 48–49). The District Court ruled, and Plaintiffs conceded, the three year

Missouri statute of limitations for wrongful death claims provided in Missouri Revised Statute § 537.100 applied to actions for death under the PAA. (Defs.' J. App. 63). The District Court further ruled in its first order that it did not need to determine when a wrongful death action accrued under a PAA claim because, under its view of Missouri law, Plaintiffs' "claims did not accrue until they knew or reasonably should have known of the cause of their injuries, or in the case of wrongful death, the wrongful nature of the deaths." (Defs.' J. App. 63–64). Accordingly, the District Court initially denied Mallinckrodt and Cotter's motions to dismiss the wrongful death actions based on the statute of limitations. (Defs.' J. App. 65).

The District Court's initial conclusion that a Missouri wrongful death claim does not accrue until the cause is known or reasonably should be known was based on a single Missouri Court of Appeals' case, *Boland v. St. Luke's Health Systems, Inc.*, Nos. WD 74364, WD 75366, WD 75367, WD 75484, WD 74845, 2013 WL 6170598 (Mo. Ct. App. Nov. 26, 2013) (unpublished). (Defs.' J. App. 64). The District Court relied on the *Boland* decision for the proposition that "'[a] wrongful death cause of action does not necessarily accrue at the time of death; rather, it accrues at the time that a diligent plaintiff has knowledge of facts sufficient to put him on notice of an invasion of his legal rights.'" (Defs.' J. App. 64) (quoting *Boland*, 2013 WL 6170598 at *7). **Eight months after the District Court denied**

the motions to dismiss, the Missouri Supreme Court overturned the Court of Appeals' decision in *Boland* and reaffirmed long-standing Missouri precedent that a wrongful death claim under § 537.100 accrues at the decedent's death. (Pls.' App. 165); *Boland v. Saint Luke's Health System, Inc.*, 471 S.W.3d 703, 710 (Mo. banc 2015).

Based on the reversal of *Boland*, Mallinckrodt and Cotter filed a motion for reconsideration of the District Court's previous Order denying the request to dismiss wrongful death claims or, in the alternative, motion for judgment on the pleadings. (Pls.' App. 2, 185–94, 195). Citing the Missouri Supreme Court's opinion in *Boland*, Mallinckrodt and Cotter argued Plaintiffs' causes of action for wrongful death accrued at the time of the decedent's death, and all claims not filed within the three year limitations period were time barred. (Pls.' App. 185–86). In response, Plaintiffs again argued federal common law and CERCLA imposed a discovery rule and saved their untimely claims. (Pls.' App. 199). When opposing the Defendants' motion to reconsider the District Court's first ruling, Plaintiffs also argued for the first time that Defendants were estopped from asserting the statute of limitations due to fraudulent concealment. (Pls.' App. 205). As with their previous briefing, Plaintiffs never disputed that the Missouri wrongful death statute is a substantive rule of decision.

On October 31, 2016, the District Court granted Mallinckrodt and Cotter's motion for reconsideration and, upon consideration, entered judgment on the pleadings. (Pls.' App. 4–5, 195). The District Court started its analysis by determining whether Missouri law governs the accrual and limitations period. (Pls.' App. 202). The court noted that, under 42 U.S.C. § 2014(hh), the substantive rules of decision in a PAA action are derived from state law, unless inconsistent with the PAA. (Pls.' App. 204). Because the Missouri statute of limitations and accrual period *limit or condition the right to recover for an alleged wrongful death*, the District Court concluded the state accrual and limitations period were substantive law. (Pls.' App. 204–205). With no inconsistencies between state law and the PAA, the District Court applied the accrual and three year limitations period from Missouri Revised Statute § 537.100 and dismissed the untimely claims. (Pls.' App. 205).

In arriving at its ruling, the District Court thoughtfully analyzed and rejected Plaintiffs' arguments in favor of engrafting a "discovery rule" onto the accrual of a PAA claim. (Pls.' App. 205–07). The court also rejected Plaintiffs' argument that "federal common law" applies to the PAA. (Pls.' App. 206). The District Court also rejected Plaintiffs' CERCLA argument because they cited no support for the argument, and "[b]y its plain terms, CERCLA applies to cases 'brought under state law.'" (Pls.' App. 206) (quoting 42 U.S.C. § 9658(a)(1)). Thus, the CERCLA

provision did not apply to the federal cause of action brought under the PAA. (Pls.' App. 206). Finally, the court rejected Plaintiffs' fraudulent concealment and equitable estoppel argument because "Plaintiffs [] never alleged that Defendants engaged in fraudulent concealment." (Pls.' App. 205).

After dismissing the untimely wrongful death claims, the District Court further ordered the parties to file an "agreed list of Plaintiffs whose claims [were] barred under the Court's October 31, 2016 Memorandum and Order." (Pls.' App. 5). The parties identified 71 Plaintiffs that filed wrongful death claims more than three years after the decedent's death. (Defs.' J. App. 75–84). An additional Plaintiff was identified following the submission of the agreed list. (Defs.' J. App. 82). The Court consolidated the cases of the 72 Plaintiffs, plus two more subsequently identified (Birkla and Weaver), for purposes of the appeal of *Halbrook, et al. v. Mallinckrodt LLC, et al.*, Case No. 4:14-cv-0668. (Defs.' J. App. 85–86). After consolidating the actions, the District Court entered judgment on behalf of Mallinckrodt and Cotter. (Pls.' App. 208).

After the District Court entered judgment on the pleadings of the 74 Plaintiffs, another untimely Plaintiff was identified, the claim for decedent Minniette Burress. (Pls.' App. 209–12). The District Court entered judgment on the claim for Burress' death. (Pls. App. 213). This additional claim is the subject of this appeal. Plaintiffs filed a motion to consolidate the *Burress* appeal with the

Halbrook appeal, Appeal No. 17-1452, because the issues in the two appeals are identical. The Eighth Circuit consolidated the cases on June 20, 2017 bringing the total Plaintiffs at issue in this appeal to 75.

SUMMARY OF THE ARGUMENT

The District Court did not err in granting Mallinckrodt judgment on the pleadings against Plaintiffs' wrongful death claims filed more than three years after the decedents' deaths. The Price-Anderson Act expressly derives substantive rules of decision from the law of the state where the alleged nuclear incident occurred, unless the state law is inconsistent with the PAA. 42 U.S.C. § 2014(hh). Because the nuclear incident(s) alleged by Plaintiffs occurred in Missouri, the applicable wrongful death statute is Missouri Revised Statute § 537.100. The statute provides a wrongful death action must be commenced within three years after the decedent's death. The District Court thoroughly and appropriately analyzed the Missouri wrongful death statute, PAA statute mandating the use of state substantive law, and relevant case law. Based on this analysis, the District Court properly concluded Missouri law regarding the accrual and limitations period of a wrongful death action are substantive law and must be applied in a PAA action.

Plaintiffs' brief all but ignores the Congressional mandate in 42 U.S.C. § 2014(hh) to apply state substantive law. Plaintiffs' brief never asserts the District Court erred in finding that the Missouri wrongful death statute's limitations period

and accrual are substantive law. They also never explain the application of § 2014(hh) to the appealed issues. In so doing, Plaintiffs are silent on the central legal issue regarding when their PAA claims for wrongful death accrued.

Plaintiffs attempt to avoid this key issue by advancing two oblique theories for the application of a discovery rule and an unsupported fraudulent concealment argument. First, Plaintiffs argue a CERCLA statute that applies a discovery rule exclusively to actions brought *under state law* applies to these federal PAA claims. Because these PAA claims are federal causes of action, not state causes of action, this unsupported argument fails. Second, they argue federal common law applies a discovery rule to PAA claims. This argument, also wholly unsupported, fails because the PAA expressly adopts state substantive law, not federal common law. Finally, Plaintiffs contend fraudulent concealment equitably estops Mallinckrodt from asserting the Missouri statute of limitations. This unsupported argument fails because Plaintiffs have not alleged fraudulent concealment and Missouri does not recognize equitable defenses to the statute of limitations based on civil fact patterns. For these reasons, as more fully explained below, the District Court's ruling should be affirmed.

STANDARD OF REVIEW

Mallinckrodt concurs with Plaintiffs' statement that the issues on appeal are subject to *de novo* review. *Williams v. Bradshaw*, 459 F.3d 846, 848 (8th Cir.

2006) (holding standard of review of judgment on the pleadings is *de novo)*; *In re ADC Telecommunications, Inc. Securities Litig*., 409 F.3d 974, 976 (8th Cir. 2005) (holding standard of review of district court's statute of limitations determination is *de novo*).

ARGUMENT

I. The District Court Correctly Determined the Accrual and Limitation Period of Plaintiffs' Wrongful Death Claims Under the Price-Anderson Act are Derived from Missouri Law.

A. The Price-Anderson Act Adopts Missouri Substantive Law.

Plaintiffs' exclusive causes of action against Mallinckrodt were individual public liability actions under the Price-Anderson Act ("PAA"), 42 U.S.C. § 2011 *et seq*. Congress enacted the PAA in 1957 with the intent of "protect[ing] the public," "encourag[ing] the development of the atomic energy industry," and "limit[ing] the liability of those persons liable" for nuclear incidents. 42 U.S.C. § 2012(i). Congress has amended the PAA on several occasions, including prominent amendments in 1988 that applied retroactively, known as the Amendments Act. *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1096 (7th Cir. 1994). The Amendments Act created a federal cause of action under the PAA called a "public liability action." 42 U.S.C. § 2014(hh); *In re TMI Litig. Cases Consol., II*, 940 F.2d 832, 854 (3d Cir. 1991).

The PAA defines several key terms applicable in this matter. A "public liability action, as used in section 2210 [of the Act], means *any* suit asserting

public liability." 42 U.S.C. § 2014(hh) (emphasis added); *Id.* Public liability is a broad term encompassing "*any* liability arising out of or resulting from a *nuclear incident* or precautionary evacuation" other than a few enumerated exceptions not at issue in this case. 42 U.S.C. § 2014(w) (emphasis added). The Act defines a nuclear incident as:

> any occurrence . . . causing . . . bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material . . . .

42 U.S.C. §2014(q). Following these definitions, Plaintiffs concede the claims for their decedents' deaths are public liability actions. (Pls.' App. 150, ¶ 71).

With the recognition that their claims are public liability actions, the starting point for determining the statute of limitations and accrual period is 42 U.S.C. § 2014(hh). With emphasis added, the text of § 2014(hh) states:

> A public liability action shall be deemed to be an action arising under section 2210 of this title, and the ***substantive rules for decision*** in such action ***shall be derived from the law of the State*** in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of such section.

"While the public liability cause of action itself and certain elements of the recovery scheme are federal, the underlying rules of decision are to be derived from state law." *In re TMI Litig. Cases Consol., II*, 940 F.2d at 854. Section 2214 (hh) even expressly declares a public liability action "arises under [42 U.S.C. §

2210]." Therefore, under § 2014(hh), the question of whether a state statute of limitations and accrual period apply in a PAA action is resolved by determining if the rules of decision are procedural or substantive. *Lujan v. Regents of University of California*, 69 F.3d 1511, 1516 (10th Cir. 1995).

B. Missouri's Wrongful Death Statute of Limitations and its Accrual are Substantive Law that Apply in a Price-Anderson Act Action.

The District Court properly found Missouri's wrongful death statutes' accrual and limitations period were substantive law applicable in a public liability action stemming from a Missouri incident. As the District Court explained, "[W]here a statute of limitations does not merely bar the remedy for the violation of a right but limits or conditions the right itself, courts have treated the statute [and its corresponding accrual rules] as substantive." (Pls.' App. 204) (quoting *Lujan*, 69 F.3d at 1517) (alterations in District Court opinion). The distinction between merely barring a remedy and limiting or conditioning the right itself depends on whether the right to bring suit existed at common law or was created by statute. *Lujan*, 69 F.3d at 1517; *Safarti v. Wood Holly Assoc.*, 874 F.2d 1523, 1525 (11th Cir. 1989). "A statute of limitations that restricts a right created by statute rather than a right at common law generally is deemed to be a substantive limit on the right as opposed to a mere procedural limit on the remedy." *Safarti*, 874 F.2d at 1525.

Eighth Circuit precedent establishes that a statute of limitations is substantive where the limitation period and right of action are created by statute. *See Bell v. Wabash Ry. Co.*, 58 F.2d 569 (8th Cir. 1932). The plaintiff in *Bell* filed a state court action under the Federal Employers Liability Act ("FELA"), 45 U.S.C. § 51 *et seq*. *Id.* at 570. After it was removed, plaintiff sought remand of the action because the FELA statute prohibited removal. *Id*. On appeal, the Eighth Circuit concluded the prohibition against removal was inapplicable because a FELA action must be brought within two years of its accrual, and plaintiff failed to file suit during the limitation period. *Id*. The *Bell* court reasoned that FELA "establishe[d] a new right of action unknown to the common law." *Id*. When the legislature creates a new statutory cause of action and prescribes the limitation period for the action, "those limitations [are] conditions of the liability itself." *Id*. at 571. Because FELA created the cause of action and imposed a limitations period, the limitations period was "not a mere statute of limitations pertaining to the remedy." *Id*. Accordingly, plaintiff had no right to bring the untimely action, and the prohibition against removal could not be invoked. *Id*. at 572.

The Missouri statute of limitations and accrual period for wrongful death actions are substantive rules because they were created by statute. *See* Mo. Rev. Stat. § 537.100. Missouri's wrongful death statute was construed in *Crenshaw v. Great Central, Inc.*, 527 S.W.2d 1 (Mo. Ct. App. 1975). The *Crenshaw* court held

plaintiffs could not recover damages from an insurer for an uninsured motorist claim because an essential element of the claim was a right to recover against the uninsured tortfeasor under the wrongful death statute. *Id.* at 4. When plaintiffs filed the insurance action, they no longer had a viable cause of action under the wrongful death statute because the limitations period had expired. *Id*.

The *Crenshaw* court explained, in Missouri, there "is no common-law right of action for wrongful death." *Id*. Wrongful death actions are solely a creation of statute, and litigants must comply with the statutory requirements. *Id*. "Under the wrongful death statute a cause of action ***accrued*** to plaintiffs upon the death of their son . . . ." *Id*. (emphasis added). "Compliance with the requirement that an action be filed [during the limitations period] is a ***necessary condition attached to the right to sue***—not merely a statute of limitations in the ordinary sense." *Id*. (emphasis added). The court further explained the wrongful death statute created a new cause of action and "at the same time introduced into the terms of the statutes as an inherent part of the cause of action a time limit for its maintenance." *Id*. Under this structure, "***the limitations of the death statutes are matters of substantive right*** and not mere technical limitations or bars to the remedy." *Id*. (emphasis added). This Missouri precedent unequivocally establishes the accrual and limitations period in the Missouri wrongful death statute are conditions of the statutorily created right and substantive law.

Over a century of Missouri Supreme Court precedent confirms a wrongful death action accrues at the death of the decedent. Federal appellate courts construing state law are "bound by [the] state supreme court's construction of its own law." *In re Western Limestone, Inc.*, 538 F.3d 858, 866 (8th Cir. 2008). In *Kennedy v. Burrier*, the court held, under the statute, the cause of action accrues "whenever the defendant's liability became perfect and complete," which is the death of the decedent. 26 Mo. 128, 130 (1865). Nearly a hundred years later, the Missouri Supreme Court followed the reasoning of *Kennedy* in *Frazee v. Partney*, 314 S.W.2d 915, 921 (Mo. 1958). The *Frazee* court construed the "positive terms" of the wrongful death statute as dictating that a wrongful death cause of action accrues at the death of the decedent. *Id*. The *Frazee* court reached this conclusion based on "the cold, clear words of the statute." *Id*. The *Kennedy* and *Frazee* line of cases was recently reaffirmed by the Missouri Supreme Court in *Boland v. St. Lukes Health System, Inc.*, 471 S.W.3d 703, 709 (Mo. banc 2015). Under this precedent, the accrual of a Missouri wrongful death action occurs at the death of the decedent.

Where the language of the statute is clear, courts are required to effectuate the statutory terms as written. *Carton v. General Motor Acceptance Corp.*, 611 F.3d 451, 458 (8th Cir. 2010). Looking to § 2014(hh), the language unambiguously requires the Court to apply Missouri substantive law, unless it is

inconsistent with the PAA. Plaintiffs never argue § 2014(hh) is ambiguous. They also never contend Missouri law regarding accrual of a wrongful death action is procedural or that it is inconsistent with the PAA. Moreover, binding Missouri precedent establishes the wrongful death statute's limitations period and accrual of the cause of action are conditions attached to the right to sue enacted when the legislature created the cause of action. The District Court's analysis followed this binding case law—specifically quoting *Crenshaw* and *Lujan*—in concluding Plaintiffs' wrongful death claims filed more than three years after the decedents' deaths were time barred. In accordance with the law and facts, the District Court's ruling should be affirmed.

II. The Statute of Limitations for Plaintiffs' Price-Anderson Act Claim is Not Controlled by CERCLA.

A. The PAA is a Federal Cause of Action Unaltered by CERCLA's Discovery Rule Exclusively Limited to State Law Causes of Action.

Plaintiffs argue a CERCLA provision, 42 U.S.C. § 9658—which can impose a discovery rule on accrual of state law causes of action related to hazardous materials—saves their untimely claims. None of Plaintiffs' causes of action, however, were state law causes of action. Additionally, none of their claims were based on the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601–9675, as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100

Stat. 1613, 1615. CERCLA does not even provide a private "cause of action for personal injury or property damage." *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2180 (2014). Instead, Plaintiffs' lone cause of action was a federal cause of action arising under the PAA. (Plaintiffs' Brief, p. 1). Accordingly, the CERCLA provision regarding the accrual of ***state*** law causes of action for exposure to hazardous substances does not save their untimely ***federal*** causes of action against Mallinckrodt.

Despite both the CERCLA and PAA statutes being in existence for approximately three decades, Plaintiffs were unable to cite a single case where the discovery rule of 42 U.S.C. § 9658 was applied to a PAA cause of action. Without any authority to support their lead argument, Plaintiffs argue the text of 42 U.S.C. § 9658 is applicable to a PAA action. This argument must fail. "The rules of statutory construction mandate, when a statute's language is plain, the sole function of the court is to enforce it according to its terms." *Carton v. General Motor Acceptance Corp.*, 611 F.3d 451, 458 (8th Cir. 2010) (internal quotes omitted). "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as having their ordinary, contemporary, common meaning." *U.S. v. Friedrich*, 402 F.3d 842, 845 (8th Cir. 2005).

Applying these fundamental rules of statutory construction dictates the conclusion that § 9658 does not apply to the federal cause of action created by the

PAA. The foundational prerequisite for the CERCLA discovery rule is a state law cause of action:

> In the case of any action ***brought under State*** law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility, if the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute.

§ 9658(a)(1) (emphasis added). Section 9658 does not provide that the discovery rule or "federally required commencement date" is applicable to federal statutes, the PAA, or any federal causes of action.[2] Likewise, no provision of the PAA adopts or incorporates § 9658. State law and federal law are wholly distinct, and nothing about the ordinary meaning of these words or phrases suggest "brought under State law" includes federal law. The statutory provision is unambiguous, and the Court should apply Congress' intent as written and affirm the District Court's ruling that CERCLA does not "displace the state limitations period applicable to a PAA public liability action." (Pls.' App. 206).

[2] Plaintiffs' brief cites the definition of release in 42 U.S.C. § 9601(22). This definition references the PAA, but it excludes certain releases of radioactive material from the definition of release. Additionally, the application of definitions in § 9601 is expressly limited to Subchapter I of CERCLA. Section 9658 is contained in Subchapter III of CERCLA. Thus, there is no connection between § 9658 and the PAA.

Plaintiffs nonetheless argue § 9658 should be applied to the PAA because the substantive rules of a PAA claim are derived from state law. (Plaintiffs' Brief, p. 12). Plaintiffs boldly proclaim their PAA claims "are actions brought under state law within the meaning of CERCLA," yet fail to explain how CERCLA somehow transforms the PAA into a state law cause of action or cite a single authority supporting this self-contradicting proposition. (Plaintiffs' Brief, p. 13). Their argument and its premise simply ignore the fact that the PAA is a federal cause of action. Cases cited by Plaintiffs confirm the PAA's status as a federal cause of action regardless of its utilization of state substantive law. (Plaintiffs' Brief, p. 14, quoting *In re TMI Litigation Cases Consolidated II*, 940 F.2d 832, 855 (3d Cir. 1991) (stating "state law provides the content of [a PAA action] and operates as federal law."). The *TMI* case further explains, "[t]he Amendments Act creates a federal cause of action which did not exist prior to the Act . . . ." 940 F.2d at 856. Another case Plaintiffs cite, *Cook v. Rockwell Int'l Corp.*, states the PAA amendment in 1988 "created a federal cause of action for nuclear torts." 618 F.3d 1127, 1136 (10th Cir. 2010).[3] Neither the PAA nor the case law supports the notion that the incorporation of state law provisions by the PAA federal cause of action transforms the PAA into a state cause of action for CERCLA purposes.

[3] Plaintiffs' attribute the *Cook* opinion to "then-Judge Gorsuch" apparently to give weight to the quote based on Judge Gorsuch's elevation to the U.S. Supreme Court. Justice Gorsuch, however, did not author the opinion or serve on the three judge panel that rendered the opinion. 618 F.3d at 1132.

Decisional law supports the rejection of the CERCLA discovery rule in a public liability action. The Tenth Circuit has applied a state statute of limitations, including accrual date, in a PAA action. *Lujan v. Regents of University of California*, 69 F.3d 1511, 1517 (10th Cir. 1993). The *Lujan* court analyzed whether New Mexico's wrongful death statutes' statute of limitations was substantive and applied to a PAA action in accordance with 42 U.S.C. § 2014(hh). 69 F.3d at 1516–18. During its analysis, the *Lujan* court discussed CERCLA's discovery rule for "state-law claims arising out of exposure to hazardous substances." *Id.* at 1518. The court did not apply the CERCLA discovery rule to plaintiff's PAA claim and only mentioned it as an example of Congress's ability to adopt a discovery rule if it chooses. *Id.* Instead, the court concluded New Mexico's statute of limitations, including its accrual period without a discovery rule, was substantive and applied to bar plaintiff's PAA claim. *Id.* at 1516–19.

Other federal court decisions support the conclusion that state law determines the limitations period and accrual date for a PAA claim. In *Day v. NLO, Inc.*, the Sixth Circuit noted "[b]ecause the [PAA] provides no statute of limitations, the district court held, and neither party contests on appeal, that the limitations period and accrual and tolling rules must be borrowed from state law." 3 F.3d 153, 154 n.1 (6th Cir. 1993). In a separate case, the Sixth Circuit stated "presumably Congress intended not to alter the state law statutes of limitations for

nuclear incidents that are not [extraordinary nuclear occurrences]." *Nieman v. NLO, Inc.*, 108 F.3d 1546, 1561 (6th Cir. 1997).[4] A Colorado district court expressly held "[t]he PAA mandates application of state substantive law. Statutes of limitations are substantive." *Cook v. Rockwell Intern. Corp.*, 755 F. Supp. 1468, 1482 (D. Colo. 1991).

Plaintiffs' brief mistakenly claims *O'Connor v. Boeing North American, Inc.*, 311 F.3d 1139 (9th Cir. 2002), stands for the proposition that § 9658(a)(1) preempts Missouri state law applied through the PAA.[5] (Plaintiffs' Brief, p. 15). However, a full reading of *O'Connor* demonstrates the court did not consider whether the discovery rule from § 9658(a)(1) is applicable to PAA claims. *Id.* at 1148, n.4. The opinion's analysis of the CERCLA discovery rule is explicitly limited to its impact on plaintiffs' *state law causes of action*. *Id.* at 1143–44, 1148. After acknowledging plaintiffs had a PAA claim, the court explained "the district court did not decide" whether the CERCLA discovery rule applied to the PAA claim. *Id.* Because the district court did not decide whether the CERCLA

[4] The PAA permits the government to require as part of an indemnity contract the waiver of a statute of limitations defense that is more restrictive than a three year limitations period from the time the claimant knew or reasonably could have known of the cause of their injury. 42 U.S.C. § 2210(n)(1). Courts have interpreted this as a statute of limitations in the PAA, but it is only applicable in the event of an "extraordinary nuclear event" ("ENO"). *Lujan*, 69 F.3d at 1515. The PAA does not have a statute of limitations or discovery rule for standard nuclear incidents, such as the instant case. *Id*. at 1518.

[5] Plaintiffs cite page 1154 of the opinion for this proposition, but the cited page does not mention the PAA or federal statutes that derive substantive rules from state law. *Id.* at 1154.

discovery rule applied to a PAA claim, the Ninth Circuit instructed the district court, on remand, to determine, *inter alia*, whether "the state or federal discovery rule applies to [PAA] claims."[6] *Id.* Thus, contrary to Plaintiffs' representation, *O'Connor* does not stand for the proposition that the discovery rule provided in CERCLA applies to a PAA claim. Rather, the Ninth Circuit stated it was **not** addressing that issue.

Accordingly, the plain language of 42 U.S.C. § 9658 does not support Plaintiffs' argument that the CERCLA provision engrafting a discovery rule on certain state causes of action applies to the federal cause of action created by the PAA. Cases construing the PAA further discredit the argument as does Plaintiffs' failure to cite a single case supporting their position. Therefore, the Court should affirm the District Court's ruling dismissing Plaintiffs' wrongful death claims filed more than three years after the decedent's death.

B. The District Court's Analysis of CERCLA did Not Render a Subsection of the Act Superfluous.

The starting point for any statutory analysis is the statute's text. *Adams v. Apfel*, 149 F.3d 844, 846 (8th Cir. 1998). "If the statute is clear and unambiguous, judicial inquiry is complete." *Id.* "A statute is clear and unambiguous when it is not possible to construe it in more than one reasonable manner." *Id.* (internal

[6] Mallinckrodt was unable to locate any subsequent ruling by the trial court on this issue, so it is unknown if the plaintiffs ever argued a discovery rule applied to their PAA claims.

quotation omitted). Given the clear, unambiguous language of 42 U.S.C. § 9658, there is no need to resort to the statutory construction exercise purportedly undertaken by Plaintiffs. The plain language of the statute limits its applicability to state law causes of action. § 9658(a)(1). Yet, because Plaintiffs devote a significant amount of their briefing to trying to make § 9658(a)(1) say something it does not state or suggest, Mallinckrodt addresses Plaintiffs' argument.

Plaintiffs gloss over the language of the statute and move directly to the claim that the District Court's interpretation would render § 9658(a)(3) superfluous. Section 9658(a)(3) states: "Nothing in this section shall apply with respect to any cause of action brought under section 9607 of this title." Under Plaintiffs' argument, because § 9658(a)(3) excludes an action brought under a specific federal law, the discovery rule from § 9658(a)(1) must apply to all other federal statutes. Stated differently, Plaintiffs argue, because 42 U.S.C. § 9607 is a federal statute, "brought under State law" must mean "brought under State [and all federal law, except for § 9607]." As with their general CERCLA argument, they cite no relevant authority that supports this imaginative reading of § 9658.

The rule of construction Plaintiffs attempt to apply is the "'interpretive canon, *expression unius est exclusio alterius*, expressing one item of [an] associated group or series excludes another left unmentioned.'" *N.L.R.B. v. SW General, Inc.*, 137 S.Ct. 929 (2017) (quoting *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 80

(2002) (alteration in original). The canon "does not apply to every statutory listing or grouping; it has force only when the items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned are excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003). This canon "should be invoked only when other aids to interpretation suggest that the language at issue was meant to be exclusive." *Bailey v. Fed. Interm. Credit Bank of St. Louis*, 788 F.2d 498, 500 (8th Cir. 1986).

Plaintiffs' argument fails to show Congress associated as a group—for purposes of the discovery rule in § 9658—a PAA public liability action under § 2014(hh) and a CERCLA § 9607 action, and intentionally only excluded § 9607 from § 9658. Plaintiffs also never address the distinctions between § 9607 and the PAA that undermine their supposition that Congress associated the statutes. Specifically, § 9658 was enacted by Congress in 1986. A PAA public liability action, on the other hand, was not created until Congress enacted § 2014(hh) as part of the Amendments Act in 1988. Thus, Congress could not have viewed § 9607 and a public liability action as a group when it enacted § 9658. If Congress considered these statutes in a similar light, it could have referenced § 9658 as part of the Amendments Act or, better yet, it could have applied a discovery rule to a public liability action. It did neither. Another distinction is § 2014(hh) expressly requires the use of substantive state law, where § 9607 does not. Accordingly,

there is no basis to conclude the exclusion of a § 9607 action from the CERCLA provision meant to include a public liability action.

Plaintiffs' argument also ignores a fundamental rule of statutory construction that courts "must avoid statutory interpretation that renders any section superfluous and does not give effect to all words used by Congress." *In re Windsor on the River Associates, Ltd.*, 7 F.3d 127, 130 (8th Cir. 1993). In this exercise, the court must "interpret the words of th[e] statut[e] in light of the purposes Congress sought to serve." *Id.* Thus, the question is whether § 9658(a)(3) is susceptible to a reasonable interpretation that avoids rendering the statute superfluous and is consistent with the purposes Congress sought.

This question can only be answered in the affirmative. The plain language of § 9658(a)(3)—which is under the subtitle "State statutes of limitations for hazardous substances"—simply states a § 9607 liability action does not borrow state statutes of limitations. This is consistent with the CERCLA statutory scheme that includes its own statute of limitations for § 9607 actions. 42 U.S.C. § 9613(g)(2). Section 9658(a)(3) does not appear to be a heavily litigated provision of CERCLA, but this interpretation is consistent with the sole case Mallinckrodt found citing the provision. *See Duke Energy Progress, Inc. v. Alcan Aluminum Corp.*, Nos. 5:08-CV-460-FL; 5:08-CV-463-FL, 1014 WL 4825292, at *3 (E.D.N.C. Sept. 25, 2014) (unpublished). The *Duke Energy* case cited §

9658(a)(3) for the basic proposition that North Carolina's statute of limitations did not apply to plaintiff's § 9607 action. *Id.* Therefore, the District Court's ruling did not render an entire subsection of the CERCLA statute superfluous.

Plaintiffs' concern over rendering statutory provisions superfluous actually supports the District Court's finding that the CERCLA provision is inapplicable to a public liability action. Since 1966, the PAA has contained a provision allowing the Government to require contractors to waive certain defenses "arising out of certain [extraordinary nuclear occurrences] ("ENO")." *Lujan v. Regents of University of California*, 69 F.3d 1511, 1515 (10th Cir. 1995). One of the "defenses contractors were required to waive was" any statute of limitations defense that would bar a claim brought less than "three years from the date the claimant first knew, or reasonably could have known, of his injury or damage and cause thereof." *Id.* (citing 42 U.S.C. § 2210(n)). "Congress and the courts have construed the [PAA] and its amendments as establishing a statute of limitations, at least for actions arising out of an ENO."[7] *Id.* The District Court recognized that the PAA contains a discovery rule, but not for nuclear incidents that fail to meet the threshold of an ENO. (Pls.' App. 171). Therefore, applying CERCLA's discovery

[7] An ENO is a defined term in the PAA, and requires a finding by the Nuclear Regulatory Commission or Secretary of Energy that the discharge of radioactive material was substantial and will cause substantial damage to persons or property. 42 U.S.C. § 2014(j). The subject action does not stem from an ENO, and an ENO was not alleged.

rule to all nuclear incidents under the PAA—rather than exclusively to ENO incidents as Congress intended—would render Congress' limitation of the discovery rule to only ENO incidents superfluous and defeat the legislative intent. If Congress intended such a result, it could have expressly provided for it in the PAA.

C. Plaintiffs' Policy Arguments are Irrelevant to the Application of § 9658.

As the Eighth Circuit has previously counseled litigants, "when statutes are straightforward and clear, legislative history and policy arguments are at best interesting, at worst distracting and misleading, and in neither case authoritative." *Pucket v. Hot Springs School Dist. No. 23-2*, 526 F.3d 1151, 1159 (8th Cir. 2008). Plaintiffs' policy arguments fall in the category of distracting and misleading and certainly are not authoritative.

Plaintiffs urge the Court to ignore the plain language of § 9658, which is expressly limited to actions brought under state law, and extend it to include the federal cause of action provided by the PAA. They cite numerous cases making general statements about CERCLA, but none of the cited cases support the proposition that the CERCLA discovery rule for state causes of action applies to the federal cause of action created by the PAA. Mallinckrodt asks the Court to apply the plain meaning of the statute and reject its application to a claim brought

under federal law. Given the clear language of the statute, policy arguments are simply irrelevant.

III. Federal Common Law Does Not Determine the Accrual Date of Plaintiffs' Wrongful Death Claims for Statute of Limitations Purposes.

As an alternative to their meritless CERCLA statutory construction argument, Plaintiffs offer a passing claim that "federal common law accrual rules" impose a discovery rule onto the PAA. This fleeting argument again ignores that the substantive rules of decision in a PAA action are derived from state law. Because the accrual of a wrongful death action in Missouri is a substantive rule of decision, Plaintiffs' causes of action accrued at the death of their decedents. *Boland v. St. Lukes Health System, Inc.*, 471 S.W.3d 703, 708–09 (Mo. 2015). Accordingly, Plaintiffs' PAA claims are time barred because the decedents died more than three years before the lawsuits were filed.

As explained in other sections of this brief, Plaintiffs' brief is devoid of any real discussion of §2014(hh) or whether the state limitations period and accrual are substantive or procedural. Instead, Plaintiffs rely on inapposite cases to claim the accrual period is derived from "federal common law." (Plaintiffs' Brief, p. 27–28). None of Plaintiffs' cited cases, however, apply the rule they advocate. Only one of the cases involved a PAA claim, and, in that case, the court never reached the accrual issue. *See Corcoran v. New York Power Authority*, 202 F.3d 530, 544 (2d Cir. 1999). The remaining cases are limited to actions brought under wholly

distinct federal statutes: 42 U.S.C. § 1983; the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001, *et seq*.; and Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b), 2671–2680. Of these three statutes, only the FTCA contains a statute of limitations (28 U.S.C. § 2401(b)), and all of them are silent on the accrual period. Most importantly, none of the statutes contain a Congressional mandate to apply state substantive rules of decision comparable to § 2014(hh). Therefore, the cases cited by Plaintiffs have no persuasive value for determining when a cause of action accrues under the PAA.

Plaintiffs compound the problem of relying on irrelevant cases by also failing to address the relevant authorities construing when a cause of action under the PAA accrues. The leading case is *Lujan v. Regents of University of California*, 69 F.3d 1511 (10th Cir. 1995). The *Lujan* court analyzed whether New Mexico's wrongful death statute, including its accrual provision, applied as substantive law under § 2014(hh). *Id*. at 1514, 1516–17. *Lujan* explained wrongful death statutes are generally substantive because they are created and defined by statutes. *Id*. at 1517. Additionally, the *Lujan* court discussed the interplay between statutes of limitations and accrual by noting "[o]rdinarily, when federal law borrows a state statute of limitations, it also borrows state law governing when the statute began to run and when it is tolled." *Lujan*, 69 F.2d at 1516–17, n.5 (10th Cir. 1995) (citing *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463–64 (1975).

Continuing their practice of ignoring the troublesome, Plaintiffs never discuss *Lujan* even though the District Court heavily relied on it.

The *Lujan* court's analysis of the New Mexico statute of limitations is particularly instructive. The New Mexico statute, like the Missouri statute, conditioned recovery on filing suit within a specified time after the decedents' death. *Id*. at 1517. Based on its analysis, the *Lujan* court concluded the New Mexico statutory requirements were part of the substantive law and applied the accrual and limitation period to bar the untimely action. *Id*. at 1522–23. *Lujan* did not apply "federal common law" as advocated by Plaintiffs.

Under 42 U.S.C. § 2014(hh), federal law—including common law—is discarded and replaced with state substantive law, unless the state law is inconsistent with 42 U.S.C § 2210. As explained above, the accrual of a Missouri wrongful death claim is a substantive rule of decision. Plaintiffs fail to identify any provision of § 2210 that would be inconsistent with the application of Missouri's accrual period. Therefore, the accrual period for a PAA action must be derived from Missouri state law, and there is no legal justification to resort to federal common law. For these reasons, the District Court's ruling should be affirmed.

IV. Fraudulent Concealment and Equitable Estoppel are Inapplicable in this Matter and Do Not Prevent Plaintiffs' Wrongful Death Claims From Being Time Barred.

Plaintiffs' final fallback argument is a "Hail Mary" attempt to claim that the "Defendants" are "equitably estopped from asserting Plaintiffs' wrongful death claims accrued on the date of each decedent's death." (Plaintiffs Brief, p. 28). They contend the basis for the equitable estoppel is fraudulent concealment. (Plaintiffs Brief, p. 28). The District Court evaluated Plaintiffs' argument and explained Mallinckrodt was not equitably estopped from asserting the limitations period "because Plaintiffs have never alleged that Defendants engaged in fraudulent concealment." (Pls.' App. 205). Like their other arguments, this third attempt to make an end run around Missouri's wrongful death statute of limitation fails.

Equitable doctrines cannot thwart the Missouri wrongful death statute of limitations under the present facts. The Missouri Supreme Court addressed the issue of whether fraudulent concealment or equitable estoppel bar the wrongful death statute of limitations in *Boland v. St. Luke's Health Systems, Inc.*, 471 S.W.3d 703 (Mo. 2015). The *Boland* court explained that the wrongful death statute of limitations is a special statute of limitations. *Id*. at 711. "'[A] special statute of limitations must carry its own exceptions and [courts] may not engraft others onto it.'" *Id*. (quoting *Frazee v. Partney*, 314 S.W.2d 915, 919 (Mo. 1958)).

Section 537.100 has two legislatively enacted exceptions to the running of the statute, neither of which is applicable here. Fraudulent concealment is not a codified exception to the wrongful death statute of limitations. *Id*. at 712. "Equity should not be deployed in a manner that countermands the clear intent and language of the legislature, particularly in regard to a statutorily created cause of action." *Id*. Therefore, allegations of fraudulent concealment do not equitably estop a defendant from asserting the wrongful death statute of limitations contained in § 537.100. *Id*.

Plaintiffs argue equitable estoppel can bar Mallinckrodt's assertion of the statute of limitations defense. (Plaintiffs' Brief, p. 28–31). They rely on *State ex rel. Beisly v. Perigo*, 469 S.W.3d 434 (Mo. banc 2015).[8] *Perigo* is clearly distinguishable. In *Perigo*, the defendant allegedly had his wife murdered and, in an effort to conceal his ***criminal*** responsibility, "disguised the nature of the decedent's death . . . to look like a home invasion," used an untraceable weapon, lied to law enforcement, destroyed evidence, and denied involvement in the murder. *Id*. at 436. In this regard, the common law maxim, quoted by Plaintiffs, "'that no person shall take advantage of or benefit from his or her wrong'" meant the proactive concealment of evidence of a ***crime***. *Id*. at 440. The *Perigo* court

[8] Plaintiffs also cite *O'Grady v. Brown*, 654 S.W.2d 94 (Mo. banc 1983), but *O'Grady* did not involve the wrongful-death statute of limitations or equitable estoppel.

recognized a potential conflict with the holding in *Boland* that equity cannot toll a wrongful death statute, and, to resolve the conflict, it *sua sponte* indicated a key distinction in the cases was *Perigo* was "predicated upon a criminal fact pattern." *Id*. at 445, n.9. Obviously, the instant action is predicated on a civil fact pattern. Accordingly, the *Perigo* opinion is inapplicable to the case before the Court, and Mallinckrodt urges the Court to follow *Boland*.

Because they do not like the result, Plaintiffs argue the *Boland* opinion was poorly reasoned. (Plaintiffs' Brief, p. 31). The *Perigo* opinion, however, is the opinion with limited precedential value. The dissent in *Perigo* explained that *Boland* was issued by regular members of the Missouri Supreme Court. *Id*. at 446. The *Perigo* majority, on the other hand, included a judge sitting as a special judge. *Id*. at 445. The dissenter pointed out that the *Perigo* opinion quashed a writ of prohibition, and he tacitly invited the defendant to simply file another motion to dismiss that could be construed consistent with *Boland* by the regular members of the court. *Id*. at 446. The Eighth Circuit has also favorably cited the *Boland* opinion. *DeCoursey v. American General Life Ins. Co.*, 822 F.3d 469, 474 (8th Cir. 2017). Therefore, the *Boland* opinion is binding law that bars Plaintiffs' unpled argument of fraudulent concealment.

Even if equitable estoppel could bar Mallinckrodt's use of the statute of limitations defense, which it cannot, the equitable theory would not be available to

Plaintiffs under the facts of this case. As a threshold matter, Plaintiffs implicitly concede the District Court's finding that they never alleged fraudulent concealment in the operative Complaints. Plaintiffs' brief paraphrases four conclusory allegations from their representative Complaint, none of which allege fraud. (Plaintiffs' Brief, p. 31–32). Plaintiffs never argue they pleaded fraud against Mallinckrodt or explain how the recited facts support the elements of a fraud claim. The District Court was not required to "create claims that [were] not clearly raised" or "conjure up unpled allegations to save [the] complaint." *Gregory v. Dillard's Inc.*, 565 F.2d 464, 473 (8th Cir. 2009) (internal quotations omitted). Therefore, the District Court properly rejected Plaintiffs' unpled fraud argument.[9] *Rodgers v. City of Des Moines*, 435 F.3d 904, 910 (8th Cir. 2006).

Even a generous reading of Plaintiffs' Complaints cannot support a plausible claim for fraudulent concealment. Under Missouri law:

> "[t]o constitute concealment of a cause of action within the general rule tolling the statute of limitations on that ground the concealment must be fraudulent or intentional and, … there must be something of an affirmative nature designed to prevent, and which does prevent, discovery of the cause of action."

Owen v. General Motors Corp., 533 F.2d 913, 919–20 (8th Cir. 2008) (alteration in original) (quoting *Hasenyager v. Bd. Of Police Com'rs of Kansas City*, 606 S.W.2d

[9] Any suggestion that Plaintiffs pleaded fraudulent concealment is belied by the procedural history. Plaintiffs did not argue fraudulent concealment until they opposed the motion for reconsideration, which was after the Missouri Supreme Court issued the *Perigo* and *Boland* opinions. This history suggests Plaintiffs added their argument to fit the *Perigo* opinion rather than their pleadings.

468, 471 (Mo. Ct. App. 1980). Fraudulent concealment is an affirmative act, not "'mere silence on the defendant's part.'" *Id.* at 920 (quoting *Gilliam v. Gohn*, 303 S.W.2d 101, 107 (Mo. 1957). The concealment requires the use of some means to prevent discovery of the cause of action. *Id*. "Silence becomes misrepresentation only when there is a duty to speak." *Id*. Even *Perigo*—the case Plaintiffs rely on—limits equitable estoppel to situations where the defendant "made positive efforts to avoid the bringing of the suit against her or misled the claimants." 469 S.W.3d at 441).

Fraud claims must plead "with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). The heightened pleading standard for fraud claims requires a plaintiff to "specify the time, place, and content of the defendant's false representation, as well as the details of the defendant's fraudulent conduct." *OmegaGenesis Corp. v. Mayo Foundation for Medical Education and Research*, 861 F.3d 800, 804 (8th Cir. 2017) (internal quotes omitted). Comparing the elements of fraudulent misrepresentation to Plaintiffs' allegations highlights the absence of facts required to plead a fraud claim. Plaintiffs never allege Mallinckrodt had a duty to inform Plaintiffs or the decedents about any material facts. Plaintiffs fail to allege the existence of any false representations by Mallinckrodt, let alone the time, place, and content of an alleged misrepresentation. They fail to allege any *affirmative acts* by Mallinckrodt that were calculated to

prevent or inhibit Plaintiffs from filing suit. Even the new argument in their briefing based on the Energy Employees Occupational Illness Compensation Program, 42 U.S.C.A. § 7384 *et seq*., (which they concede is not applicable) does not support a fraud claim against Mallinckrodt because the Congressional findings referenced by Plaintiffs fail to even mention Mallinckrodt and certainly do not allege any positive actions by it.

The lack of any alleged attempt to conceal a potential cause of action from Plaintiffs has even greater context given the absence of any allegations that Mallinckrodt had a relationship with Plaintiffs or any knowledge of Plaintiffs' alleged injuries. There are no allegations that Mallinckrodt knew any of the decedents were ill or the cause of their alleged illnesses. To the extent it is alleged exposure to radioactive material was the cause of the alleged illnesses, there are no pleaded facts alleging Mallinckrodt knew the decedents were exposed to radioactive material allegedly released by Mallinckrodt. On this point, Plaintiffs allege other entities released radioactive material calling into question whether the decedents were exposed by Mallinckrodt. Given the absence of these required factual allegations in the operative Complaints, the District Court correctly ruled Plaintiffs failed to allege fraudulent concealment against Mallinckrodt.

In summary, the Missouri wrongful death statute of limitations, Missouri Revised Statute § 537.100, cannot be tolled or barred based on fraudulent

concealment or equitable estoppel. The Missouri statute is a special statute, and the legislature did not provide for the tolling or estoppel arguments raised by Plaintiffs. Even if these arguments were theoretically possible, Plaintiffs failed to plead sufficient facts to state a plausible claim for fraudulent concealment. Therefore, the District Court's dismissal of Plaintiffs' untimely claims should be affirmed.

CONCLUSION

For all of the above reasons, defendant-appellee Mallinckrodt respectfully requests that the Court affirm the District Court's grant of judgment on the pleadings to Mallinckrodt against Plaintiffs' wrongful death claims on statute-of-limitations grounds for all claims filed more than three years after the decedent's death.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 9,694 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font.

3. This brief and addendum have been scanned for viruses and was found to be virus-free as required by Eighth Circuit Rule of Appellate Procedure 28A(h).

Dated: September 1, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of September, 2017, I electronically filed the above with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to counsel of record.

/s/ David R. Erickson
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