IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

SCOTT D. MCCLURG, et al., Plaintiffs, vs. MALLINCKRODT, INC., et al., Defendants.	Pertaining to Cases Consolidated for Discovery and Pretrial Proceedings under Lead Case No. 4:12CV00361 AGF

MALLINCKRODT'S MEMORANDUM OF LAW
IN SUPPORT OF ITS MOTION TO DISMISS

This document applies to:

McClurg, et al. v. Mallinckrodt, Inc. et al., No. 4:12-cv-00361
Adams, et al. v. Mallinckrodt, Inc. et al., No. 4:12-cv-00641
Steinmann, et al. v. Mallinckrodt, Inc. et al., No. 4:12-cv-01942
Schneider, et al. v. Mallinckrodt, Inc., et al., No. 4:13-cv-00751
Vorce v. Mallinckrodt, Inc. et al., No. 4:13-cv-01160
Lange, et al. v. Mallinckrodt, Inc. et al., No. 4:13-cv-01483
Bilger, et al. v. Mallinckrodt, Inc. et al., No. 4:13-cv-01160
Bell v. Mallinckrodt, Inc. et al., No. 4:13-cv-02378
McPherson v. Mallinckrodt, Inc. et al., No. 4:13-cv-02508
Reed, et al. v. Mallinckrodt, Inc. et al., No. 4:14-cv-00033
Robinson, et al. v. Mallinckrodt, Inc. et al., No. 4:14-cv-00034
O'Laughlin, et al. v. Mallinckrodt, Inc. et al., No. 4:14-cv-00035
Bright, et al. v. Mallinckrodt, Inc. et al., No. 4:14-cv-00036
Anderson, et al. v. Mallinckrodt, Inc. et al., No. 4:14-cv-00037
Gamblin, et al. v. Mallinckrodt, Inc. et al., No. 4:14-cv-00100
Branstetter v. Mallinckrodt, Inc. et al., No. 4:14-cv-00210
Kelly v. Mallinckrodt, Inc. et al., No. 4:14-cv-00247
Lloyd v. Mallinckrodt, Inc. et al., No. 4:14-cv-00283
Headrick, et al. v. Mallinckrodt, Inc. et al., No. 4:14-cv-00351
Halbrook, et al. v. Mallinckrodt, Inc. et al., No. 4:14-cv-00668
Beatty, et al. v. Mallinckrodt, Inc. et al., No. 4:14-cv-00669
Steinbruegge, et al. v. Mallinckrodt, Inc. et al., No. 4:14-cv-00670
Randall, et al. v. Mallinckrodt, Inc. et al. No., 4:14-cv-00671
McDonald, et al. v. Mallinckrodt, Inc. et al., No. 4:14-cv-00672
Starling, et al. v. Mallinckrodt, Inc., et al., No. 4:14-cv-00912
Burns, et al. v. Mallinckrodt, Inc., et al., No. 4:14-cv-00913

Plaintiffs have been allowed numerous attempts to state a claim under the Price Anderson Act ("PAA") over the past two years, yet Plaintiffs' current pleadings still fail to allege the necessary facts in support of their claims. In addition, the allegations of the Complaints themselves establish the untimeliness of Plaintiffs' claims. Because Plaintiffs have repeatedly squandered their multiple chances to plead a PAA cause of action, the Complaints in these consolidated actions should be dismissed with prejudice.

I. BACKGROUND

Plaintiffs initially attempted to plead exposure in excess of federal dose standards through the conclusory allegation that "contamination levels at the North St. Louis County Sites exceed federal dose limits." (Doc. 1, Compl., ¶ 55).[1] Defendants moved to dismiss for, among other reasons, Plaintiffs' failure to meet the pleading requirements of the PAA. In response, Plaintiffs argued "These allegations are more than adequate to raise a plausible claim that…Plaintiffs were exposed to radiation in excess of federal dose limits." (Doc. 83, Plaintiffs' Opposition, p. 6). The Court disagreed and ruled the conclusory allegations failed to establish a claim under the PAA. The Court also confirmed the maximum permissible radiation dose levels set by federal standards establish the duty of care for radiation injuries and that imposing state law duties would conflict with federal law. (Doc. 141, March 27, 2013 Memorandum and Order, pp. 14–15) ("an essential element of a public liability action is that each plaintiff's exposure exceeded the federal dose limits"). In addition, the Court found Plaintiffs' claims are subject to Missouri's five-year statute of limitations for personal injury actions. (*Id.* at 15). The Court granted Plaintiffs 45 days to "file amended complaints that sufficiently plead a cause of action under the PAA" and stated that "Failure to do so will result in dismissal of these actions." (*Id.* at 16).

[1] All Docket numbers refer to the *McClurg* docket unless otherwise noted.

Plaintiffs were not able to comply with the Court's Order and moved for a lengthy extension of time, citing "the [alleged] complexity of determining radiation doses and other factual matters necessary to sufficiently plead a cause of action under the PAA." (Doc. 150, Order, p. 2). Specifically, Plaintiffs sought more time due to "the factual and scientific complexity involved with analyzing radiation doses received over time." (Doc. 145, Plaintiffs' Motion for Additional Time, ¶ 6). Plaintiffs explained that, upon receipt of the Court's Order granting leave for Plaintiffs to amend, "Plaintiffs immediately conferred with their experts in the relevant fields of expertise and continue to do so." (*Id.* at ¶ 7). The Court allowed some, but not all, of the additional time sought by Plaintiffs, finding that it "fail[ed] to see why an extension of that duration is necessary" as "[t]hese cases are over a year old and the necessity of providing the *factual information necessary to satisfy these pleading requirements* should not come as a surprise to Plaintiffs." (Doc. 150, Order, p. 2) (emphasis added). The Court reiterated that "[n]o additional extensions will be granted, and the complaints will be subject to dismissal in the event that the amended complaints are not timely filed." (*Id.*)

After a lengthy delay, Plaintiffs filed Amended Complaints that did not even attempt to comply with the Court's explicit order to properly plead a cause of action under the PAA. Rather, Plaintiffs simply restated the same allegation that radiation *in the environment* at the various North St. Louis County sites exceeded federal limits (Doc. 151, First Am. Compl., ¶ 69), which the Court had already held insufficient to allege a cause of action under the PAA.

Defendants again moved to dismiss the First Amended Complaints, based on Plaintiffs' failure to plead that each Plaintiff's exposure exceeded the federal dose limits. (Doc. 170, 171). Before these motions were ruled upon, Plaintiffs sought leave to file Second Amended Complaints, which again alleged contamination *at the North St. Louis County Sites* exceeded

federal dose requirements and the added one generic sentence alleging that Plaintiffs were exposed to radiation "in excess of 500 millirem" or "in excess of 100 millirem," during certain periods of time. (*See, e.g.*, Doc. 201, Second Am. Compl., ¶ 24.A). In so pleading, Plaintiffs have done nothing more than state, in a conclusory manner, an element of their claim. Plaintiffs provide no factual support for this bare allegation, rather, Plaintiffs' Complaints continue to be based on the same premise that this Court found insufficient to state a PAA cause of action – that contamination at the various North St. Louis County Sites is in excess of federal standards and Plaintiffs lived around Coldwater Creek at some point over the past several decades.

Plaintiffs began filing these cases over two years ago. Since that time, Plaintiffs have not altered their Plaintiff-specific allegations, which completely fail to plead facts in support of each Plaintiff's alleged exposure. Plaintiffs have failed to take advantage of multiple opportunities to properly plead facts in support of their PAA claims, despite being given ample opportunity and guidance. Plaintiffs' one-sentence addition merely restates the purported federal dose standard and does not meet Plaintiffs' burden to plead *facts* showing they are entitled to recovery under the PAA.

Further, Plaintiffs' claims are barred by Missouri's statutes of limitations. All wrongful death Plaintiffs bringing claims more than three years after the date of death are clearly time barred. In addition, the personal injury Plaintiffs again fail to plead any facts regarding each individual Plaintiff's alleged exposure to radiation at a dose in excess of the federal dose limit or when each Plaintiff was first diagnosed with his or her alleged injury. Instead, the dates Plaintiffs do allege establish their claims are untimely. Because Plaintiffs still fail to plead "the factual

information necessary to satisfy these pleading requirements," (Doc. 150, Order, p. 2), Mallinckrodt moves to dismiss the operative complaints in the above-referenced cases.[2]

II. PLAINTIFFS' ALLEGATIONS

During World War II, the United States Army created the Manhattan Engineering District ("MED") to begin working on the first atomic bomb. (*See* Doc. 201, Second Am. Compl., ¶ 26). After the war, the Atomic Energy Commission ("AEC") was formed to carry on nuclear research for peaceful purposes. (*Id.*) Plaintiffs allege contamination from these activities at various sites located in and around St. Louis, Missouri. Plaintiffs allege that from 1942 to 1957, Mallinckrodt processed uranium under contract with the MED and/or the AEC at a facility in downtown St. Louis currently referred to as the St. Louis Downtown Site. (*Id.* at ¶ 27). Plaintiffs also allege Mallinckrodt began storing radioactive waste residue at the St. Louis Airport Site ("SLAPS") in north St. Louis County in 1946 and that the SLAPS contaminated the surrounding area for decades thereafter. (*Id.* at ¶¶ 8, 28, 46–48). Plaintiffs further allege other parties transferred waste residues from the SLAPS for storage at various sites in North St. Louis County and at the West Lake Landfill. (*Id.* at. ¶¶ 29–30, 49–53). Plaintiffs allege Defendants' actions contaminated these sites and resulted in Plaintiffs' exposure to hazardous, toxic, and radioactive waste materials. (*Id.* at ¶ 24.A).

III. LEGAL STANDARD

Under Rule 8(a)(2) of the Federal Rules of Civil Procedure, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." This standard requires more than "labels and conclusions." *Bell Atlantic v. Twombly*, 550 U.S. 544,

[2] Mallinckrodt also incorporates by reference Cotter Corporation's motion to dismiss and the arguments therein, to the extent not inconsistent with those herein.

555 (2007). Thus, "a formulaic recitation of the elements of a cause of action will not do." *Id.* Rather, to survive a motion to dismiss, the plaintiff must allege facts that are sufficient, if true, to raise a right to relief above the speculative level and to state a claim that is "plausible" on its face. *Id.* "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949–50 (2009). Although a court may accept as true all well-pleaded facts, it does not have to accept as true "a legal conclusion couched as a factual allegation." *Id.* Moreover, "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but has not show[n]—that the pleader is entitled to relief." *Id.* at 1950.

IV. ARGUMENT

A. Plaintiffs' Addition of One Conclusory Sentence Fails to State A Claim Under The Price-Anderson Act.

Plaintiffs' current Complaints use language ***identical*** to that in prior Complaints, with the addition of one sentence alleging "annual exposure to radiation" over varied periods of time "was in excess of 500 millirem" or "was in excess of 100 millirem." (*See, e.g.*, Doc. 201, Second Am. Compl., ¶ 24.A).[3] In other words, Plaintiffs have merely restated a legal threshold element of their PAA claim (*i.e.*, the alleged federal dose standard). Plaintiffs, however, cannot use this bare allegation to carry the day because Plaintiffs have again failed to add any factual bases for this conclusion.

[3] Plaintiffs also continue to allege that Missouri state law, and not federal law, provides the controlling standard of care. Specifically, Plaintiffs argue that Missouri state law "provide[s] that handling nuclear materials constitutes an abnormally dangerous activity" and that "a person is strictly liable for harm, injury, or damage arising from an abnormally dangerous activity." (Second Am. Compl., ¶ 73). This argument was already rejected by this Court. (*See* Doc. 141, Order, pp. 14-15).

In deciding whether a plaintiff has stated a claim, courts "are not bound to accept as true a legal conclusion couched as a factual allegation." *Iqbal*, 556 U.S. at 678. Thus, the determination on a Rule 12 motion to dismiss must be based only upon well-pleaded factual allegations, putting aside conclusory statements and "threadbare recitals of the elements." *Id.* Here, putting aside Plaintiffs' most recent conclusory allegation, the Complaints contain the exact same bare factual allegations as the prior Complaints, which this Court has already found fail to state a cause of action under the PAA.

Since the first Complaints were filed more than two years ago, Plaintiffs have been attempting to plead a PAA cause of action by generally alleging that certain areas of land in North St. Louis County were contaminated with radiation and that individuals that lived and worked in the area had been exposed. Plaintiffs failed to properly support their claims and were granted multiple opportunities to re-plead. Now, *without changing or adding a single fact regarding the alleged exposure*, Plaintiffs generally assert each Plaintiff's "average annual exposure to radiation during the time [he or she] lived in close proximity to Coldwater Creek, the SLAPS and HISS…was in excess of [500 or 100] millirem." (*See generally* Complaints, ¶ 24.A). This allegation is nothing more than a "threadbare recital" of a legal element, and fails to provide the requisite factual basis for Plaintiffs' claims.

After all this time, and after purportedly working for a year to determine each Plaintiff's alleged "dose," Plaintiffs still fail to plead a proper factual basis for their alleged exposure. The Plaintiff-specific allegations have remained unchanged throughout two years of litigation. Plaintiffs still fail to provide any information regarding the circumstances of any Plaintiff's exposure – there are no specific references to dates or duration of exposure (beyond general time frames associated with residences in north St. Louis County), specific locations (beyond various

addresses "in close proximity to Coldwater Creek, SLAPS, and HISS"), specific chemicals or substances, or even the type of exposure alleged (*e.g.* air, soil, water). (*See, e.g.*, Second Am. Compl., ¶ 24.A). This information is readily available to Plaintiffs, and must have been considered by Plaintiffs' experts over the past year to allow for an allegation regarding each Plaintiff's exposure to an alleged dose. Plaintiffs, however, still refuse to plead these (or any other) facts in support of their claims.

Plaintiffs have repeatedly failed to correct infirmities identified in Defendants' prior motions to dismiss and this Court's March 27, 2013 Order. Even after multiple attempts, the only facts alleged are that: contamination levels at the North St. Louis County Sites exceeded federal dose limits, Plaintiffs were physically present in an area near Coldwater Creek, and they contracted an illness at some unidentified point thereafter. Anyone who has ever lived or worked in the areas described and contracted an illness could make identical claims to those of Plaintiffs.

As this Court has already held, these bare allegations fail to show that Plaintiffs are entitled to relief. Plaintiffs' failure to provide a factual basis for their claims after multiple attempts requires dismissal with prejudice. *See, e.g.*, *Adkins v. Chevron Corp.*, No. 2:11-CV-173, 2012 WL 6680366, at *12 (E.D. Tenn. Dec. 21, 2012) (dismissing plaintiffs' amended PAA complaint with prejudice after plaintiffs failed to address deficiencies); *United States ex rel. Nathan v. Takeda Pharms. N. Am., Inc.*, 707 F.3d 451, 461 (4th Cir. 2013) ("The granting of leave to file another amended complaint, when [plaintiff] was on notice of the deficiencies before filing the most recent amended complaint, would undermine the substantial interest of finality in litigation and unduly subject [defendant] to the continued time and expense occasioned by [plaintiff's] pleading failures."); *Mir v. Fosburg*, 646 F.2d 342, 347 (9th Cir. 1980) (a district court's discretion to dismiss a case with prejudice is especially broad "when the

court has already given a plaintiff one or more opportunities to amend his complaint"); *Aguiar v. California Sierra Exp., Inc.*, No. 2:11-CV-02827-JAM, 2012 WL 1593202, at *2 (E.D. Cal. May 4, 2012) ("Because plaintiff's FAC does not contain sufficient factual matter alleging a plausible claim to relief, and because plaintiff already has had an opportunity to amend in response to prior Rule 12 Motions by [defendant], dismissal with prejudice is now warranted.") (citing *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951 (2009)).

B. Multiple Plaintiffs Still Fail To Plead Receipt Of Radiation In Excess Of Federal Dose Limits.

In addition to every Plaintiff failing to plead a PAA claim due to the above issues, a number of Plaintiffs still fail to even allege a dose of radiation in excess of the federal dose limits Plaintiffs themselves allege were in place. Plaintiffs allege the federally-regulated radiation dose threshold for the general public between 1957 and 1989 was 500 millirem per year. (Doc. 201, Second Am. Compl., ¶ 21). From 1989 to the present, Plaintiffs allege the federal dose limit changed to a 100 millirem per year limit. (*Id.*) Certain Plaintiffs, however, appear to be alleging exposure prior to 1989, but fail to allege a dose of exposure in excess of 500 millirem per year.[4]

For example, decedent Mary Beatty's average annual exposure between 1967 and 1970 is alleged to be "in excess of 100 millirem," well below the 500 millirem Plaintiffs allege to be the federal dose limit during that timeframe. (*Beatty* Complaint, Doc. 1 of No. 4:14-cv-00669, ¶ 24.A.1). Decedent William Sayre (*Beatty* Complaint, ¶ 24.A.3) and Plaintiff Kimberly Sayre (*O'Laughlin* Complaint, Doc. 1 of No. 4:14-cv-000358, ¶ 24.A.2) make the same inconsistent allegations. Other Plaintiffs allege exposure "in excess of 100 millirem" both before and after 1989, with no clarification as to whether these Plaintiffs are alleging the post-1989 exposure caused their injuries. And Plaintiffs Kathleen Bilger and William Donaldson fail to allege

[4] *See* Ex. 1, listing Plaintiffs.

exposure to any dose of radiation at all. (*Bilger* First Am. Compl., Doc. 10 of No. 4:14-cv-02163, ¶ 24.A.1; *McClurg* Second Am. Compl., Doc. 201).

C. Plaintiffs Cannot Avoid Their Burden To Plead Exposure In Excess Of Federal Dose Standards.

Notwithstanding the Court's prior Order and the overwhelming precedent on the issue, Plaintiffs again appear to suggest in their Second Amended Complaints that Missouri strict liability should apply instead of federal dose standards because Plaintiffs have attempted to limit their allegations against Mallinckrodt to 1942 through 1957, when Plaintiffs allege a lack of federal regulation. (Second Am. Compl., ¶¶ 5–6, 8–13, 79–79.) Plaintiffs' attempt to manipulate their allegations against Mallinckrodt, however, does not relieve Plaintiffs of their burden to comply with the Court's Order and federal pleading standards. In the interest of brevity, and because these issues have been briefed, Mallinckrodt refers the Court to those briefs and incorporates by reference its prior arguments on this issue. (*See* Doc. 158, 159, 176).

D. Plaintiffs' PAA Claims Are Also Barred By Missouri's Statute of Limitations.

1. Wrongful Death Claims Brought More Than Three Years After Death Are Barred By Missouri's Statute of Limitations.

All Plaintiffs bringing wrongful death claims more than three years after the alleged date of death must be dismissed under the applicable limitations period. In Missouri, "Every [wrongful death action] shall be commenced within three years after the cause of action shall accrue." Mo. Rev. Stat. § 537.100. For purposes of calculating the statute of limitations, "a cause of action accrues to the statutory beneficiaries when the death occurs." *Dzur v. Gaertner*, 657 S.W. 2d 35, 36 (Mo. Ct. App. 1983); *see also State v. Dolan*, 46 S.W.3d 94, 98–99 (Mo. Ct. App. 2001) (referring to public policies expressed in § 537.100 and holding wrongful death claim time-barred three years after date of death).

The plain language of Plaintiffs' Complaints establishes the untimeliness of Plaintiffs' wrongful death claims. Multiple Plaintiffs plead their decedent died in the 1970's, 1980's and 1990's – decades before these actions were filed. Missouri law is clear: actions for wrongful death must be brought within three years of the date of death. Thus, all wrongful death claims filed more than three years after the alleged date of death are untimely on their face and should be dismissed.[5] *See, e.g.*, *Grantham v. Jones*, No. 05-4017, 2005 WL 1532951 (W.D. Mo. June 24, 2005) (granting motion to dismiss wrongful death claims filed more than three years after date of death); *Fogerty v. Metro. Life Ins. Co.*, 666 F. Supp. 167 (E.D. Mo. 1987) (granting motion to dismiss after deciding that five-year statute of limitation applied to claim and complaint was not filed within five years); *Bradley Timberland Res. v. Bradley Lumber Co.*, 712 F.3d 401 (8th Cir. 2013) (noting a "motion to dismiss may be granted when a claim is barred under a statute of limitations" and affirming the trial court's dismissal on defendant's motion to dismiss under Arkansas law); *Anderson v. Card*, No. 4:05-cv-629, 2005 WL 2406019 (E.D. Mo. Sept. 29, 2005) (granting prisoner's motion to dismiss § 1983 claim barred by the applicable statute of limitations); *Cross Oil Co. v. Phillips Petroleum Co.*, 944 F. Supp. 787 (E.D. Mo. 1996) (granting portion of motion to dismiss claim barred by the statute of limitations); *Kuiper v. Busch Entm't Corp.*, No. 4:93-cv-1501, 1994 WL 763592 (E.D. Mo. Apr. 5, 1994) (granting motion to dismiss action barred by Virginia statute of limitations).

Despite plainly pleading dates of death outside the three year statute of limitations, some Plaintiffs, apparently to avoid the consequences of their untimely claims, allege:

> Plaintiff 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. Plaintiff lacked knowledge of the decedent's exposure to

[5] *See* Ex. 2, identifying untimely wrongful death claims.

> radiation and the relationship between that exposure and decedent's death and had no reasonable basis to determine same until less than three years before commencement of this action.

(*See, e.g.*, *Beatty* Complaint, No. 4:14-cv-00669, Doc. 1, ¶ 24.A). The addition of these two standard sentences, however, does not save Plaintiffs' untimely claims, as Plaintiffs once again fail to allege any *facts* establishing how their decades-old claims could be timely. In ruling on a Rule 12 motion to dismiss, the Court is "free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations." *Wiles v. Capitol Indem. Corp.*, 280 F.3d 868, 870 (8th Cir. 2002). Here, without any facts supporting how or why Plaintiffs were unaware of the cause of death, a bland allegation that Plaintiffs lacked the knowledge to discover the alleged cause of injury fails to revive Plaintiffs' patently untimely claims. *See, e.g.*, *Southeast Missouri Hosp. v. C.R. Bard, Inc.*, No. 1:07-cv-0031-TCM, 2008 WL 4104534 (E.D. Mo. Aug. 27, 2008) (granting motion to dismiss plaintiffs' antitrust claims in part as barred by statute of limitations, ruling claims were not tolled by generic allegations that unlawful conduct could not have been discovered even "by exercise of due diligence").

Moreover, Plaintiffs affirmatively plead facts regarding the highly publicized activity surrounding the disposal of radioactive materials at the various sites into the 1990's, establishing they should have been aware of these incidents decades ago. (*See* Doc. 201, Second Am. Compl. at ¶¶ 54–57). According to Plaintiffs' allegations, the activities surrounding the disposal of radioactive materials at the various sites have been publicly-known for decades. The Complaints allege extensive and public "Investigation of Contamination" occurring from 1989 through 1995. (*Id.*) The U.S. Army Corps of Engineers website, cited to and relied upon by Plaintiffs in their

various Complaints,[6] establishes that newsletters and public meetings concerning contamination and remediation efforts at the relevant sites were ongoing as early as 1998. Accordingly, the very sources Plaintiffs rely upon to prosecute their action now were being publically disseminated over a decade before Plaintiffs field their claims.

Plaintiffs alleging wrongful death claims have pled facts making those claims untimely under Mo. Rev. Stat. § 537.100. The bald conclusion that Plaintiffs "neither knew nor reasonably should have known" of their potential claims does not save them from dismissal, and instead, outright contradicts Plaintiffs' own allegations regarding the history of public activities taking place amongst the various sites. All Plaintiffs bringing wrongful death claims more than three years after the date of death must be dismissed as untimely.

2. Personal Injury Claims Brought More Than Five Years After Plaintiffs' Diagnoses Are Barred By Missouri's Statute of Limitations.

This Court has already determined Plaintiffs' PAA claims are subject to Missouri's five-year statute of limitations. (Doc. 141, Memorandum and Order, p. 15). Despite these issues being raised in Defendants' first motions to dismiss and the Court's Order, Plaintiffs still fail to plead their claims are timely. The dates of any individual Plaintiff's diagnosis remain absent the Amended and Second Amended Complaints. Some Plaintiffs, however, establish the untimely nature of their claims by alleging dates of diagnosis in their respective Plaintiff Fact Sheets ("PFS") more than five years before the claims were filed.[7] These claims are barred by Missouri's five year statute of limitations. *Lockett v. Owens-Corning Fiberglas*, 808 S.W.2d 902, 907 (Mo. Ct. App. 1991) (statute of limitations begins to run when the injury is diagnosed and theory as to cause is ascertainable). However, should the Court not wish to look beyond the

[6] *See* http://www.mvs.usace.army.mil/Missions/CentersofExpertise/FormerlyUtilizedSitesRemedialActionProgram.aspx, cited in Plaintiffs' Second Amended Complaint at n. 7.

[7] *See* Exhibit 3, listing Plaintiffs with untimely claims based on allegations in PFS.

pleadings, review of the PFS is not needed because all Plaintiffs have failed to plead a timely cause of action.

Under Mo. Rev. Stat. § 516.120(4), plaintiffs must bring personal injury claims within five years. The five year period begins:

> not when the wrong is done or the technical breach…of duty occurs, but ***when the damage resulting therefore is sustained and is capable of ascertainment***, and, if more than one item of damage, than the last item, so that all resulting damage may be recovered, and full and complete relief obtained.

Mo. Rev. Stat. §516.100 (emphasis added). When damages involve a physical ailment, damages are "capable of ascertainment" when (1) the injury is diagnosed and (2) a theory as to its cause is ascertainable such that a plaintiff could have first maintained the action to a successful result. *Lockett*, 808 S.W.2d at 907. "Plaintiff's ignorance of his cause of action will not prevent the running of the statute." *Ahearn v. Layfayette Pharmacal, Inc.*, 729 S.W.2d 501, 503 (Mo. Ct. App. 1987).

a. Plaintiffs' theory as to cause (radiation from Coldwater Creek and the North St. Louis County Sites) was ascertainable over a decade ago.

Plaintiffs' own allegations outline the public activities at the various sites over recent decades. Plaintiffs allege that: in 1989, Congress added SLAPS, HISS and the Futura Site to the EPA's National Priorities List; in 1992, the Madison Site was added to the FUSRAP list for cleanup; in 1994 the DOE issued a remedial investigation which, according to Plaintiffs, "concluded that contamination is present in both surface and subsurface soils at the North St. Louis County Sites; and in 1995 the DOE issued an addendum that involved sampling of various sites to confirm the presence of radioactive contamination around the North St. Louis County Sites. (Doc. 201, Second Am. Compl., ¶¶ 54–57). Plaintiffs further refer to the U.S. Army Corps of Engineers website, which establishes that newsletters and public meetings concerning

contamination and remediation efforts at the relevant sites were ongoing as early as 1998. (*Id*. at n. 7).

Plaintiffs do not attempt to allege why the alleged cause of radiation exposure could not be ascertained until sometime within the five years prior to the filing of their Complaints. Instead, Plaintiffs' pleadings make clear that the radioactive contamination at the sites alleged has been publicly known since the late 1980's. Because of the widely publicized nature of investigation pleaded by Plaintiffs, a cause of action was capable of ascertainment decades before Plaintiffs filed their claims.

b. Plaintiffs failed to allege their date of diagnosis or any other facts to establish their claims are timely.

No Plaintiffs allege a diagnosis date; instead, each Plaintiff alleges only that he or she was "subsequently" diagnosed after living or working at one or more addresses "near" Coldwater Creek, SLAPS or HISS.[8] Plaintiffs allege Defendants' alleged activities took place over the course of very specific time periods, yet Plaintiffs go out of their way to avoid pleading specific timelines related to each Plaintiff's ascertainment. Following the first round of motion to dismiss briefing and this Court's ruling, Plaintiffs were fully aware of the bar on untimely claims and, if their claims were timely, could have avoided this ground for dismissal by simply pleading basic facts essential to their claims. And again, this information must have been readily available to Plaintiffs for their experts' dose analyses. Yet, no Plaintiffs allege dates of diagnoses or other similar facts.

For example, Plaintiff Arnold Schneider alleges living at 1710 Marshall Court, Florissant, Missouri from 1964 to 1973, and at 2625 Dresden Drive, Florissant, Missouri from 1973 to 1975. (*See Schumer/Schneider* Second Am. Compl., No. 4:13-cv-00751, ¶ 24.A.2). But Mr.

[8] *See* Exhibit 4, listing Plaintiffs.

Schneider does not allege any facts related to his diagnosis; instead, he merely alleges he was "subsequently" diagnosed with colon cancer. (*Id.*) According to these allegations, Mr. Schneider could have been diagnosed and been aware of his cancer for almost 40 years. After all this time, and after the multiple attempts to replead, the Complaints still fail to establish Plaintiffs' claims are timely.

Some Plaintiffs again attempt to rely on the universal statement that they were diagnosed "fewer than five years prior to the commencement of this action," in an apparent effort to plead around any statute of limitations defense. (*See, e.g.*, *Bilger* First Am. Compl., Doc. 10 of No. 4:13-cv-02163, ¶ 24.A.1). Under an *Iqbal/Twombly* analysis, the Court is free to ignore this type of conclusory statement. *See Wiles v. Capitol Indem. Corp.*, 280 F.3d 868, 870 (8th Cir. 2002) (a court is "free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations").

Despite the defenses raised in response to the prior Complaints and the Court's confirmation of the applicable limitations period with an invitation to raise the defense in a subsequent motion to dismiss, Plaintiffs have again failed to provide any basis to suggest their claims are timely. Facts supporting each Plaintiff's claims could have easily been pled by Plaintiffs, and Plaintiffs' failure to provide ***any*** additional Plaintiff-specific allegations in their Amended Complaints is telling. In these situations, courts have utilized Rule 9 as a "screening device" for time-barred claims for purposes of achieving a "just, speedy, and inexpensive adjudication of complaints." *Hoover v. Langston Equip. Assocs.*, 958 F.2d 742, 744 (6th Cir. 1992); *see also Contract Buyers League v. F & F Inv.*, 300 F. Supp. 210, 219 (N.D. Ill. 1969) ("considering the scope of the present litigation and the consequent magnitude of the discovery to be undertaken, it is particularly desirable that there be expeditious definition of the exact limits

of the litigation in order to avoid unnecessary complexity and expense"), *aff'd sub nom*, 420 F.2d 1191 (7th Cir. 1970). Accordingly, Plaintiffs' untimely claims must be dismissed.

V. CONCLUSION

Plaintiffs still fail to properly plead a claim under the PAA act, and the Court should dismiss Plaintiffs' Amended Complaint in its entirety with prejudice. In addition, Mallinckrodt respectfully requests the Court enter an order holding that the claims set forth in Exhibits 2–4 are barred by the applicable statutes of limitations.

Dated: June 20, 2014

Respectfully submitted,

SHOOK, HARDY & BACON L.L.P.

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of June, 2014, I electronically filed the above and foregoing 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/ Steven D. Soden
ATTORNEY FOR DEFENDANT MALLINCKRODT LLC (INCORRECTLY DENOMINATED AS MALLINCKRODT, INC.)