IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STACY SHERFEY, as the Administrator of the Estate of TRACEN SHERFEY, a Minor, Deceased, and STACY SHERFEY and NEIL SHERFEY, h/w, Individually in Their Own Right,	§	
Plaintiffs,	§	
v.	§	Case No. 12-4162
Johnson & Johnson, et al.,	§	
Defendants.	§	

ORDER

AND NOW, this ____ day of _____ 2014, upon consideration of Defendants Johnson & Johnson, Johnson & Johnson Sales and Logistics Company, LLC, McNeil-PPC, Inc. and Wal-Mart Stores, Inc. ("Defendants") Motion to Dismiss Certain of Plaintiffs' Claims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, and any opposition thereto, **IT IS HEREBY ORDERED THAT** Defendants' Motion is **GRANTED**.

SO ORDERED:

_____
Hon. Robert F. Kelly, U.S.D.J.

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Plaintiffs,	§	
v.	§	Case No. 12-4162
Johnson & Johnson, et al.,	§	
Defendants.	§	

DEFENDANTS' MOTION TO DISMISS

For the reasons set forth in the accompanying Memorandum of Law, Defendants move to Dismiss the claims asserted by Plaintiffs pursuant to Fed. R. Civ. P. 12(b)(6)..

This, the 14th day of February, 2014.

By: /s/ David F. Abernethy

David F. Abernethy
PA Attorney No. 36666
Melissa A. Graff
PA Attorney No. 90363
Meredith N. Reinhardt
PA Attorney No. 93504
DRINKER BIDDLE & REATH LLP
One Logan Square, Suite 2000
Philadelphia, PA 19103-6996
(215) 988-2700
M. Andrew Snowden
PA Attorney No. 200881
BUTLER SNOW LLP
500 Office Center Drive, Ste. 400
Fort Washington, PA 19034

Phone: (267) 513-1883
Email: Andy.Snowden@butlersnow.com

OF COUNSEL:
Christy D. Jones, Esquire
Alyson B. Jones, Esquire
BUTLER SNOW LLP
1020 Highland Colony Parkway, Suite 1400
Ridgeland, MS 39157
Tel: (601) 985- 4523
Tel: (601) 985-4427
Fax: (601) 985-4500
Christy.jones@butlersnow.com
Alyson.jones@butlersnow.com

Michael B. Hewes
BUTLER SNOW LLP
1300 25th Avenue, Suite 204
Gulfport, MS 39501
Tel: (228) 575-3039
Fax: (228) 868-1531
Michael.hewes@butlersnow.com

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MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

Defendants Johnson & Johnson, Johnson & Johnson Sales & Logistics Company, LLC, McNEIL-PPC, Inc., and Wal-Mart Stores, Inc. move for an Order dismissing certain of Plaintiffs' claims pursuant to Federal Rule of Civil Procedure 12(b)(6).

Plaintiffs are Stacy Sherfey, as the Administrator of the Estate of Tracen Sherfey, and Stacy Sherfey and Neil Sherfey, individually. They filed this Complaint alleging injuries to Tracen Sherfey in February 2009. (Doc. No. 1-1, Complaint, ¶¶ 26, 103-108.) Plaintiffs allege that Stacey Sherfey purchased one bottle of cherry flavored Infants' Tylenol® from her local Wal-Mart store and on February 16 and 17, 2009, administered three doses to her son, Tracen. *Id.* at ¶¶ 17, 103-105. They further allege that he began vomiting blood after receiving the third dose on February 17 and died of acute liver failure on February 19, 2009. *Id.* at ¶¶26, 105-108.

Plaintiffs filed their Complaint on June 27, 2012, more than three years and four months after Tracem Sherfey's death. They assert claims said to sound in strict product liability, recklessness, negligence, breach of express and implied warranty, negligent infliction of

emotional distress, consumer protection violations and civil conspiracy, and seek punitive damages. *Id.* at ¶¶29-33, 42-44, 156-189, 278-348, Counts I-IV, XIII-XVII, XIX. They assert claims against the following Defendants:

- Johnson & Johnson ("J&J"), a holding company that does not manufacture, market, or sell *any* product.
- McNEIL-PPC, Inc. ("McNEIL"), the corporation that makes and sells Infants' Tylenol.
- Johnson & Johnson Sales & Logistics Company, LLC ("JJSLC") a distributor that does not manufacture, market or sell *any* product.
- Wal-Mart Stores, Inc. ("Wal-Mart"), where Plaintiffs alleged they purchased the Infant's Tylenol.
- Inmar, Inc., Carolina Supply Chain Services, LLC, and Carolina Logistics Services, companies allegedly hired by or acting on behalf of J&J and/or McNEIL to conduct various recalls, but which this Court dismissed with prejudice in a multi-district litigation ("MDL"). *In re McNeil Consumer Healthcare, Mktg. & Sales Practices Litig.,* MDL No. 2190, 2011 U.S. Dist. LEXIS 76800, at *58-59 (E.D. Pa. July 14, 2011).[1]
- All of the individual defendants against whom Plaintiffs asserted claims – William Weldon, Rosemary Crane, Ashley McEvoy, Gary Benedict, Dr. Edwin Kuffner, Lorraine Bailer, Colleen Goggins and Peter Luther – have been dismissed as fraudulently joined. *See* Order [Doc. 53].

[1] These Contractor Defendants are represented by separate counsel.

Defendants removed this action on July 20, 2012. *See* Notice of Removal [Doc. 1]. On January 29, 2014, after briefing and oral argument, Plaintiffs' Motion to Remand (Doc. No. 18) was denied (Doc. No. 53).

SUMMARY OF ARGUMENT

Plaintiffs' personal injury claims are barred by limitations as a matter of law based on the allegations of the Complaint itself.

Plaintiffs' claims for alleged violations of Nevada's deceptive trade practices law, civil conspiracy, punitive damages, and breach of express warranty fail to state legally cognizable claims under applicable state law against any Defendant.[2]

APPLICABLE LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(6), the Court should dismiss a complaint that fails to state a claim upon which relief may be granted.

In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007), the Supreme Court explained that "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions. . . . Factual allegations must be enough to raise a right to relief above the speculative level." *Id.* at 555 (citation omitted). In *Ashcroft v. Iqbal,* 556 U.S. 662 (2009), the Court held that Rule 8 demands "more than an unadorned, the-defendant-unlawfully-harmed-me accusation," and therefore a complaint that offers only "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Id.* at 678. The complaint is legally insufficient if it tenders "naked assertion[s]" devoid of "further factual enhancement." *Id.*

[2] Count XVIII of Plaintiffs' Complaint asserted a claim for "aiding and abetting" only against the Contractor Defendants and is not relevant to this motion.

To survive a motion to dismiss, the Complaint must contain sufficient factual allegations to "state a claim to relief that is plausible on its face." *Id.* "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* "Allegations that are 'merely consistent with a defendant's liability' or show the 'mere possibility of misconduct' are not enough" to survive a motion to dismiss. *Santiago v. Warminster Twp.*, 629 F.3d 121, 133 (3d Cir. 2010) (quoting *Iqbal*, 556 U.S. at 678).

I. The Personal Injury and Products Liability Claims, Including Strict Liability, Recklessness, Negligence, Negligent Infliction of Emotional Distress, Breach of Implied Warranty, Civil Conspiracy, and Punitive Damages Claims, Should be Dismissed with Respect to All Moving Defendants Because These Claims Are Barred by the Applicable Statutes of Limitations.

Pennsylvania's borrowing statute must be applied by this Court to determine the applicable limitations period in a diversity case removed from state court. *See, e.g., Agere Sys., Inc. v. Advanced Envtl. Tech. Corp.*, 552 F. Supp. 2d 515, 523 (E.D. Pa. 2008); *Donovan v. Idant Labs.*, 625 F. Supp. 2d 256, 265 (E.D. Pa. 2009). Pennsylvania law controls not only the length of the applicable period but all matters that pertain to application of the statue, including accrual and tolling. This is dictated by the plain language of section 5521(b). It refers to the "period of limitations provided . . . by the law of this Commonwealth," which can only be determined by applying the Pennsylvania statue in light of Pennsylvania case law on accrual and tolling. *See also Ross v. Johns-Manville Corp.*, 766 F.2d 823, 827 (3d Cir. 1985) (time of accrual of foreign claim was dictated by Pennsylvania law, citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142, which provides that the law of the forum "determines all matters including the application of limitations").

Under the Pennsylvania borrowing statute, the shorter of two limitations periods – that imposed by the law of Nevada, where the claim accrued, or that imposed by the law of Pennsylvania, where this action was filed – applies in this case. 42 Pa. Cons. Stat. § 5521(b);

Hamid v. Stock & Grimes, LLP, No. 11-2349, 2011 WL 3803792, at *2 (E.D. Pa. Aug. 26, 2011); *Unisys Fin. Corp. v. U.S. Vision*, 630 A.2d 55, 57-58 (Pa. Super. Ct. 1993). Pennsylvania imposes a two-year limitations period for personal injury, survival actions and wrongful death claims, *see* 42 Pa. C.S.A. § 5524(2), which must be applied even if the Nevada period is longer. Nevada law imposes, on wrongful death and personal injury claims, a two year limitations period. *See* Nev. Rev. Stat. 11.190(4)(e).

The only longer statute of limitation period provided by Nevada law is that for survival actions. Nev. Rev. Stat. Ann. § 11.310 states, in relevant part:

> 1. If the person entitled to bring an action dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by the person's representatives, after the expiration of that time, and within 1 year from the person's death.

However, even if the Nevada survival statute applied (and it does not), Plaintiffs' claims would still be time-barred because the Complaint was not filed "within 1 year from [Tracen Sherfey's] death.

The applicable statute of limitations under Nevada law is *shorter* than the law in Pennsylvania for implied warranty claims in personal injury actions. It imposes a two-year statute of limitations. *See Campos v. New Direction Equip. Co.,* 2009 U.S. Dist. LEXIS 7086, at *4-5 (D. Nev. Jan. 16, 2009) ("The Nevada Supreme Court has held that personal injury actions are subject to the two-year statute of limitations, regardless of whether a plaintiff labels his claims as one sounding in contract or tort.") (citing *Blotzke v. Christmas Tree, Inc.,* 499 P.2d 647, 647 (Nev. 1972)). Thus, under the borrowing statute the shorter Nevada period applies to that claim.

The Complaint alleges that Tracen Sherfey was given three doses of Infants' Tylenol on February 16 and 17, 2009; that he began vomiting blood after e third dose on February 17; and hat he died of acute liver failure on February 19, 2009. Complaint, ¶¶ 103-108. The Complaint was filed on June 27, 2012, more than three years and four months after the death. On the face of the Complaint the claims listed above are barred by limitations as a matter of law.

Plaintiffs have argued that the discovery rule might toll limitations and this precludes the Court from deciding this question as a matter of law. But even where the rule applies it cannot toll limitations for the wrongful death or survival claims beyond the date of death. *Pastierik v. Duquesne Light Co.*, 526 A.2d 323, 326-27 (Pa. 1987). The tolling applicable to the minor's personal injury claim under 42 Pa. C.S.A. § 5533(b) also does not apply after death. Thus, the survival action had to be asserted, like any other survival action, within two years after that date. *Holt v. Lenko*, 791 A.2d 1212, 1214-15 (Pa. Super. Ct. 2002) (tolling applies only to a living minor plaintiff and survival action based on deceased minor's personal injury claim was time-barred when asserted more than two years after date of injury).

And even if the discovery rule could be applied after death (and under *Pastierik*, it cannot be) it cannot save these claims. The sudden, catastrophic and unexpected reaction to an over the counter medication, as described in the Complaint, indisputably put Plaintiffs on notice that the child had suffered an injury that may have been caused by the medication. Plaintiffs then were obligated to investigate the facts and bring their claim within the limitations period. The discovery rule tolls limitations only if the facts show "the inability of the injured [plaintiff], despite the exercise of due diligence, to know of the injury or its cause." *Pocono Int'l Raceway, Inc. v. Pocono Produce, Inc.*, 468 A.2d 468, 471 (Pa. 1983). Under the applicable law:

> [t]he statute begins to run in such instances when the injured party "possesses sufficient critical facts to put him on notice that a wrong has been committed and

> that he needs to investigate to determine whether he is entitled to redress." *Haggart v. Cho,* 703 A.2d 522, 526 (Pa. Super. 1997). The party seeking to invoke the discovery rule "bears the burden of establishing the inability to know that he or she has been injured by the act of another despite the exercise of reasonable diligence." *Cochran v. GAF Corp.,* 542 Pa. 210, 666 A.2d 245, 249 (Pa. 1995).

Baselice v. Franciscan Friars Assumption BVM Province, Inc., 879 A.2d 270, 276 (Pa. Super. Ct. 2005). The Complaint does not allege what, if anything, Plaintiffs did to investigate the cause of death, or why they would be unable to determine that cause within the limitations period in the exercise of due diligence.

Similarly, the applicable limitations were not tolled by the doctrine of fraudulent concealment, which applies only where a plaintiff alleges and proves by "clear, precise and convincing" evidence that defendants "through fraud or concealment . . . cause[d] the plaintiff to relax his vigilance or deviate from his right of inquiry . . . ." *Baselice*, 879 A.2d at 278.

Plaintiffs have pointed to allegations that Defendants concealed from the public the existence of manufacturing or quality control issues at the Fort Washington facility where Tylenol products were manufactured. But the doctrine does not apply based on concealment from the public of the conduct that allegedly caused the injury. It must be based on separate acts of fraud or concealment that prevent or frustrate the investigation *these Plaintiffs* otherwise would have conducted to determine the existence of their claim. *See, e.g., Mest v. Cabot Corp.,* 449 F.3d 502, 517 (3d Cir. 2006) (no fraudulent concealment where there were no statements directly from defendant to the plaintiff asserting that doctrine); *Ciccarelli v. Carey Canadian Mines, Ltd.,* 757 F.2d 548, 557 (3d Cir. 1985) (offer of proof insufficient to establish basis for fraudulent concealment tolling because the fact that defendant withheld information from the public about the hazards of asbestos did not invoke the doctrine); *Zafarana v. Pfizer Inc.,* 724 F. Supp. 2d 545, 554 (E.D. Pa. 2010) (fraudulent concealment "requires that a plaintiff show a

separate fraudulent act committed by the defendant to conceal the harm apart from the fraud that forms the basis for the plaintiff's complaint," and does not apply where "Plaintiffs do not appoint to any separate act of fraud done by Defendants to conceal the injury, and cannot rely on fraudulent concealment to toll the state of limitations"); *Speicher v. Dalkon Shield Claimants Trust*, 943 F. Supp. 554, 559 & n.4 (E.D. Pa. 1996) (fraudulent concealment requires act of concealment directed at specific plaintiff rather than general public); *Baselice,* 879 A.2d at 279 (alleged pattern of conduct by defendant to conceal abuse of children did not toll limitations on plaintiff's claims because plaintiff knew he had been injured and the defendant did nothing to mislead him as to the existence of the abuse or the identity or whereabouts of the alleged abuser). Again, the Complaint does not allege that Plaintiffs did anything to investigate their claims nor does it allege that any of the Defendants did or said anything to frustrate or prevent ***their*** inquiry into a potential claim. The sufficiency of the facts alleged to establish fraudulent concealment is an issue of law for the Court. *Nesbitt v. Erie Coach Co.,* 204 A.2d 473, 476 (Pa. 1964). This Complaint contains no allegations that could invoke the doctrine.

For these reasons, Plaintiffs' personal injury claims, sounding in strict liability, recklessness, negligence, negligent infliction of emotional distress, breach of implied warranty, civil conspiracy, and punitive damages, should be dismissed as to all Defendants, because they are barred by limitations as a matter of law based on the allegations in the Complaint itself.

II. Plaintiffs' Claims for Violation of Consumer Protection Law, Civil Conspiracy, Breach of Express Warranty and Punitive Damages are Not Legally Cognizable Claims Under Applicable Law with Respect to Any Moving Defendant

A. Deceptive Trade Practices

Nevada's "consumer protection law" is codified in the Nevada Deceptive Trade Practices Act ("NDTPA"). *See* N.R.S. §§ 598.0903 *et seq.* "A claim under the NDTPA 'sounds in fraud and thus still must meet the particularity requirement of Rule 9(b).'" *Chattem v. BAC Home*

Loan Servicing LP, No. 11-1727, 2012 WL 2048199, at *2 (D. Nev. June 5, 2012) (quoting *Weinstein v. Mortg. Capital Assocs., Inc.,* No. 10-01551, 10-1562, 2011 WL 90085, at *11 (D. Nev. Jan. 11, 2011)); *see Simon v. Bank of Am., N.A.,* No. 10-00300, 2010 WL 2609436, *8 (D. Nev. June 23, 2010) (same). The allegations here are entirely conclusory, indeed, precisely the type of unadorned "the-defendant-unlawfully-harmed-me accusation[s]" condemned as inadequate by *Iqbal.* 556 U.S. at 678. Plaintiffs fail to assert any Defendant-specific "facts related to the alleged misrepresentation or which specific provision of the NDTPA Defendant[s] [allegedly] violated." *Chattem*, 2012 WL 2048199 at *3. Count XVI therefore states no plausible claim for relief.

A claim under Pennsylvania's Unfair Trade Practices and Consumer Protection Law (UTPCPL) would fare no better. Pennsylvania's UTPCPL does not allow recovery for personal injuries. 73 Pa. Stat. Ann. § 201.9.2-(a) (providing a cause of action related the "ascertainable loss of money or property"); *see, e.g., Crumm v. K. Murphy & Co.*, No. 05-02780, 2009 WL 6057715 (Pa. Com. Pl. Sept. 16, 2009). In any event, Plaintiffs also do not allege any nexus to Pennsylvania; they do not allege that they are Pennsylvania residents, the transaction involved property located in the Commonwealth, or that the transaction occurred here. *See, e.g., Baker v. Family Credit Counseling Corp.*, 440 F. Supp. 2d 392, 413-14 (E.D. Pa. 2006 (Dubois, J.) (dismissing UTPCPL claims of class action named plaintiffs who were not Pennsylvania residents): *Mikola v. Penn Lyon Homes, Inc.,* No. 07-0612, 2008 WL 2357688, at *3 (M.D. Pa. June 4, 2008) (permitting UTPCPL claims by non-Pennsylvania residents because they "alleged that they contracted with the defendants, who were undoubtedly doing business in Pennsylvania, for the purchase of a home to be built in Pennsylvania"); *Lewis v. Bayer AG*, 66 Pa. D. & C. 4th 470, at *78-79 (Phila. Cnty. Ct. C.P. 2004) (law of the state of sale, rather than UTPCPL, would

apply to consumer protection claims of class action member who were not Pennsylvania residents).

B. Civil Conspiracy and Punitive Damages

Counts XVII and XIX purport to state claims for civil conspiracy and punitive damages. *See* Compl. at ¶¶ 317-340. Under Pennsylvania law where "no predicate cause of action exists . . . claims for civil conspiracy fail as a matter of law" because "absent a civil cause of action for a particular act, there can be no cause of action for civil conspiracy to commit that act." *See Phillips v. Selig*, 959 A.2d 420, 437 (Pa. Super. Ct. 2008) (internal quotation marks omitted). Similarly, "'[i]f no cause of action exists, then no independent action exists for a claim of punitive damages since punitive damages [are] only an element of damages.'" *Pioneer Commercial Funding Corp. v. Am. Fin. Mortg. Corp.,* 855 A.2d 818, 833 n. 33 (Pa. 2004)(quoting *Kirkbride v. Lisbon Contractors, Inc.,* 555 A.2d 800, 802 (Pa. 1989)). Because Plaintiffs' underlying liability claims are insufficient, their derivative liability theories should also be dismissed. And these claims fare no better under Nevada law. *See Sahara Gaming Corp. v. Culinary Workers Union Local 226,* 984 P.2d 164, 165 (Nev. 1999) (civil conspiracy claim was derivative of underlying defamation claim; affirming summary judgment as to both claims); *Thompson v. Progressive Ins. Co.,* 2013 Nev. Unpub. LEXIS 85, at *6-7 n.3 (Nev. Jan. 17, 2013) (a party "cannot pursue a 'claim' for punitive damages because punitive damages are a remedy, not a cause of action") (quoting 22 Am. Jur. 2d Damages § 551 (2003)).

C. Breach of Express Warranty

Plaintiffs identify two alleged express warranties in their Complaint: (1) J&J's Credo and (2) J&J's public pronouncements about the safety of its pediatric medicines. J&J's Corporate Credo is not an "express warranty" about the safety and/or efficacy of the Infants' Tylenol purchased by Plaintiffs. It is statement of the values that guide J&J's corporate decision-

making. *See* www.jnj.com/connect/about-jnj/jnj-credo/. It does not address any specific products or contain any mention of safety and/or efficacy, and makes no representation of fact that could be construed as a warranty.

The only specific "public pronouncements" referred to in the Complaint are statements made by Mr. Weldon and Ms. Goggins in the course of Congressional testimony in May and September 2010. Tracen Sherfey died in February 2009, so these "public pronouncements" post-date his death and could not have formed the "basis of the bargain" between Plaintiffs and any of the Defendants. Plaintiffs fail to identify ***any*** express warranty by McNEIL-PPC, JJSLC or Wal-Mart.

CONCLUSION

Based on the foregoing, this Court should dismiss Plaintiffs' personal injury claims against all Defendants as time-barred. Further, the Court should dismiss Plaintiffs' claims for violation of consumer protection law, civil conspiracy, breach of express warranty, and punitive damages. The moving Defendants respectfully request all other relief to which they are entitled.

THIS, the 14th day of February, 2014.

Respectfully submitted,

/s/ David F. Abernethy
David F. Abernethy
PA Attorney No. 36666
Melissa A. Graff
PA Attorney No. 90363
Meredith N. Reinhardt
PA Attorney No. 93504
DRINKER BIDDLE & REATH LLP
One Logan Square, Suite 2000
Philadelphia, PA 19103-6996
(215) 988-2700

Attorneys for Defendants Johnson & Johnson, McNEIL-PPC, Inc., Johnson & Johnson Sales & Logistics Company, LLC, and Wal-Mart Stores, Inc.

OF COUNSEL:

Christy D. Jones
Michael B. Hewes
Butler, Snow, O'Mara, Stevens & Cannada, PLLC
1020 Highland Colony Parkway, Suite 1400
Ridgeland, MS 39157

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of February, 2014, a true and correct copy of the foregoing was sent via ECF filing to:

Joseph L. Messa, Jr., Esq.
Irene M. McLafferty, Esq.
Thomas N. Sweeney, Esq.
Messa & Associates, P.C.
123 South 22nd Street
Philadelphia, PA 19103

David Newmann, Esq.
Stephen A. Loney, Esq.
Hogan Lovells US LLP
1835 Market Street, 29th Floor
Philadelphia, PA 19103

/s/ Meredith N. Reinhardt
Meredith N. Reinhardt