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## **JURISDICTIONAL STATEMENT**

Defendant IVAX Corporation, Inc., formerly AZenith Goldline Pharmaceuticals, Inc. adopts  
Plaintiff/Appellants= jurisdictional statement.<sup>1</sup>

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<sup>1</sup>Earlier this year, Zenith Goldline Pharmaceuticals, Inc. changed its name to IVAX  
Pharmaceuticals, Inc. Defendant/Respondent will continue to refer to Zenith Goldline throughout the  
brief to avoid confusion.

## STATEMENT OF FACTS

On July 23, 1997, Plaintiff/Appellants filed their initial petition against Dr. Blake Lambourne and two hospitals alleging the April 1996 deaths of Debra Pankins and her twins were the result of a failure to monitor and treat liver damage caused by the administration of the anti-hypertension drug Aldomet (generic: Methyldopa). (L.F. 112-129). The manufacturer of the Methyldopa taken by Debra Pankins was listed as AZenith® on the pill bottles. Plaintiff/Appellants did not include "Zenith" in the original Petition.

In August 1997, Plaintiff/Appellants served interrogatories upon Defendant St. Louis University. (Supp.L.F., Vol. 1 at 5). The interrogatories inquired about Dr. Lambourne (Ms. Pankins=treating physician) who was an employee of St. Louis University during the time in question. (Supp.L.F., Vol. 1 at 1-4). On September 29, 1997, Defendant St. Louis University filed an objection to Plaintiff/Appellants=interrogatory number three, which asked for the home address of Dr. Lambourne. (Supp.L.F., Vol. 1 at 1-4). Over a year and a half elapsed before Plaintiff/Appellants filed a motion to call up the objection for hearing. (Supp.L.F., Vol. 1 at 5-6). There is no indication Plaintiff/Appellants ever asked St. Louis University to produce Dr. Lambourne for deposition prior to April 1999 (21 months after suit was filed), and at no time through written discovery did Plaintiff/Appellants ever ask about the manufacturer of Methyldopa or the identity of AZenith® as listed on the pill bottle.

On October 13, 1999, over two years after the original petition was filed, Plaintiff/Appellants moved for and received an Order granting leave to add Zenith-Goldline as an additional Defendant. (L.F. 57). On October 21, 1999, Plaintiff/Appellants filed an amended petition adding Zenith Goldline

Pharmaceuticals, Inc. (Zenith Goldline) as a defendant (L.F. 87-103). On March 31, 2000, Zenith Goldline was served.

On May 2, 2000, Plaintiff/Appellants filed a Motion for Default and Inquiry against defendant Zenith Goldline. On May 2, 2000, counsel for Zenith Goldline also spoke with Plaintiffs/Appellants counsel and indicated a limited entry of appearance was being filed on behalf of Zenith Goldline that same day. During the conversation, Plaintiffs/Appellants counsel did not voice an objection to the filing of the entry of appearance. Plaintiff/Appellants never called for hearing their Motion for Default and Inquiry.

On May 5, 2000, defendant Zenith Goldline filed an Answer to Plaintiffs/Appellants Amended Petition. (L.F. 70-78). In the Answer, Zenith Goldline stated Plaintiff's claims are barred in whole or in part by the applicable statutes of limitations. (L.F. 74).

On May 26, 2000, Zenith Goldline filed a Motion to Dismiss and Supporting Memorandum based on the Statute of Limitations for wrongful death actions, ' 537.100 RSMo. (1998), because over three years had passed between the accrual of Plaintiffs/Appellants cause of action and the filing of the amended petition adding Zenith Goldline. The Motion to Dismiss erroneously referred to the applicable statutory provision for the Statute of Limitations but quoted the correct applicable language. Defendant/Respondent's Motion to Dismiss provided: 'The applicable statute of limitations period for wrongful death claims in Missouri is three (3) years according to MO. REV. STAT. 508.010 (1998), which states '[e]very action instituted under ' 537.080 shall be commenced within three years after the cause of action shall accrue. (L.F. 80). Defendant/Respondent's supporting memorandum also clearly set forth that Defendant/Appellant was relying upon Section 537.100 as the basis for dismissal.

On August 8, 2000, the Hon. Robert H. Dierker, Jr. entered an order granting Defendant/Appellant Zenith Goldline's Motion to Dismiss. (L.F. 33-35). Plaintiffs/Appellants' appeal followed. On August 14, 2001, the Missouri Court of Appeals, Eastern District, issued its opinion transferring the matter to the Missouri Supreme Court due to the general interest and importance of the issues.

## POINTS RELIED ON

- I. THE TRIAL COURT DID NOT ERR IN DISMISSING PLAINTIFFS=/APPELLANTS= ACTION AGAINST DEFENDANT/RESPONDENT ZENITH GOLDLINE BECAUSE PLAINTIFFS=/APPELLANTS= ACTION WAS BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS IN THAT THE LANGUAGE OF SECTION 537.100 CLEARLY PROVIDES THE STATUTE IS ONLY TOLLED IF SERVICE CANNOT BE HAD ON A NON-RESIDENT DEFENDANT THAT WOULD SUBJECT THE DEFENDANT TO THE JURISDICTION OF MISSOURI COURTS; PLAINTIFFS/APPELLANTS COULD HAVE SERVED DEFENDANT/RESPONDENT ZENITH GOLDLINE PURSUANT TO MISSOURI-S LONG-ARM STATUTE, AND THERE WERE NO ALLEGATIONS ZENITH GOLDLINE ABSENTED ITSELF FROM THE STATE ASO THAT@IT WOULD INTENTIONALLY AVOID SERVICE BY BEING ABSENT FROM THE STATE
- II. THE TRIAL COURT DID NOT ERR IN DISMISSING PLAINTIFFS=/APPELLANTS= ACTION AGAINST DEFENDANT/RESPONDENT BECAUSE THE WRONGFUL DEATH STATUTE OF LIMITATIONS BARRED PLAINTIFFS=/APPELLANTS= ACTION AND DEFENDANT/RESPONDENT DID NOT WAIVE THE PROTECTION OF THE STATUTE OF LIMITATIONS
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IV. THE TRIAL COURT DID NOT ERR IN DISMISSING PLAINTIFFS=/APPELLANTS=  
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IN THAT STATUTES ARE PRESUMPTIVELY SEVERABLE AND THE REMAINING  
PORTIONS WOULD BE COMPLETE, CONSTITUTIONAL, LEGISLATIVE  
ENACTMENTS WHERE NO WORDS WERE NEEDED TO BE ADDED

## ARGUMENT

**I. THE TRIAL COURT DID NOT ERR IN DISMISSING PLAINTIFFS=/APPELLANTS= ACTION AGAINST DEFENDANT/RESPONDENT ZENITH GOLDLINE BECAUSE PLAINTIFFS=/APPELLANTS= ACTION WAS BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS IN THAT THE LANGUAGE OF SECTION 537.100 CLEARLY PROVIDES THE STATUTE IS ONLY TOLLED IF SERVICE CANNOT BE HAD ON A NON-RESIDENT DEFENDANT THAT WOULD SUBJECT THE DEFENDANT TO THE JURISDICTION OF MISSOURI COURTS; PLAINTIFFS/APPELLANTS COULD HAVE SERVED DEFENDANT/RESPONDENT ZENITH GOLDLINE PURSUANT TO MISSOURI=S LONG-ARM STATUTE, AND THERE WERE NO ALLEGATIONS ZENITH GOLDLINE ABSENTED ITSELF FROM THE STATE ASO THAT@ IT WOULD INTENTIONALLY AVOID SERVICE BY BEING ABSENT FROM THE STATE.**

The trial court granted Zenith Goldline=s motion to dismiss based on the applicable statute of limitations for wrongful death actions. When reviewing a trial court=s granting of a motion to dismiss, the appellate court gives the pleadings their broadest intendment, treats all alleged facts as true and construes the allegations favorably to the plaintiff. Arbuthnot v. DePaul Health Systems, 891 S.W.2d 564, 565 (Mo.App.E.D. 1995). However, summary disposition is particularly appropriate in statute of limitations cases because the underlying facts are relatively easy to develop. Id.

In this case, Plaintiffs/Appellants first sought to add Zenith Goldline as a defendant by the filing of a second amended petition on October 21, 1999, over three and a half years after the April 1996 deaths of Debra Pankins and her unborn children. Plaintiff/Appellants, therefore, did not file their action against Zenith Goldline Pharmaceuticals, Inc. within the three year period prescribed by the wrongful death statute and as a consequence, their actions against Zenith Goldline are barred.

Plaintiff has filed a Wrongful Death action as provided for by Missouri statute, Section 537.080. Any wrongful death action pursuant to ' 537.080 RSMo. (1998) is governed by a specific statute of limitations as set forth in ' 537.100 RSMo. (1998) where the legislature determined a wrongful death action shall only be commenced within three years after the cause of action accrues.

Here, Plaintiffs=/Appellants= petition alleges Debra Pankins and her unborn children died in April 1996, and the second amended petition was filed in October 1999, over three and a half years after the action accrued. On its face, Plaintiffs=/Appellants= action against Zenith Goldline is barred by the applicable three year statute of limitations.

1. The Tolling Provision of Section 537.100 Does Not Apply Because Zenith Goldline Could Have Been Served Under Missouri's Long-Arm Statute, Which Equates to Service AIn the State.@

Plaintiffs/Appellants attempt to excuse their delay in filing against this Defendant/Respondent by relying on a tolling provision that does not apply. The statute of limitations for a wrongful death action, ' 537.100, provides the statue may be tolled when Aany defendant . . . at the time any such cause of action accrues, shall then or thereafter be absent or depart from the state, **so that** personal service cannot be had upon such defendant in the state . . .@ (emphasis added).

Plaintiffs/Appellants interpret the above provision to mean the statute of limitations for wrongful death actions are forever tolled if an out-of-state corporation does not have an agent in the state and, therefore, cannot be physically served in the state. Such an interpretation conflicts with principles behind service of process and the jurisdiction of our courts. In its order/judgment, the trial court correctly noted service can be had in this state when the process issued out of a court of this state can bring a defendant personally before the court. (L.F. at 34). At the time Plaintiffs/Appellants' claim arose, Zenith could have been brought personally before the court in one of two ways, by service under the foreign corporation statute, ' 351.594 or under the long arm statute, ' 506.510, which provides: AService of process upon any person who is subject to the jurisdiction of the courts of this state, as provided in ' 506.500, may be made by personally serving the process . . . upon a corporation by serving the process upon a managing officer or any person or corporation who shall be designated as a registered agent by such corporation in any of the several states, and **shall have the same force and effect** as though the process had been served **within this state**. (Emphasis added).

The above provision makes it clear that service of a corporate registered agent in another state would have the same force and effect as though the process had been served within this state. For all practical purposes, out-of-state service on a corporation that subjects it to our courts' jurisdiction equates to service in the state. In its underlying opinion, the Missouri Court of Appeals, Eastern District, agreed: AService under ' 506.510 satisfies the requirement of ' 537.100, under which a cause of action is not tolled if personal service can be had upon a defendant in this state. Dupree v. Zenith Goldline Pharmaceuticals, No. ED78469, slip op. at 6 (Mo.App.E.D. Aug. 14, 2001). Since Zenith Goldline

was amenable to personal service under the laws of Missouri and subject to Missouri jurisdiction under the long-arm statute, the tolling provision in ' 537.100 did not apply. *See* ' 506.500 RSMo. (1998).

Haver v. Bassett, supports the position the tolling provision in ' 537.100 is not tolled if the out of state defendant could have been served pursuant to Missouri law. Haver v. Bassett, 287 S.W.2d 342 (Mo.App.1956). In Haver, the appellate court affirmed the dismissal of plaintiff's wrongful death action against a nonresident motorist based upon the wrongful death statute of limitations, ' 537.100. Id. at 345. There, plaintiffs/Appellants relied upon the similar language as the current Plaintiffs/Appellants by arguing the nonresident defendant was absent from the state and could not be personally served in the state. The Court considered the purpose behind the tolling provision contained in ' 537.100: The plaintiff should not lose his right of action by the bar of the statute of limitations, if, during any substantial period of the time during which the statute otherwise would be running, the defendant had departed from, or resided out of the state, so that ordinary legal process, such as would afford a foundation for a personal judgment against the defendant, could not be served upon him. Id. at 345.

The Court rejected the plaintiff's interpretation of ' 537.100 because the defendant was amenable to service under the nonresident motorist statute, and such service sufficiently confers jurisdiction on a court to enter judgment in personam against a defendant so served.<sup>2</sup> Id. at 346.

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<sup>2</sup>Plaintiffs/Appellants attempt to distinguish Haver by claiming the court's ruling was only based on whether or not service on the secretary of state would be considered personal service. The court in Haver adopted the principle that where legal process could be had on an individual, such as would afford a foundation for a personal judgment against the defendant, the reason for suspending the statute

Similar to the nonresident motorist statute, the long-arm statute would have sufficiently conferred jurisdiction on a court to enter judgment in personam against a defendant so served. Haver, 287 S.W.2d at 346. The tolling provision of ' 537.100 does not apply, and the trial court's judgment should be affirmed.

Plaintiffs/Appellants rely on Poling v. Moitra, 717 S.W.2d 520 (Mo.banc 1986) as support for their argument the tolling provision applies even where long-arm service is available. (Appellant's Supplemental Brief at 20). In Poling, the Missouri Supreme Court held a medical malpractice statute of limitations was tolled under ' 516.200 against a defendant doctor who moved out of state, regardless of whether he could have been served under the long arm statute. Section 516.200 provides: Aif at any time when any cause of action herein specified accrues against any person **who is a resident of this state** and he is absent therefrom, such action may be commenced within the times herein respectively limited after the return of such person into the state; and if, after such cause of action shall have accrued, **such person depart from and reside out of this state, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action.** (Emphasis added).

In Poling, defendant argued ' 516.200 should not be applied literally so as to toll the statute of limitations while the resident doctor was absent from the state. Id. at 521. Relying on Williams v. Malone, the defendant argued the defendant could have been subject to service under the long-arm limitations does not exist. Id. at 345. Although the court of appeals also acknowledged inconsistent opinions in other states, it also found the courts have, in a majority of cases, decided in favor of allowing the statute of limitations to run in favor of the nonresident. Id. at 345.

statute, and applying the tolling provisions of 516.200 would not further the purposes of the long-arm statute. Id.

The Court refused to adopt the reasoning expressed in Williams and instead focused on the literal language of ' 516.200 providing that the statute is tolled if the resident would Adepart from and reside out of this state.@ Id. The Court found Athe tolling provisions of 516.200 are clear, unequivocal, and free of ambiguity. The statute admits of no exception and the Court should not engraft one by judicial legislation. If the legislature intended to make the statute impotent in cases where an **absent** defendant can be sued via the long-arm statute, it could have expressly done so.@ Id. at 522.

As the Missouri Court of Appeals in the case at hand correctly noted, Poling is not applicable. First, Poling addressed a different statute of limitation with a different tolling provision. Additionally, ' 516.200, by its terms, has an applicability only to state residents, and our courts have so held. In Ahern v. Lafayette Pharmacal, Inc., a plaintiff argued ' 516.200 should apply to toll the statute of limitations against two out of state pharmaceutical manufacturers. The court of appeals clearly responded: Athe record does not indicate that these Defendants were, in fact, ever residents of Missouri. Section 516.200 is therefore not applicable to the present action.@ Ahern v. Lafayette Pharmacal, Inc., 729 S.W.2d 501, 504 (Mo.App. E.D. 1987).

A residence of a corporation shall be deemed for all purposes to be in the county where the registered office is located. State ex rel. Smith v. Gray, 979 S.W.2d 190, 192 (Mo.banc 1998). As Plaintiffs/Appellants admit in their brief, Zenith Goldline does not maintain a registered agent in the state for service of process, therefore, it is not a state resident. Thus, the Poling analysis of ' 516.200 is inapplicable.

Poling is further distinguishable because the Court's concerns with respect to serving individuals out of state are not present here. Compared to individuals, corporations are simple to locate and serve.

2. The Tolling Provision of Section 537.100 Does Not Apply Because Plaintiffs' Petition Lacks Any Allegations Zenith Goldline Absented Itself from the State As That It Would Intentionally Avoid Service By Being Absent From the State.

In their Supplemental Brief, Plaintiffs/Appellants claim that by giving effect to Missouri's long-arm statute in reference to ' 537.100, the Wrongful Death Statute of Limitations would never be tolled under any circumstances. (Plaintiffs'/Appellants' Supplemental Brief at 17). That is not the case. Section 537.100 would be tolled if an individual defendant somehow intentionally avoided service by being absent from or departing from the state. But that is not the situation here, and thus, tolling does not apply.

As the trial court correctly noted in its order/judgment, As that in the phrase Be absent or depart from the state so that personal service cannot be had denotes cause and effect. (L.F. at 34). The tolling provision is meant to aid those plaintiffs who must chase or locate defendants who intentionally avoid process into another state or locate defendants who have intentionally avoided process by their absence. However, unlike a potentially-mobile individual defendant, Zenith Goldline's identity and location did not change since the action accrued; as a corporation, it was simple to locate and serve. Plaintiffs' petition lacks any allegations Zenith Goldline absented itself from the state As that it would intentionally avoid service by being absent from the state. If the provision was intended to toll the statute of limitations indefinitely for a foreign corporation, the legislature would have stated so in the

statute. The difficulties associated with serving individuals out of state, which justify tolling under limited circumstances, simply do not arise with a foreign corporation easily located and served under Missouri law. That explains the absence of case law holding the statute of limitations is tolled indefinitely with respect to foreign corporations, and judgment should be affirmed in favor of defendant/respondent Zenith Goldline.

Plaintiffs/Appellants argue that locating and serving Zenith Goldline was somewhat difficult because the company was not listed in the Physicians Desk Reference, and there were difficulties in ultimately deposing the treating physician to determine the manufacture. However, any delay in deposing the treating physician was due in large part to Plaintiffs/Appellants' own inaction. In September 1997, over one and a half years prior to the statute running, Plaintiffs/Appellants served an interrogatory on St. Louis University requesting the home address of Dr. Lambourne. In November 1997, St. Louis University objected (Supp.L.F., Vol. 1 at 1-4) and it was not until May 1999, over eighteen months later and a month after the statute of limitations had run that Plaintiffs/Appellants filed a motion to compel directed towards this interrogatory. (Supp.L.F., Vol. 1 at 5-6). There is also no evidence in the record Plaintiffs/Appellants ever requested St. Louis University to make Dr. Lambourne, its employee and the individual who prescribed the drug in question, available for deposition prior to the running of the statute.

Plaintiffs/Appellants also fail to mention decedent Debra Pankins' prescription bottle for Methyldopa listed Zenith as the manufacturer, and they could have cross-referenced the company's name by simply doing an internet search or consulting with a physician. Even if the manufacturer's name was not listed on the bottle, Plaintiffs/Appellants could have obtained this information by forwarding an

interrogatory to the hospital relative to the identity of the prescription. Moreover, a simple internet search could have revealed Zenith Goldline's website, <http://www.zenithgoldline.com>, which listed the company's address and contact information.<sup>3</sup>

Thus, Plaintiffs/Appellants did not have to chase Defendant. Zenith Goldline could be easily served under Missouri law using the long arm statute provided by the legislature in ' 506.500. At no time did Defendant/Respondent abscond or conceal itself so as to prevent the commencement of this action.<sup>4</sup>

Plaintiffs/Appellants' interpretation of ' 537.100 would result in a permanent tolling provision for an out of state defendant which has no registered agent in the state of Missouri. This would be an absurd result. In construing a statute, a reviewing court is not to assume the legislature intended an absurd result. Budding v. SSM Healthcare System, 19 S.W.2d 678, 681 (Mo.banc 2000).

For example, J.P. Morgan Chase & Co. Incorporated is a major company providing a wide range of financial services. It has assets of approximately \$660 billion and stockholders' equity of more than \$30 billion and is listed in the Dow Jones Global Titan index as one of the world's largest

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<sup>3</sup>After the company's name changed to Ivax Pharmaceuticals, Inc., the website changed to [www.ivaxpharmaceuticals.com](http://www.ivaxpharmaceuticals.com)

<sup>4</sup>Plaintiffs/Appellants also cite Rademeyer v. Farris, 145 F.Supp.2d 1096 (E.D.Mo. 2001), arguing the long arm statute should not satisfy the requirements of ' 537.100. In Rademeyer, Judge Limbaugh essentially deferred to this Court in Poling as his basis for concluding the long arm statute would not apply to ' 516.200. As outlined above, Poling is distinguishable from the instant case.

companies. The identity of the company and its headquarters are readily ascertainable. Yet, this Court would discover J.P. Morgan does not have an agent for service of process in the State of Missouri.

Under Plaintiffs=/Appellants= interpretation of ' 537.100, the statute of limitations would forever be tolled with respect to wrongful death actions brought against J.P. Morgan Chase. The Missouri legislature could not have intended such results. Given the static nature of a company-s location as opposed to the often mobile status of an individual, the legislature could not have intended ' 537.100 to apply to nonresident corporations who do not possess a registered agent in the state. Rather, the provisions of ' 537.100 are designed to aid those plaintiffs who must chase individual defendants out of the state and encounter difficulties in service of process. The wrongful death statute of limitations has expired, and this Court should affirm the judgment entered by the trial court in favor of Zenith Goldline.

**II. THE TRIAL COURT DID NOT ERR IN DISMISSING  
PLAINTIFFS=/APPELLANTS= ACTION AGAINST  
DEFENDANT/RESPONDENT BECAUSE THE WRONGFUL DEATH  
STATUTE OF LIMITATIONS BARRED PLAINTIFFS=/APPELLANTS=  
ACTION AND DEFENDANT/RESPONDENT DID NOT WAIVE THE  
PROTECTION OF THE STATUTE OF LIMITATIONS.**

Plaintiffs/Appellants argue defendant Zenith Goldline has waived the protection of the statute of limitations by: 1) failing to timely raise the issue, and 2) failing to properly identify ' 537.100 RSMo. in its Answer or Motion to Dismiss. Plaintiffs=/Appellants= arguments are misplaced.

While it is accurate Defendant/Respondent filed an entry of appearance (preserving all defenses) thirty-two days after being served with the Amended Petition and an Answer three days later, the timing

of Defendant-s/Respondent-s filings does not have a bearing on the preservation of the affirmative defense of Statutes of Limitation. Plaintiffs/Appellants filed a Motion for Default, but by never calling up their motion for hearing or failing to file a motion to strike Defendant/Respondents= affirmative defenses,

Plaintiffs/Appellants waived any objection to the timeliness of Defendant=s/Respondent=s filing.

Additionally, Plaintiffs/Appellants have not preserved this argument for review.<sup>5</sup>

Plaintiffs/Appellants argue the Statute of Limitations defense must be filed within thirty days or it is automatically waived. (Appellants= Supplemental Brief at 25-6). Yet, Defendant/Respondent is not aware of any caselaw, statute, or rule requiring the Statute of Limitations defense to be filed within thirty days or waiver will automatically result. To the contrary, a trial court has discretion to allow a party to file a responsive pleading after the expiration of a time limit. *See* Jordan v. Kansas City, 929 S.W.2d 882, 885 (Mo.App. W.D. 1996)(trial court did not abuse its discretion in granting motion to dismiss filed out-of-time based on the defense of *res judicata*).

In their Supplemental Brief, Plaintiffs/Appellants cite Adams v. Inman and Storage Masters v. City of Chesterfield, but neither court in those cases held the affirmative defense of statute of limitations will be waived if not presented within thirty days. Instead, both the Western District and the Eastern District held that the statute of limitations defense must be included in an answer as an affirmative defense or the defense will be waived. Adams v. Inman, 892 S.W.2d 651, 652 (Mo.App. W.D. 1994); Storage Masters v. City of Chesterfield, 27 S.W.3d, 862, 864 (Mo.App. E.D. 2000). Defendant/Respondent Zenith Goldline has preserved its affirmative defense of Statute of Limitations by including the defense in its answer.

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<sup>5</sup>On appeal, Plaintiffs/Appellants argue for the first time Defendants/Respondents waived the defense of Statute of Limitations. Issues raised for the first time on appeal are not preserved for review. Seitz v. Lemay Bank and Trust Co., 959 S.W.2d 458, 462 (Mo.banc 1998).

Plaintiffs/Appellants also cite 55.27 MRCP and ' 509.090 for their proposition of mandatory waiver of Statutes of Limitations if not filed within thirty days. Yet, neither the cited rule nor the statutory provision require the defense of statute of limitations to be filed within 30 days or the defense will be automatically waived. Zenith Goldline did not waive the defense of Statute of Limitations by its Entry of Appearance a mere 32 days after service of the petition.

Plaintiffs/Appellants also argue Defendant/Respondent waived its affirmative defense by failing to properly identify the statutory provision relied upon in its answer and/or motion to dismiss. The requirement of pleading the particular provision invoked on for the defense follows from the burden of the defendant to prove a special affirmative defense. Rebel v. Big Tarkio Drainage Dist., 602 S.W.2d 787, 790 (Mo.App. W.D. 1980). A judgment of dismissal not responsive to an issue in the pleading is gratuitous. Id.

In its motion to dismiss, Defendant/Respondent stated: "The applicable statute of limitations period for wrongful death claims in Missouri is three (3) years according to MO. REV. STAT. 508.010 (1998), which states "[e]very action instituted under

' 537.080 shall be commenced within three years after the cause of action shall accrue." L.F. at 78-80. From Defendant's/Respondent's quotation of the language contained in

' 537.100 RSMo., it would have been obvious to the trial court the citation of "508.010" was a scrivener error. Moreover, Defendant/Respondent identified ' 537.100 RSMo. in its Memorandum in Support. It is clear from the record the trial court understood Defendant's/Respondent's argument with respect to ' 537.100, and the court's order/judgment was in direct response to the pleadings filed.

Defendant/Respondent did not waive the issue of statute of limitations, and this Court should affirm the order/judgment of the trial court.

**III. THE TRIAL COURT DID NOT ERR IN DISMISSING PLAINTIFFS=/APPELLANTS= ACTION AGAINST DEFENDANT BECAUSE PLAINTIFFS=/APPELLANTS= SUGGESTED INTERPRETATION WOULD VIOLATE THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.**

In Bottineau Elevator v. Woodward-Clyde Consultants, 963 F.2d 1064 (8<sup>th</sup> Cir. 1992), Judge McMillian held a North Dakota tolling statute placed a significant burden on interstate commerce because it forces a non-resident defendant to choose between being physically present in the state for the limitations period or forfeiting the statute of limitations defense. @ Id. at 1074. The Eighth Circuit found the state's interest in assisting its residents in litigating against non-resident Defendants/Respondents, when long-arm service is available, cannot justify the imposition of a greater burden on non-residents than residents. @ Id.

The Court reasoned, we think the state's legitimate interest could adequately be protected by a narrower statute that would toll the running of the statute of limitations when long-arm service or substituted service or constructive service is not available. @ Id.

This Eighth Circuit opinion reinforces those arguments made by Zenith Goldline, that the tolling provision of the Missouri wrongful death statute of limitations does not apply under these circumstances. The reason for tolling the statute, which is to prevent the statute from running when plaintiff cannot obtain valid service upon an absent defendant so as to confer jurisdiction on the Court, does not exist here. Here, Zenith Goldline could be easily served under Missouri law. This again, explains the

absence of Missouri case law holding the wrongful death statute is perpetually tolled against a foreign corporation with no registered agent in Missouri.

Bottineau also discredits Plaintiffs/Appellants' argument, namely that it is the mechanism of service in the state that is important. As Zenith Goldline has shown, Missouri case law concerning tolling provisions holds it is the legal force and validity of service that is important. This is consistent with the holding in Bottineau and the purpose behind the tolling provision, which is to prevent the statute of limitations from running where plaintiff cannot obtain a foundation for personal jurisdiction against defendant.

Plaintiffs/Appellants claim \$ 537,100 (per their interpretation) is not unconstitutional arguing the requirement of all out-of-state corporations to maintain a registered agent in the state is only a minimal burden due to the nominal expense of retaining a business to accept service in the state. Plaintiffs/Appellants' argument that maintaining a registered agent is only a minimal burden assumes the presence of a registered agent would not automatically subject an out-of-state corporation to the jurisdiction of Missouri's courts. However, the question of whether the presence of a registered agent in Missouri automatically subjects an out-of-state company to this state's jurisdiction has not been decided and would be a case of first impression for this Court.

In Knowlton v. Allied Van Lines, the Eighth Circuit held an out-of-state company who appointed an agent for service of process subjected itself to the jurisdiction of Minnesota courts for any cause of action. Knowlton v. Allied Van Lines, 900 F.2d 1197, 1199 (8<sup>th</sup> Cir. 1990). The Eighth Circuit reasoned that the whole purpose of requiring designation of an agent for service is to make a nonresident suable in the local courts. Id. The Eighth Circuit acknowledged a designation of an agent

for service can be limited to claims arising out of activities in the state and some statutes are so limited, but the Minnesota statutes contained no language indicating that service on the registered agent would be limited to claims arising out of activities within the state. Id.

As in Knowlton, neither ' 506.510 nor ' 351.594 contain language restricting service of process on a registered agent to claims arising out of activities within the state. Requiring an out-of-state corporation to consent to the jurisdiction of our courts in order to avoid a perpetual tolling provision would be an undue burden under the Commerce

Clause. As a result, this Court should not interpret ' 537.100 literally as Plaintiffs/Appellants suggest.<sup>6</sup>

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<sup>6</sup>Plaintiffs/Appellants also argue Defendants/Respondents waived the issue of the constitutionality of the tolling provisions of ' 537.100. The critical question whether a waiver of a constitutional question occurred is whether the party affected had a reasonable opportunity to raise the constitutionality of the act or statute by timely asserting the claim before a court of law. Callier v. Director of Revenue, 780 S.W.2d 639, 647 (Mo.banc 1989). In a supplemental memorandum, Defendants/Respondents raised constitutional issues in direct response to Plaintiffs/Appellants' suggested interpretation of ' 537.100 as set forth in Plaintiffs/Appellants' Memorandum of Law. As a practical matter, Defendant/Respondent raised the constitutional issue at the earliest possible time and thus, the issue has not been waived.

In their Supplemental Brief, Plaintiffs/Appellants cite State ex rel. K-Mart v. Hollinger, 1998 WL 327185 (Mo.App. W.D. 1998) for the proposition the act of appointing an agent for service of process does not grant jurisdiction over a foreign corporation.<sup>7</sup> In K-Mart, the Missouri Court of Appeals, Eastern District rejected the Knowlton analysis when examining Missouri's service statutes. Instead, the court concluded that terms such as "when by law it may be sued as such" (§ 506.510), appeared to indicate that service would be only proper if there was a separate legal basis for obtaining jurisdiction.

On transfer, this Court found it unnecessary to address the question: "We need not address the issue of whether registration of a foreign corporation and designation of an agent for service of process, without more, is always sufficient" State ex rel. K-Mart Corporation v. Hollinger, 986 S.W.2d 165, 168 (Mo.banc 1999). As a result, the effect of a registered agent is an open question for this Court. In K-Mart, this Court also noted the difference in opinion in the federal circuits as to this issue (Knowlton and Wenche Siemer v. Learjet Acquisition Corp., 966 F.2d 179 (5<sup>th</sup> Cir. 1992)) as well as a split in United States Supreme Court justices on a similar issue. Id. at 169, fn4. (This Court noted in Burham v. Superior Court, 495 U.S. 604, 110 S.Ct. 2105, 109 L.Ed.2d 631 (1990) justices were split on the rationale behind upholding jurisdiction as to a nonresident individual served with process while visiting in the state).

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<sup>7</sup>K-Mart, 1998 WL 327185 (Mo.App. W.D. 1998) was subsequently transferred to this Court and therefore, the decision is not published in the permanent law reports.

Defendant/Respondent suggests that the Eighth Circuit in Knowlton possesses the more reasoned approach with respect to the effect of having a registered agent in the State of Missouri. As this Court noted in K-Mart, we can find no Missouri case challenging jurisdiction over a foreign corporations whose registered agent was served in Missouri. @ K-Mart, 986 S.W.2d at 168. The probable reason for the absence of such Missouri cases is that companies having registered agents in this State traditionally understand the presence of a registered agent would likely subject them to the jurisdiction of our courts. Plaintiffs/Appellants' interpretation of ' 537.100 would mean out-of-state companies would be required to obtain a registered agent in the state in order to avoid a perpetual tolling, and the jurisdictional results would impose an undue burden on these companies.<sup>8</sup>

Where a foreign corporation with no registered agent in Missouri is easily located and served under Missouri law, no reason exists to toll the statute of limitations. Moreover, to toll the statute under these circumstances is unconstitutional and in violation of the Commerce Clause. This Court should affirm the trial court's dismissal of Plaintiffs/Appellants' claim based upon the expiration of the statute of limitations.

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<sup>8</sup>In Rademeyer v. Farris, Judge Limbaugh recognized the constitutional problems when a foreign corporations is forced to choose between exposure to the general jurisdiction of a state and a statute of limitations defense and an individual resident is forced to either continue residing in the state or forfeit the defense. 145 F.Supp.2d 1096, 1106 (E.D.Mo. 2001). Rademeyer is on transfer to the Eighth Circuit Court of Appeals.

**IV. THE TRIAL COURT DID NOT ERR IN DISMISSING PLAINTIFFS=/APPELLANTS= CAUSE OF ACTION AGAINST DEFENDANT BECAUSE THE ENTIRE SECTION OF THE WRONGFUL DEATH STATUTE OF LIMITATION WOULD NOT BE DECLARED VOID IF THE TOLLING PROVISION WERE FOUND TO BE UNCONSTITUTIONAL IN THAT STATUTES ARE PRESUMPTIVELY SEVERABLE AND THE REMAINING PORTIONS WOULD BE COMPLETE, CONSTITUTIONAL, LEGISLATIVE ENACTMENTS WHERE NO WORDS WERE NEEDED TO BE ADDED.**

Plaintiffs/Appellants suggest that if this Court were to find the tolling provisions of ' 537.100 are constitutionally deficient, the entire statute should be declared void. Plaintiffs/Appellants primarily focus on the presumed intent of the legislature in enacting ' 537.100. By so arguing, Plaintiffs/Appellants fail to acknowledge the statutory doctrine of severability, where there exists a presumption offending portions can be stricken and the Supreme Court can give effect to the remaining portions of the statute.

First, Defendant/Respondent contends this Court will only reach the question poised in Plaintiffs=/Appellants= fourth point if their interpretation of ' 537.100 is adopted. That being said, Defendant/Respondent will address Plaintiffs=/Appellants= fourth point.

All statutes should be upheld to the fullest extent possible. General Motors Corp. v. Director of Revenue, 981 S.W.2d 561, 568 (Mo.banc 1998). Statutes are presumptively severable. Id. Under the statutory severability standard, the legislature is presumed to have intended this Court to give effect to parts of the statute which are not invalidated.

Section 1.140 RSMo. (1998) provides, in pertinent part: Aif any provision of a statute is found . . . to be unconstitutional, the remaining provisions of the statute are valid unless the court finds the valid provisions of the statute are so essentially and inseparably connected with, and so dependant upon, the void provision that it cannot be presumed that the legislature would have enacted the valid provisions without the void one. . .@

In Simpson v. Kilcher, this Court examined a statute having three subsections. Simpson v. Kilcher, 749 S.W.2d 386, 388 (Mo.banc 1988). The two subsections immunized sellers of liquor from liability for injuries caused by their patrons, and the third subsection imposed liability against a liquor licensee convicted of selling liquor to an obviously intoxicated person or to a person under the age of 21 if the sale of intoxicants was the primary cause of the injury. Id. at 388-89. This Court held that even if subsection three of the statute was found unconstitutional, the remaining portions were complete, constitutional, legislative enactments prohibiting dram shop liability in that no words were needed to be inserted into any subsection or provision to give complete meaning to the remaining subsections. Id. at 393.

This Court noted Athe test of the right to uphold a law, some portions of which may be invalid, is whether or not in so doing, after separating that which is invalid, a law in all respects complete and susceptible of constitutional enforcement is left, which the legislature would have enacted if it had known that the excscinded portions were invalid.@ Id. Moreover, this Court noted that under the statutory standard (outlined previously), the legislature is presumed to have intended this Court to give effect to the parts of the statute which are not invalidated. Id.

As in Simpson, in the statutory provision at issue, ' 537.100 RSMo., the remaining portions are complete, constitutional, legislative enactments regulating the time for the filing of wrongful death claims where no words are needed to be inserted into any provision to give complete meaning to the remaining provision. If the tolling provisions were removed, ' 537.100 would provide:

Every action instituted under ' 537.080 shall be commenced within three years after the cause of action shall accrue . . . and provided, that if any such action shall have been commenced within the time prescribed in this section, and the plaintiff therein take or suffer a nonsuit, or after a verdict for him in the judgment be arrested, or after a judgment for him the same be reversed on appeal or error, such plaintiff may commence a new action from time to time within one year after such nonsuit suffered or such judgment arrested or reversed.@

The above language would be complete in its meaning and would need no additional language inserted to give effect to its meaning.

Plaintiffs/Appellants argue the Missouri Legislature would not have enacted a wrongful death statute of limitation without a tolling provision because the tolling provisions existed in ' 537.100 since 1909 and other statutes of limitations have contained tolling provisions. The fact all Missouri statutes of limitation contain tolling provisions does not necessarily evince the legislature's intent that these provisions be an integral and necessary part of the remaining statute. It is simply a leap in logic to opine the legislature would not have enacted this Statute of Limitations without a tolling provision to balance out the interests of the parties.@ (Plaintiffs/Appellants= Supplemental Brief at 37). In the absence of evidence to the contrary, this Court should find the legislature presumed for it to give effect to the

remaining portions of the statute, if this Court should find the tolling provisions of ' 537.100 unconstitutional.

**CONCLUSION**

For all the above reasons, this Court should affirm the order of the trial court dismissing IVAX Pharmaceuticals, Inc., formerly AZenith Goldline Pharmaceuticals, Inc.)

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**CERTIFICATE OF SERVICE**

The undersigned certifies that on the \_\_ day of September, 2001, the original plus ten copies of the foregoing were delivered to the Missouri Supreme Court and two copies were mailed to:

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## **CERTIFICATE OF COMPLIANCE**

Comes now G. Keith Phoenix, attorney of record for Zenith Goldline Pharmaceuticals, Inc., and hereby certifies as follows:

1. This brief complies with Rule 55.07 MRCP;
  2. This brief complies with the limitations in Rule 84.06(b) MRCP;
  3. This brief contains 7,270 words;
  4. That the floppy disk containing this brief is prepared in WordPerfect 7.0 format and is free of any known virus.
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