UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In re: "AGENT ORANGE" PRODUCT LIABILITY LITIGATION	MDL No. 381
THE VIETNAM ASSOCIATION FOR VICTIMS OF AGENT ORANGE/DIOXIN, et al., Plaintiffs, -against- THE DOW CHEMICAL COMPANY, et al., Defendants.	04 CV 0400 (JBW)

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT DISMISSING PERSONAL INJURY CLAIMS OF INDIVIDUAL PLAINTIFFS BASED ON STATUTES OF LIMITATIONS

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PRELIMINARY STATEMENT

The undersigned defendants ("defendants") respectfully submit this memorandum of law in support of their motion for partial summary judgment dismissing personal injury claims of individual plaintiffs on the ground that those claims are barred by the applicable statutes of limitations.

STATEMENT OF FACTS

Plaintiffs' specific allegations concerning their exposure to Agent Orange and the personal injuries that allegedly resulted from that exposure are addressed below in Points A.4.-5. and B.3. of the Argument section. Defendants also incorporate by reference herein the Statements of Facts set forth in the memoranda of law filed in support of defendants'

accompanying motions to dismiss or for summary judgment based on the government contractor defense, the nonjusticiability of plaintiffs' claims, and the failure of plaintiffs' federal and international law claims to state a claim upon which relief can be granted.

ARGUMENT

MOST OF THE INDIVIDUAL PLAINTIFFS' PERSONAL INJURY CLAIMS ARE BARRED BY THE APPLICABLE STATUTES OF LIMITATIONS

A. All Federal Claims Based on Injuries that Manifested Prior to January 30, 1994 Are Barred by the Statute of Limitations

The individual plaintiffs assert claims for personal injury caused by exposure to Agent Orange in Vietnam based on alleged violations of the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350, the Torture Victim Protection Act of 1991 ("TVPA"), 28 U.S.C. § 1350 (hist. & stat. n.), the common law of the State of New York, and "the laws of Vietnam." As described below, all federal claims for personal injuries that manifested prior to January 30, 1994 are barred by the applicable ten-year statute of limitations.

1. The Ten-Year Statute of Limitations

No action can be maintained under the TVPA "unless it is commenced within 10 years after the cause of action arose." 28 U.S.C. § 1350 (hist. & stat. n. § 2(c)). The ATCA does not contain a statute of limitations. Accordingly, this Court should apply the limitations period "from the most analogous state law unless a federal law clearly provides a closer analogy and federal interests are better served by applying the federal statute of limitations." Manlinguez v. Joseph, 226 F. Supp. 2d 377, 386 (E.D.N.Y. 2002); Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 462 (D.N.J. 1999); Wiwa v. Royal Dutch Petroleum Co., No. 96 Civ. 8386, 2002 WL 319887, at *18 (S.D.N.Y. Feb. 28, 2002). In the case of the ATCA, the courts have repeatedly held that the TVPA's ten-year statute of limitations should be applied "because ATCA claims

require careful examination of the international obligations of the United States and often entail preparation that would be stymied by requiring imposition of the time restrictions of state tort actions." Manlinguez, 226 F. Supp. 2d at 386 (citing Papa v. United States, 281 F.3d 1004, 1012 (9th Cir. 2002)); Iwanowa, 67 F. Supp. 2d at 462;[1] see also Hoang Van Tu v. Koster, 364 F.3d 1196, 1199 (10th Cir.), cert. denied sub nom., 73 U.S.L.W. 3203 (U.S. Oct. 4, 2004).

2. The "Diligence-Discovery Rule" Applicable to the Federal Statute of Limitations

Here, plaintiffs did not file their action until January 30, 2004. Thus, unless a plaintiff's claim did not "accrue" until some time after January 30, 1994 – the date ten years prior to the commencement of this action – that claim is time-barred.[2] "'Federal law governs the question of when a federal claim accrues. . . .'" Leon v. Murphy, 988 F.2d 303, 309 (2d Cir. 1993) (quoting Morse v. University of Vt., 973 F.2d 122, 125 (2d Cir. 1992)).

Generally, a claim for personal injury based on federal law accrues at the time of the plaintiff's injury. See, e.g., Barrett v. United States, 689 F.2d 324, 327 (2d Cir. 1982), cert.

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[1] Plaintiffs allege in the "Class Allegations" section of their Amended Class Action Complaint dated September 10, 2004 (hereinafter the "Complaint") that a question of law and fact common to the putative class is whether "plaintiffs state a valid claim under . . . 18 U.S.C. § 2441 for violations of international law and war crimes," although plaintiffs do not invoke 18 U.S.C. § 2441 – the War Crimes Act – as a basis for any of their separately pleaded claims for relief. Compare Complaint, ¶ 254.A with ¶¶ 262, 266, 270. As an initial matter, since the War Crimes Act is a criminal statute, it cannot serve as the basis for a civil action. See H.R. Rep. No. 104-698, at 11 (1996), reprinted in 1996 U.S.C.C.A.N. 2166, 2176 (the War Crimes Act creates a "new federal criminal offense for the commission of certain war crimes in violation of the Geneva Conventions of 1949" with the purpose of allowing "the federal government [to] prosecute members of the U.S. armed forces or U.S. nationals who have allegedly committed certain war crimes. . ."). However, even if plaintiffs had standing to assert a claim based on Section 2441, they would not be able to invoke the unlimited period available for criminal prosecutions. See Handel v. Artukovic, 601 F. Supp. 1421, 1431 (C.D. Cal. 1985) ("Criminal prosecutions of crimes against humanity should be and are subject to a statute of no limitations; but civil actions cannot be subjected to this rule under American law").

[2] The term "accrual" denotes the date when an action can be maintained, or "arises," for statute of limitations purposes, thereby starting the running of the limitations period. See, e.g., In re African-Am. Slave Descendants Litig., 304 F. Supp. 2d 1027, 1067 (N.D. Ill. 2004).

denied sub nom., 462 U.S. 1131 (1983). However, in United States v. Kubrick, 444 U.S. 111 (1979), in a suit brought under the Federal Tort Claims Act ("FTCA"),[3] the Supreme Court confirmed that in medical malpractice cases, the limitations period does not begin to run "until the plaintiff has discovered both his injury and its cause." Id. at 120. The Supreme Court also made clear that the plaintiff must exercise reasonable diligence to discover the cause of his or her injury and cannot satisfy the requirements of the rule absent "blameless ignorance." Id. at 120 n.7 (citing Urie v. Thompson, 337 U.S. 163, 169-70 (1949)); see also id. at 122-23.

The courts have, post-Kubrick, extended this so-called "diligence-discovery rule" to cover not only claims of medical malpractice, but also other situations where the plaintiff "would reasonably have had difficulty discerning the fact or cause of injury at the time it was inflicted." Kronisch v. United States, 150 F.3d 112, 121 (2d Cir. 1998); Barrett, 689 F.2d at 327. As stated in Kronisch,

> Under this rule, "accrual may be postponed until the plaintiff has or with reasonable diligence should have discovered the critical facts of both his injury and its cause." [Barrett, 689 F.2d at 327]. Discovery of the "critical facts" of injury and causation is not an exacting requirement, but requires only "knowledge of, or knowledge that could lead to, the basic facts of the injury, [i.e.], knowledge of the injury's existence and knowledge of its cause or of the person or entity that inflicted it. . . . [A] plaintiff need not know each and every relevant fact of his injury or even that the injury implicates a cognizable legal claim. Rather, a claim will accrue when the plaintiff knows, or should know, enough of the critical facts of injury and causation to protect himself by seeking legal advice."

[3] 28 U.S.C. § 2401 provides that a tort claim against the United States is barred unless it is presented in writing to the appropriate federal agency "within two years after such claim accrues." 28 U.S.C. § 2401(b).

150 F.3d at 121 (emphasis added) (quoting Guccione v. United States, 670 F. Supp. 527, 536 (S.D.N.Y. 1987), aff'd on other grounds, 847 F.2d 1031 (2d Cir. 1988), cert. denied, 493 U.S. 1020 (1990)).[4]

Furthermore, while "[a] claim does not accrue when a person has a mere hunch, hint, suspicion, or rumor of a claim . . . such suspicions do give rise to a duty to inquire into the possible existence of a claim in the exercise of due diligence." Id. (emphasis added) (citing Hobson v. Wilson, 737 F.2d 1, 35 (D.C. Cir.), cert. denied sub nom., 470 U.S. 1084 (1984)). In addition, "[w]hen a plaintiff receives information sufficient to put him on inquiry notice, the statute of limitations will begin to run if the plaintiff does not reasonably exercise due diligence in conducting the inquiry. In other words, he is held to be on notice of all facts he could have learned through reasonably diligent inquiry." Hobson, 737 F.2d at 35 n.107; see also Skwira v.

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[4] Furthermore, in the case of Agent Orange claims asserted under the ATCA and the TVPA, a compelling argument can be made that the strict date of injury accrual rule, not the diligence-discovery rule, should be applied. In Kubrick, the Supreme Court, quoting extensively from the Restatement (Second) of Torts, identified two rationales for applying a discovery rule in medical malpractice actions. First,

> in most instances the statutory period within which the action must be initiated is short – one year, or at most two, being the common time limit. This is for the purpose of protecting physicians against unjustified claims; but since many of the consequences of medical malpractice often do not become apparent for a period longer than that of the statute, the injured plaintiff is left without a remedy.

Kubrick, 444 U.S. at 121 n.7 (quoting Restatement (Second) of Torts § 899 cmt. e at 444 (1979)). That rationale has no application here, since the statute of limitations prescribed by the TVPA is very long – ten years.

Second,

> the nature of the tort itself and the character of the injury will frequently prevent knowledge of what is wrong, so that the plaintiff is forced to rely upon what he is told by the physician or surgeon.

Id. That reason also is not implicated here. None of the plaintiffs ever had any cause or need to communicate with the defendants, whether before or after their exposure to Agent Orange. Indeed, even before the end of the war in Vietnam, scientists with no connection to defendants began publishing the results of studies concerning possible health effects of Agent Orange and dioxin.

United States, 344 F.3d 64, 77 (1st Cir. 2003) ("If [plaintiff] fails to undertake a reasonably diligent investigation into the cause of injury, the law will impute to her an awareness of any knowledge that she would have uncovered if she had undertaken that inquiry"), cert. denied, 124 S. Ct. 2836 (2004); Gonzalez v. United States, 284 F.3d 281, 291 n.10 (1st Cir. 2002) ("once the plaintiff [is] on notice of the injury and its potential cause, the limitations period beg[ins] to run regardless of whether [plaintiff makes] inquiries, and continue[s] to run even if [the plaintiff is] incorrectly advised").

The fact that defendants deny any causal connection between Agent Orange and any of plaintiffs' alleged personal injuries also does not somehow relieve plaintiffs from the requirements of the diligent-discovery rule. See Thompson v. United States, 642 F. Supp. 762, 766 (N.D. Ill. 1986). As described below, as to injuries that manifested prior to January 30, 1994, if Agent Orange caused plaintiffs' injuries, the plaintiffs could reasonably have been aware of that fact by January 30, 1994. Plaintiffs' federal claims based on those injuries are therefore time-barred.

3. The 10-Year Statute of Limitations Has Not Been Tolled At Any Time Since April 30, 1975

"In a complement to accrual, tolling is a concept which suspends the running of a limitations period to an accrued action. The proverbial clock is stopped when the action is tolled." In re African-Am. Slave Descendants Litig., 304 F. Supp. 2d at 1067. Since the TVPA's ten-year limitations period applies to plaintiffs' federal claims, federal law governs tolling issues. See Garfield v. J.C. Nichols Real Estate, 57 F.3d 662, 665 (8th Cir.) (state law inapplicable on issues of tolling where a federal claim is at issue and there is a federal statute of limitations for that claim), cert. denied, 516 U.S. 944 (1995); Brown v. Hartshorne Pub. Sch.

Dist. # 1, 926 F.2d 959, 961 (10th Cir. 1991) ("When Congress has provided a federal statute of limitation for a federal claim . . . state tolling . . . provisions are not applicable").

Here, plaintiffs suggest that the statute of limitations should be tolled "because of the war and the trade embargo imposed upon Vietnam." Complaint, ¶¶ 149-55, 172B. Plaintiffs' suggestion has no basis in law.

As an initial matter, it is well-established that although a state of war effectively closes the courts of each belligerent nation to the citizens and residents of the other,[5] causing a tolling of the statute of limitations, that tolling ceases upon the termination of hostilities. Hanger, 73 U.S. (6 Wall.) at 536-37. Here, plaintiffs admit that the Vietnam war ended by no later than April 30, 1975. See Complaint, ¶ 49; The Columbia Encyclopedia (6th ed. 2001) (available at http://www.bartleby.com/65/vi/VietnamW.html); see also Lord Day & Lord v. Socialist Repub. of Vietnam, 134 F. Supp. 2d 549, 564 (S.D.N.Y. 2001) ("While the United States reached a settlement of property claims and normalized diplomatic relations with Vietnam in 1995, military conflict between the two countries had long since ended").[6]

Furthermore, the "trade embargo" referred to by plaintiffs in their Complaint also cannot serve as a basis for tolling. Presumably, plaintiffs are referring to the Department of the Treasury's designation of North Vietnam and South Vietnam, on May 5, 1964 and April 30, 1975 respectively, as foreign countries subject to the Foreign Assets Control Regulations (the

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[5] See Hanger v. Abbott, 73 U.S. (6 Wall.) 532, 536 (1868); Johnson v. Eisentrager, 339 U.S. 763, 776 (1950); see also Trading with the Enemy Act, § 7(b), 50 U.S.C. App. § 7(b) ("Nothing in this Act . . . shall be deemed to authorize the prosecution of any suit or action at law or in equity in any court within the United States by an enemy or ally of an enemy prior to the end of the war . . .").

[6] Furthermore, as to those plaintiffs who were citizens of South Vietnam, an ally of the United States, no tolling of the statute of limitations could have occurred even during the war. See, e.g., Compania Maritima v. United States, 145 F. Supp. 935, 939 (Ct. Cl. 1956) (statute of limitations applicable to Philippine citizens' claims was not tolled during Second World War because the Philippine Islands and the United States were allies).

"Regulations"), 31 C.F.R. § 500 et seq. See 31 C.F.R. § 500.201 (1997).[7] Those designations were made pursuant to the authority conferred by the Trading with the Enemy Act, 50 U.S.C. App. § 5(b). The purpose of that Act and the Regulations is "to prevent hostile nations from benefitting from trade with American citizens." Vishipco Line v. Chase Manhattan Bank, N.A., No. 77 Civ. 1251, 1978 U.S. Dist. LEXIS 14556, at *8 (S.D.N.Y. Nov. 3, 1978). However, as described below, it is well-established that a citizen of a country subject to the Regulations is free to commence and maintain a lawsuit in the courts of the United States. Thus, there are no "extraordinary circumstances" outside the plaintiffs' control that prevented them from filing within ten years of the accrual of their respective claims. See Osbourne v. United States, 164 F.2d 767, 768 (2d Cir. 1947).

As an initial matter, we point out that the Foreign Assets Control Regulations nowhere purport to bar a citizen of a "designated foreign country" (here, North or South Vietnam) from bringing a personal injury lawsuit in the courts of the United States. See 31 C.F.R. § 500.201 (identifying prohibited transactions, none of which include personal injury lawsuits). As noted in Vishipco, the purpose of the Trading with the Enemy Act is to prevent hostile nations from benefiting from trade with American citizens and, consistent with that purpose, the Regulations "[i]n general . . . prohibit transfers of assets in which 'designated nationals' have an interest." 1978 U.S. Dist. LEXIS, at *9. Indeed, plaintiffs in their Complaint make no effort to explain how the language of the Regulations could be construed to bar the bringing of their claims.

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7 The Regulations were partially lifted on or about February 7, 1994, when new trade transactions with Vietnam were allowed, and fully lifted on or about March 9, 1995, when any assets in which Vietnam had an interest were unblocked. Complaint, ¶ 154; 59 Fed. Reg. 5696, 5696; 60 Fed. Reg. 12,885, 12,886.

Furthermore, even as to "prohibited transactions," the courts have made clear that the Regulations do not bar the bringing of a lawsuit or entry of judgment, but rather forbid only those judicial acts that transfer title or require immediate payment out of blocked funds. The Regulations are not an impediment to jurisdiction because the execution of any judgment can be stayed until any temporary barrier to the transfer of funds is removed. Id. at **11-14; see also Zittman v. McGrath, 341 U.S. 446, 462-63 (1951); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 410 (1964); Sardino v. Federal Reserve Bank of N.Y., 361 F.2d 106, 110-11 (2d Cir.), cert. denied, 385 U.S. 898 (1966); Hue Thi Nguyen v. United States, 56 Fed. Cl. 550, 553 (Fed. Cl. 2003); Buong Van Ho v. United States, 52 Fed. Cl. 664, 666 (Fed. Cl. 2002).

Thus, the Department of the Treasury's designation of North Vietnam and South Vietnam as foreign countries subject to the Regulations did not toll the statute of limitations, and for the reasons set forth below, the ten-year limitations period has accordingly expired for all claims based on injuries that manifested prior to January 30, 1994 – the date ten years prior to the commencement of this action.

4. The Individual Plaintiffs' Claims

Phan Thi Phi Phi ("Phi"). Phi alleges that she is a physician who, from April 1966 through July 1971, served as Director of Hospital No. 1, a mobile hospital which moved to various locations that had been heavily sprayed with Agent Orange. Complaint, ¶¶ 118-22. Phi admits that she was in areas that had been heavily sprayed, since "the trees and the fruit and vegetable plants in those valleys were often leafless, and had ceased to bear fruit." Complaint, ¶ 123. Phi alleges that in 1971-72, immediately following Phi's service in areas exposed to Agent Orange spraying, she became pregnant three times, with each of those pregnancies ending in miscarriages – in December 1971, July 1972 and November 1972, respectively. Complaint, ¶ 125. After becoming pregnant again, Phi experienced a fourth miscarriage in July 1973.

Complaint, ¶ 126. Phi alleges that her repeated miscarriages in 1971-1973 were caused by her exposure to herbicides and dioxin "through her ingestion of food and water drawn from areas sprayed with herbicides." Complaint, ¶ 127. Unless Phi's causes of action did not accrue until after January 30, 1994, more than 20 years after her fourth miscarriage, her claims are barred by the applicable ten-year statute of limitations.

Nguyen Van Quy ("Quy") and Vu Thi Loan ("Loan"), Individually and as Parents and Natural Guardians of Nguyen Quang Trung ("Trung") and Nguyen Thi Thuy Nga ("Nga"). Quy alleges that from 1972 through 1975, as a soldier serving in the army of the Democratic Republic of Vietnam (i.e., North Vietnam), he was stationed in several different provinces of South Vietnam. Complaint, ¶¶ 128-29. Quy further alleges that during those years, he knew he was in areas that had been sprayed with Agent Orange "because the trees had no leaves, and when it rained, a very strong and foul odor emanated from the ground for a brief time." Complaint, ¶ 130. During the entire 1972-1975 time period, Quy "periodically had headaches and felt exhaustion, and his skin was often itchy and broke out in rashes." Complaint, ¶ 132.

Following the end of the war, Quy married. In 1984, his wife's pregnancy ended in a stillbirth. The birth was premature and the fetus was deformed. Complaint, ¶¶ 134-35. In about 1985, Quy "had to stop working because of worsening spells of weakness and exhaustion." Complaint, ¶ 137. In 1987, Quy remarried. In 1988, his new wife, Loan, gave birth to a son, Trung, who had spinal, limb and developmental defects. In 1989, Loan gave birth to a daughter, Nga, who also was born with serious birth defects. Complaint, ¶¶ 139-42. Quy's spells of weakness and exhaustion also continued to worsen, and in 2003 he was diagnosed with stomach cancer and liver damage. Complaint, ¶¶ 143-44.

Quy alleges that his diseases and conditions, and that his children's birth defects and conditions, were caused by his exposure to Agent Orange and dioxin "through his ingestion

of food and water drawn from areas sprayed with herbicides and his direct contact with the herbicides." Complaint, ¶ 146. Thus, unless Quy could not have discovered until after January 30, 1994 the connection between Agent Orange and his fatigue, weakness and exhaustion, which commenced in 1972,[8] and his alleged inability to father children without disabilities, which he became aware of in 1984, his claims for those conditions are time-barred.[9]

Furthermore, it is well-settled that a federal statute of limitations "is not tolled during the period of a putative plaintiff's minority." McCall ex rel. Estate of Bess v. United States, 310 F.3d 984, 987 (7th Cir. 2002), cert. denied, 538 U.S. 946 (2003); Landreth v. United States, 850 F.2d 532, 534 (9th Cir. 1988), cert. denied, 488 U.S. 1042 (1989); MacMillan v. United States, 46 F.3d 377, 381 (5th Cir. 1985); Leonhard v. United States, 633 F.2d 599, 624 (2d Cir. 1980), cert. denied, 451 U.S. 908 (1981). Rather, for purposes of determining when the statute of limitations accrues as to the claim of a minor, any knowledge of the parent or guardian concerning the minor's injuries or their cause is imputed to the minor. See, e.g., Landreth, 850

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[8] It is well-established that the statute of limitations begins to run upon the discovery of the injury and its cause, "even if the full extent of the injury is not discovered until much later." Goodhand v. United States, 40 F.3d 209, 212 (7th Cir. 1994). Thus, "the fact that an injury 'has not reached its maximum severity . . . but continues to progress' does not relieve the plaintiff of the duty to use reasonable diligence to discover the original injury and its cause." Aparicio v. Norfolk & W. Ry. Co., 84 F.3d 803, 815 (6th Cir. 1996) (quoting Fries v. Chicago & N.W. Transp. Co., 909 F.2d 1092, 1096 (7th Cir. 1990)). Here, Quy admits that by 1985, he "had to stop working because of his worsening spells of weakness and exhaustion." Complaint, ¶ 137. Thus, the fact that those spells may have worsened further after 1985 does not alter the fact that Quy had discovered his "weakness and exhaustion" injury by no later than 1985. See Mix v. Delaware & Hudson Ry. Co., 345 F.3d 82, 90-91 (2d Cir. 2003), cert. denied, 124 S. Ct. 1423 (2004).

[9] Defendants' failure to seek summary judgment dismissing Quy's claims for stomach cancer and "liver damage" should not be construed as an admission that those conditions constitute "distinct injuries" for purposes of the running of the statute of limitations. See Mix, 345 F.3d at 90. Rather, defendants reserve the right to seek summary judgment dismissing Quy's claims for cancer and liver damage (and any other conditions that are not the subject of this motion) as time-barred after they have had the opportunity to take discovery concerning Quy's medical history. Defendants' reservation of rights is equally applicable to all injuries alleged by any of the other plaintiffs as to which summary judgment is not sought at this time based on the applicable statute of limitations.

F.2d at 534. The parent or guardian is required to exercise reasonable diligence in inquiring as to the cause of the minor's injury when the parent or guardian has sufficient facts to put him or her on notice of inquiry. See, e.g., Mendez v. United States, 732 F. Supp. 414, 424-28 (S.D.N.Y. 1990). Thus, Quy's claims on behalf of his children, Trung and Nga, also are barred unless Quy could not have discovered until after January 30, 1994 the alleged connection between Agent Orange and the birth defects suffered by his children.

Duong Quynh Hoa ("Hoa"), Individually and as Administratrix of the Estate of Her Deceased Child, Huynh Trung Son ("Son"). Hoa, a physician, alleges that in 1964-68, she traveled to cities that were heavily contaminated with Agent Orange and that from 1968-76, while serving in Tay Ninh province as the Minister of Health of the Provisional Government of the Republic of Vietnam, she was present when U.S. aircraft sprayed Agent Orange. Complaint, ¶¶ 147-50. In May 1970, during the period that she was being exposed to Agent Orange, Hoa gave birth to Son, who was born with developmental disabilities and died from a convulsion in 1970 at age eight months. Sometime after the war ended, Hoa began to experience itchiness and rashes on her skin. She then suffered miscarriages in 1971 and 1972. Complaint, ¶¶ 151-55. In 1985, Hoa suffered bouts of weakness and fainting spells and was diagnosed with diabetes, and in 1998, she was diagnosed with breast cancer. Complaint, ¶¶ 157-58. Unless Hoa's causes of action did not arise until after January 30, 1994, 24 years after the death of her son, 22 years after her second miscarriage and 9 years after her bouts of weakness and fainting spells, her claims for those conditions, and those made on behalf of her deceased child, are time-barred.

Ho Kan Hai ("Hai"), Individually and as Parent and Natural Guardian of Her Child, Nguyen Van Hoang ("Hoang"). Since 1972, Hai has worked as a farmer residing in southern Vietnam, in close proximity to the location of a U.S. military air base where Agent Orange was stored, transferred and sprayed. Complaint, ¶ 161. Hai has had four miscarriages,

two of her children have died, at the ages of 16 days and two years respectively, and she has had surgery to remove ovarian tumors. Complaint, ¶ 163. Since Hai has failed to allege when any of the miscarriages, deaths or surgery occurred, the Court should presume that these events all occurred well prior to 1994, a date 22 years after Hai began working as a farmer near the U.S. military air base. In addition, one of Hai's living children, Hoang, was born in 1992, with severe physical and mental disabilities. Complaint, ¶ 164. Hai's claims are barred unless she could not have discovered her injuries and Hoang's injuries, and their alleged connection to Agent Orange, until after January 30, 1994.

Ho Thi Le ("Le"), Individually and as Administratrix of the Estate of Her Deceased Husband, Ho Xuan Bat ("Bat"). Le was married to Bat. During the war, while active with the NLF, Bat observed the spraying of Agent Orange on several occasions. In 1980, Le gave birth to her first child, who died in 1982. Complaint, ¶¶ 168-69. In or about 1981, Le had a miscarriage, and in 1982, she gave birth to another child, who died at 16 days of age. Complaint, ¶¶ 168-69. At some unspecified date, Bat's health began to deteriorate. In June 2003, Bat was diagnosed with lung cancer, and he died in May 2004. Le's claims for her miscarriage and the deaths of her two children are time-barred unless she could not have discovered the alleged connection between Agent Orange and those events prior to January 30, 1994 – a date more than ten years after those events occurred.

Dang Thi Hong Nhut ("Nhut"). Nhut alleges that in 1965 she traveled to Cu Chi, an area allegedly heavily sprayed with Agent Orange, where she "often noticed a fog or mist and a strong odor in the air, and a white substance on plant leaves," and experienced skin rashes. Complaint, ¶¶ 180-81. Nhut suffered miscarriages in 1974 and 1975. Complaint, ¶¶ 183-84. In 1977, a pregnancy was terminated when an ultrasound examination determined that the fetus had spina bifida and other deformities. Complaint, ¶ 185. In 1980, Nhut suffered another

miscarriage. Complaint, ¶ 186. In 2002, a tumor was discovered in Nhut's intestine, and in 2003, her thyroid was removed because it was not functioning. Nhut's claims based on her miscarriages and on the termination of her pregnancy in 1977 are time-barred, unless she could not have discovered prior to January 30, 1994 – 14 years after her final miscarriage – the alleged causal connection between those events and Agent Orange.

Nguyen Thi Thu ("Thu"), Individually and as Parent and Natural Guardian of Nguyen Son Linh ("Linh") and Nguyen Son Tra ("Tra"). Thu is the mother of Linh and Tra, who were born in January 1987 and June 1990, respectively. Complaint, ¶ 190. Both Linh and Tra were born with congenital birth defects and are paralyzed form the waist down. Complaint, ¶ 193. Thu also alleges that she had one miscarriage which, although the date is not specified in the Complaint, presumably occurred prior to Tra's birth in 1990. Thu alleges that her children's birth defects and her miscarriage were caused by the exposure of Thu and her husband to Agent Orange when Thu repaired roads from 1973-75 in heavily sprayed areas of southern Vietnam and her husband served in the DRVN army from 1970-75, stationed in an area heavily sprayed with Agent Orange. Complaint, ¶¶ 191-92. Unless Thu could not have discovered prior to January 30, 1994 the causal connection between Agent Orange and the injuries that she alleges on behalf of herself and her children, her claims are time-barred.

Le Thi Vinh ("Vinh"). Vinh alleges that from 1969-73, she repaired roads in an area of southern Vietnam that was heavily sprayed with Agent Orange and "often saw mist in the air." Complaint, ¶ 203. Sometime after 1975 and prior to 1986, Vinh began to experience fatigue, joint pain and swollen glands and also suffered two miscarriages. By 1986, her condition had deteriorated to the point that she had to stop working. Complaint, ¶ 204. In 2002, she was diagnosed with lung cancer. Complaint, ¶ 205. Unless Vinh could not have discovered until after January 30, 1994 the connection between Agent Orange and her various conditions, all

of which (other than the lung cancer) manifested at least eight years prior to January 30, 2004, her claims are time-barred.

Nguyen Thi Nham ("Nham") and Nguyen Minh Chau (Chau"). Nham is the mother of Chau. Nham alleges that she was exposed to Agent Orange while residing in Bien Hoa, which is alleged to have been exposed to Agent Orange due to operations at a U.S. military air base in the city. Complaint, ¶¶ 207-08. Prior to 1981, Nham gave birth to a child who was born premature and died after one month, and to a second child who was born with defective intestines and died after ten days. Chau, who was born in 1981, is alleged to suffer from chloracne. Complaint, ¶ 210. Nham also alleges that in 2003, she began to experience frequent headaches and fatigue and that when she sought treatment, she was diagnosed with diabetes. Complaint, ¶ 209. Unless Nham and Chau could not have discovered prior to January 30, 1994 the causal connection between their respective health problems, which (other than Nham's diabetes) all manifested at least 13 years prior to January 30, 1994, their claims are time-barred.

Nguyen Thi Thoi ("Thoi"). Thoi alleges that she was exposed to Agent Orange after moving in 1966 to the city of Bien Hoa, due to the spraying, storage, transfer and spillage of Agent Orange at a U.S. military base located there. Complaint, ¶¶ 213-14. Thoi's first child, who was born in 1967, died in 1970 "due to high fever and convulsions." Thoi then suffered a miscarriage, which presumably occurred in the early 1970s. Complaint, ¶ 215. Thoi also alleges that she suffers from "frequent headaches, fatigue and joint pain." Complaint, ¶ 215. Since Thoi does not allege the date of onset of these conditions, they presumably first occurred long before January 30, 1994. Unless Thoi could not have discovered prior to January 30, 1994 the connection between Agent Orange and her conditions, her miscarriage and the death of her child, her claims are time-barred.

Nguyen Long Van ("Van"), Tong Thi Tu ("Tu") and Nguyen Thang Loi ("Loi"). Beginning in 1961 and continuing throughout the war, Van served with the NLF as a physician, mostly in Vung Tau, which is alleged to have been heavily sprayed with herbicides. Van alleges that he was "sprayed directly with herbicides on at least ten occasions." Complaint, ¶¶ 218-19. Van's wife, Tu, also served as a medic with the NLF from 1961 through the end of the war in 1975, during which time she too was allegedly exposed to Agent Orange. Complaint, ¶ 220. In the three years 1967, 1968 and 1969, Tu gave birth to three boys, each of whom died within a day or less after birth. Complaint, ¶¶ 222-24. In addition, in 1970, Tu gave birth to Loi, who was born with deformed feet and is developmentally disabled. Complaint, ¶ 225. In 1997, Tu was diagnosed with diabetes. Complaint, ¶ 227. In 2002, Van was diagnosed with a prostate tumor and in 2003 he was diagnosed with diabetes. Complaint, ¶ 228. Unless Van and Tu could not have discovered prior to January 30, 1994 that the deaths of their children in 1967-69 were caused by their exposure to Agent Orange, those claims are time-barred. Similarly, unless Van, Tu and Loi could not have discovered prior to January 30, 1994 that Loi's birth defects, which were manifest in 1970, were caused by the exposure of Van and/or Tu to Agent Orange, then that claim is time-barred also.

5. As to Each Injury that Manifested Prior to January 30, 1994, the Limitations Period Expired Prior to the Commencement of this Action

The issue to be determined is whether, as to each alleged injury, the plaintiff discovered, or with reasonable diligence should have discovered, prior to January 30, 1994 "the critical facts of both his injury and its cause." Barrett, 689 F.2d at 327. Discovery of those critical facts is "not an exacting requirement," and a claim will accrue "'when the plaintiff knows, or should know, enough of the critical facts of injury and causation to protect himself by seeking legal advice.'" Kronisch, 150 F.3d at 121 (quoting Guccione, 670 F. Supp. at 536).

Here, based on (1) the plaintiffs' own admissions in their Complaint, and (2) the widespread publicity in Vietnam concerning the alleged health effects of Agent Orange, no issue exists as to the fact that a claim for any injury that manifested prior to January 30, 1994 accrued prior to January 30, 1994 and is therefore barred.

a. Prior to Manifesting Injury, Each Plaintiff Was Aware That He or She Had Been Exposed to Agent Orange

Plaintiffs concede that as of the time they first experienced the injuries for which they now seek damages, they were aware that they had been exposed to Agent Orange. Thus,

- Phi, following her work from 1966 through 1971 in areas that she understood had been heavily sprayed with Agent Orange, experienced four miscarriages during the period from December 1971 until July 1973. Complaint, ¶¶ 122-26.

- Quy, while serving in the North Vietnamese army from 1972 through 1975, regularly ate plants and drank water from areas that he knew had been sprayed with Agent Orange, and during that same time period experienced headaches and exhaustion that became worse over time, as well as skin rashes. Complaint, ¶¶ 129-32.

- Hoa, during the period from 1968 to 1976, knew that she was present in an area while it was being sprayed with Agent Orange, and during that same time period gave birth to a son who was born developmentally disabled and died eight months thereafter, and also suffered two miscarriages. In addition, in about 1975, she began to suffer from skin rashes. Complaint, ¶¶ 149-55.

- Hai, in 1972, moved to an area in close proximity to a U.S. military base where herbicides were stored, transferred, spilled and sprayed. She then had four miscarriages, gave birth to two children who died young, and in 1992 gave birth to a child with severe mental and physical disabilities. Complaint, ¶¶ 161, 163-64.

- Bat, while active with the NLF, observed the spraying of herbicides on several occasions throughout the war. Complaint, ¶ 166. Thereafter, six years after the end of the war, his wife had a miscarriage in 1981. In addition, in 1982, his wife gave birth to a child who died within a few days, and a child born in 1980 also died. Complaint, ¶¶ 168-69.

- Nhut traveled to an area of South Vietnam in 1965 to visit her husband, where she "often noticed a fog or mist and a strong odor in the air, and white substance on plant leaves." Complaint, ¶ 180. During that visit, Nhut experienced skin rashes. Complaint, ¶ 181. She then lived in areas heavily sprayed with herbicides. Complaint, ¶ 182. Even before the war ended, she experienced her first miscarriage in 1974 (after having given birth to a healthy child in 1960). She then suffered another miscarriage a year later, terminated a pregnancy in 1977 because the fetus had spina bifida and other deformities, and suffered another miscarriage in 1980. Complaint, ¶¶ 183-86.

- Thu contends that both she and her husband served during the early 1970s in areas of Vietnam that were heavily sprayed with Agent Orange during the war. She then had a miscarriage and gave birth to two children who have been paralyzed since birth because of congenital birth defects. Complaint, ¶¶ 191-93.

- Vinh served from 1969-73 in an area of South Vietnam that was heavily sprayed with Agent Orange, where she "often saw mist in the air." Complaint, ¶ 203. Shortly after the war ended, Vinh began to experience fatigue, joint pain and swollen glands, and also suffered two miscarriages. Complaint, ¶ 204.

- Nham was exposed to Agent Orange when she moved to Bien Hoa, due to the spraying, storage, transfer and spillage of Agent Orange at a military base located in that city. Complaint, ¶¶ 207-08. In the late 1970s, she gave birth to two children, both of whom died within 30 days after birth. In 1981, she gave birth to a child who suffered from chloracne. Complaint, ¶ 210.

- Thoi moved to Bien Hoa in 1966, where she was exposed to Agent Orange as a result of operations at the U.S. military air base in that city. A year later, she gave birth to her first child, who died at three years of age. She also suffered a miscarriage and had frequent headaches, fatigue and joint pain. Complaint, ¶ 215.

- Van was "sprayed directly" with Agent Orange on "at least ten occasions." Complaint, ¶ 219. His wife, Tu, served as a medic for the NLF throughout the entire war, and also was exposed to Agent Orange. Complaint, ¶ 220. During the war, in the years 1967-69, Tu gave birth to three children, all of whom died within one day. In 1970, also during the war, Tu gave birth to Loi, who had birth defects and is developmentally disabled. Complaint, ¶¶ 222-25.

It is well-established that when a plaintiff experiences health problems shortly after his exposure to the substance that he or she later contends caused the health problems, the

plaintiff is placed on a duty of inquiry and cannot claim what the Supreme Court has referred to as "blameless ignorance." See Urie, 337 U.S. at 169-70.

b. The Extensive Media Reports in Vietnam Concerning Agent Orange Imposed a Duty of Inquiry on Each Plaintiff as Soon as an Injury Manifested

Even if the plaintiffs had not experienced health problems shortly after their exposure to Agent Orange, the extensive media reports in Vietnam concerning Agent Orange certainly imposed on them a "duty to inquire into the possible existence of a claim," and they are deemed to have learned any facts that they would have uncovered if they had undertaken the required inquiry. Kronisch, 150 F.3d at 121; Hobson, 737 F.2d at 35; Skwira, 344 F.3d at 77.

Even before the war ended in April 1975, the North Vietnamese government, via radio broadcasts and the national newspaper of the Communist Party, Nhan Dan (People's Daily), made well-known to the populations of North and South Vietnam the alleged adverse health effects of Agent Orange. See Affidavit of Michael M. Gordon, sworn to on November 1, 2004 ("Gordon Aff."), ¶¶ 3-11 and Exhibits 1 through 21. For example, on January 20, 1970, Nhan Dan listed specific areas of South Vietnam where crops and other vegetation were destroyed in 1969 by "US chemical toxins." The account concluded by stating that in the first ten months of 1969, the United States had sprayed "chemical toxins" on 37 of South Vietnam's 44 provinces, destroying more than 905,000 hectares of paddy fields, garden groves and crops, and contaminating more than 285,000 people, among whom 500 were allegedly killed. Gordon Aff., Ex. 5.

On January 31, 1970, Nhan Dan reported that Professor John Brian Neilands of the University of California had published a research monograph titled "Chemical Warfare in Vietnam." The article also reported that in the monograph, Professor Neilands stated that the herbicides and defoliants used in Vietnam had "'caused death and injury to civilians, mostly

children under five years of age, pregnant and breast-feeding women, the elderly and infirm.'" Gordon Aff., Ex. 6.

The following month, on February 21, 1970, an editorial of the Liberation News Agency appeared in Nhan Dan, announcing that as a result of the United States' use of "chemical weapons" in South Vietnam since 1961, "more than a million people were contaminated, [and] nearly all the provinces of the South were sprayed with chemical toxins." Gordon Aff., Ex. 8. On October 20, 1970, Nhan Dan published the full text of an announcement of the Committee to Denounce War Crimes of the US Imperialists and Their Henchmen in South Vietnam. The announcement stated, among other things, that

> Over the past nine months, according to incomplete statistics, the US sprayed chemical toxins and poison gases on an area of more than 145,000 hectares in 25 provinces, causing contamination in more than 185,000 people, including nearly 300 dead. In Mid-Central Vietnam in particular, in the first eight months of 1970, the US sprayed chemical toxins and poison gases more than 300 times in 157 areas, causing contamination in tens of thousands of people, including 69 dead and nearly 1,600 people with life-threatening diseases such as: dysentery, acute illnesses, hazy eyes, milk-loss, menstrual disorders, miscarriage, mental disorders, and so on. . . .

Gordon Aff., Ex. 10.

Three months later, on January 20, 1971, Nhan Dan published a report by Professor Nguyen Van Hieu, the Head of a delegation of scientists from the Republic of South Vietnam who had attended the International Conference on Chemical Warfare in Vietnam, which had been convened in Paris on December 12, 1970. The report noted that the Conference had taken place following the United States' announcement in April 1970 that it had prohibited the use of 2,4,5-T and Agent Orange, "in the wake of news about the discovery of 2,4,5-T's effect on women with miscarriage or birth defects." The report went on to state that, prior to the Conference,

> the press in Saigon had carried plenty of news about women giving birth to deformed babies in areas sprayed by chemical toxins. Bionetic[s] Lab in the US discovered that "Agent Orange" 2,4,5-T experimented on mice has shown hereditary effects, but this report was "suppressed" until October 1969 when some American antiwar students and the American professor [Matthew Meselson] had brought this matter to light and shaken up public opinion.
>
> This time at the Paris Scientific Conference, Vietnamese scientists have presented the effects of chemical toxins on women's reproduction, after having examined many contaminated women and children.

Gordon Aff., Ex. 11. By the time of the December 1970 conference, many Vietnamese scientists had become interested in the subject of possible health effects of Agent Orange – indeed, one of the presenters at the conference was Professor Ton That Tung of Vietnam. Gordon Aff., Ex. 18.

During the war, North Vietnam also engaged in a prolonged "bombardment" of South Vietnam with radio broadcasts reporting alleged adverse health effects of Agent Orange. Those broadcasts reached virtually every member of the population. In January 1969, the American Embassy in Saigon (through the Foreign Broadcast Information Service) advised that the use of chemicals by the United States and the Republic of Vietnam "is evidently the topic of a full-scale propaganda campaign." See Gordon Aff., Ex. 19. Hanoi radio broadcasts, citing the Liberation Press Agency as the source of their information, reported that chemicals had been used in almost all of the provinces of South Vietnam and were "unanimous in claiming serious results from the use of chemicals in South Vietnam." The American Embassy noted, as an example, that "a Liberation Broadcasting Station item on 29 November [1968] reported the destruction of 1,000 hectares of crops . . . because of the spraying of chemicals [and] also claimed that more than 100 people suffered from sore eyes, that many persons were affected with beriberi, and that a child had died." Id.

Similarly, an Air Force report concerning anti-herbicide propaganda quoted extensively from North Vietnamese radio broadcasts and articles published in 1966 which reported that the herbicides had allegedly caused, among other things, intestinal diseases, nausea, swelling of the body, skin rashes, malaria, cholera, and the death of fetuses. Gordon Aff., Ex. 20. In addition, a report of the Tactical Air Command, which appeared in the August 9, 1967 edition of the TAC Weekly Intelligence Digest, described Viet Cong propaganda concerning alleged effects of the defoliants, including fever, headaches, nausea, and skin blisters or rashes. Gordon Aff., Ex. 21.

Following the end of the war and the unification of North and South Vietnam in 1975, the Democratic Republic of Vietnam and the Vietnamese news media continued to devote extensive attention to the use of Agent Orange during the war and the myriad alleged health effects of Agent Orange on those who had been exposed to it.

In October 1980, Vietnam established a National Commission to Investigate the Effects of Chemicals Used in the Vietnam War (the "10-80 Commission"). Thereafter, as reported in December 1993 by another widely-distributed Vietnamese newspaper, Saigon Giai Phong (Saigon Liberation), the 10-80 Commission coordinated with scientists in Vietnam and several other countries, including the United States, in the conduct of scientific studies, organized three scientific conferences (both within and outside Vietnam), sent delegations to attend international conferences on dioxin, and presented numerous scientific reports. Gordon Aff., Ex. 18.

The claims of American veterans for injuries allegedly caused by Agent Orange also received extensive coverage in the Vietnamese media. On October 31, 1981, a year after Vietnam's formation of the 10-80 Commission (and while discovery proceedings were in progress in MDL No. 381), Nhan Dan republished excerpts of an article from the Guardian, a

United Kingdom newspaper, concerning alleged health effects of Agent Orange on United States veterans of the war in Vietnam and their children. The excerpted article reported that the Pentagon had recently discovered military reports showing that, in emergency situations, American planes had often dumped "chemical toxin" on US barracks in Vietnam. The article went on to state that:

> Agent Orange used to defoliate Vietnamese jungles contains the chemical dioxin of high toxicity. Many veterans who participated in the American War in Vietnam said their health deteriorated because they were contaminated with this poison. According to US military estimates, 100,000 children of US soldiers had defects at birth; and children of Australian soldiers who participated in the American War in Vietnam were also abnormal.

Gordon Aff., Ex. 14.

The same October 31, 1981 issue of Nhan Dan contained a separate article concerning a Japanese movie, filmed in Vietnam and shown on Japanese television, titled "The Defoliant Jungle". The article described images from the movie of "dead forests, of people heavily injured in the arms and legs and eyes, of deformed children, of defective fetuses, the terrible consequences lasting until today of the chemical warfare conducted by the US on a very large scale during the time they invaded Vietnam." The article also described statements about the consequences of Agent Orange that were made in the film by U.S. veterans and American scientists. Those statements made reference to cancer, defective fetuses, crippled children, body rashes, muscle cramps, tremors, swollen glands, paralysis, and damage to the nervous system. Gordon Aff., Ex. 13.

On June 31, 1982, Nhan Dan reported an interview with A. Fokin, Deputy Scientific Secretary General of the USSR Academy of Science. The article reported that the U.S. army had used more than 96,000 tons of herbicides in Vietnam, and that Fokin had stated that:

> Besides the great majority of contaminated people during the war, there are so many other victims of what we call "the long-term effects of chemical toxins." Blood composition and pathology of internal organs in these people have shown significant changes. The intentional use of Agent Orange which includes a dioxin complex with high toxicity and extremely stable in the surrounding environment has caused extremely grave consequences. This very substance is the cause of many tumors, liver and blood cancer, birth defects and pregnancy disorders, and a decrease in infant survivability. . . . The majority of birth defects have come from reproductive hereditary disorder under the influence of the chemical toxins used by the US in Vietnam.

Gordon Aff., Ex. 15.

Six months later, on January 25, 1983, Nhan Dan reported on the proceedings at an international conference on the effects of Agent Orange that had been held that month in Ho Chi Minh City (formerly Saigon). After describing the spraying during the war of Agent Orange that contained a total of 170 kilograms of dioxin, the article reported that since 1970, doctors in Hanoi had found mutations in cells of a number of people who had come from the South for treatment and had seen many miscarriages and birth defects in areas heavily sprayed with Agent Orange. The article then described the results of studies allegedly confirming that exposure to Agent Orange had caused miscarriages and an increased incidence of birth defects, abnormal pregnancies and ovarian cancer. In addition, the article made reference to surveys showing an increased incidence of stomach ailments, neurological diseases and "primitive" liver cancer cases in areas that had been sprayed with Agent Orange. Gordon Aff., Ex. 16.

In December 1993, Saigon Giai Phong reported on the proceedings of the second International Conference on "Herbicides Used During the War – Long-Term Effects on Humans and Nature," held in Hanoi in November 1993. The Conference gathered 120 Vietnamese scientists, as well as 60 scientists from 10 other countries. Both "during and after the conference, many newspapers and radio services inside and outside the country . . . carried news

and reports about the conference." In summarizing the Conference proceedings, the article stated that "reports by dozen of scientists . . . presented at the conference speak about the increased rate of birth defects, ovariocyesis, ovarian cancer, primitive liver cancer, immune deficiency, and so on, in people who have come into contact with Agent Orange; [and the increased rate of] illnesses of US and South Korean veterans affected by their wartime participation in Vietnam." Gordon Aff., Ex. 18.

Thus, the evidence is overwhelming that any resident of Vietnam who lived in or traveled to South Vietnam during the war, and who thereafter developed any of the health conditions manifested by the plaintiffs in this action, should have and would have known of the alleged connection between his or her condition and Agent Orange. In these circumstances, plaintiffs at the very least had a duty to investigate to determine whether their injuries had been caused by Agent Orange. As the Fifth Circuit recognized in United Klans of America v. McGovern, 621 F.2d 152 (5th Cir. 1980), "[w]here events receive such widespread publicity, plaintiffs may be charged with knowledge of their occurrence."[10] Id. at 154. Indeed, just weeks ago, the Sixth Circuit reaffirmed that "[t]he rule in this Circuit is that '[w]here events receive . . . widespread publicity, plaintiffs may be charged with knowledge of their occurrence.'" Ball v. Union Carbide Corp., 385 F.3d 713, 722 (6th Cir. 2004) (quoting Hughes v. Vanderbilt Univ., 215 F.3d 543, 548 (6th Cir. 2000)).[11]

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[10] In United Klans, the plaintiff alleged violations of its constitutional rights as a result of the FBI's counterintelligence program. While the Fifth Circuit looked to the law of the forum state, Alabama, to determine the appropriate statute of limitations, the Fifth Circuit also specifically noted that federal law controlled the determination of when the cause of action accrued. Id. at 153 n.1.

[11] As in United Klans, in Ball and Hughes the Sixth Circuit, while applying a state statute of limitations, applied federal law to determine when the state statute of limitations began to run. See Ball, 385 F.3d at 722-23; Hughes, 215 F.3d at 548.

The plaintiffs' situation here is virtually identical to that of the plaintiff, Margaret Winters, in Winters v. Diamond Shamrock Chemicals Co., 149 F.3d 387 (5th Cir. 1998), cert. denied, 526 U.S. 1034 (1999), in which the Fifth Circuit recognized that the widespread media coverage in the United States of the Agent Orange controversy in the 1980s was sufficient to place Ms. Winters on notice of her claims. In Winters, the plaintiff had worked as a civilian nurse in Vietnam in 1966 and 1967. In or about 1977, Winters began to experience health problems and in August 1983 was diagnosed with non-Hodgkin's lymphoma ("NHL"). However, she did not file suit until 1993, after reading an article in a local newspaper reporting a link between NHL and Agent Orange. Id. at 390. In affirming the district court's dismissal of Winters' lawsuit as barred by the Texas statute of limitations, the Fifth Circuit stated:

> Winters testified . . . that she made no effort to gather information as to what may have caused the NHL after her diagnosis in 1983. In fact, she never inquired of the cause of her illness until after she read the 1991 article. The extensive media publicity of the mid-80s, however, should have put Winters on notice that she needed to investigate any possible connection between her cancer--NHL--and her alleged exposure to Agent Orange while in Vietnam. . . . Because most of the media reports also discussed claims that the herbicide caused cancer, among various other illnesses, Winters surely had sufficient knowledge in the mid-80s "of such facts as would cause a reasonably prudent person to make an inquiry that would lead to discovery of the cause of action."
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> * * *
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> The question presented is not "whether a plaintiff has actual knowledge of the particulars of a cause of action . . . ; rather, it is whether the plaintiff has knowledge of facts which would cause a reasonable person to diligently make inquiry to determine his or her legal rights. . . . The media's coverage of the Agent Orange matter in the 80s placed within Winters's grasp such triggering facts.

Id. at 404 (citations omitted).[12] As described above, in Vietnam the extensive media coverage concerning Agent Orange triggered a duty of inquiry as to the Vietnamese plaintiffs also.

In sum, as of January 30, 1994, as to any injuries that had manifested by that date, the Vietnamese plaintiffs certainly knew or should have known enough of the "'critical facts of injury and causation'" to seek legal advice, thereby commencing accrual of the 10-year statute of limitations. See Kronisch, 150 F.3d at 121 (quoting Guccione, 670 F. Supp. at 536). They knew that they had been exposed to Agent Orange, they knew that they were suffering from health problems, and they knew from widespread media coverage that their health problems were among those allegedly caused by Agent Orange. Furthermore, if plaintiffs had sought legal advice at that point in time, they would have learned that they were not included as members of the class that had been certified in the Ryan class action in MDL No. 381, and that they would therefore need to file suit to avoid being barred by the running of the statute of limitations. Plainly, the statute of limitations ran ten or more years prior to the commencement of their action, and all federal claims based on injuries that manifested prior to January 30, 1994 are accordingly barred.

B. Most of the Plaintiffs' State Law Claims Are Barred by the New York Statute of Limitations

The individual plaintiffs also allege: (1) personal injury claims under the common law of the State of New York for assault and battery (Fifth Claim for Relief), intentional infliction of emotional distress (Sixth Claim for Relief), negligent infliction of emotional distress (Seventh Claim for Relief), negligence (Eighth Claim for Relief), wrongful death (Ninth Claim

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[12] While in Winters the Fifth Circuit addressed the accrual of the Texas statute of limitations under state law, it is clear from the court's discussion that the federal accrual rule is essentially identical. See Kronisch, 150 F.3d at 121 ("'a claim will accrue when the plaintiff knows, or should know, enough of the critical facts of injury and causation to protect himself by seeking legal advice'") (quoting Guccione, 670 F. Supp. at 536).

for Relief) and strict products liability (Tenth Claim for Relief); (2) public nuisance (Eleventh Claim for Relief); (3) unjust enrichment (Twelfth Claim for Relief); and (3) injunctive and declaratory relief (Thirteenth Claim for Relief). [13] As described below, almost all of these claims are barred by the applicable New York statutes of limitations.[14]

1. The New York Statute of Limitations Applies to Each of the Plaintiffs' New York State Law Claims

A federal court sitting in diversity applies to common law causes of action the choice of law rules and the statutes of limitations of the state in which it sits. Guaranty Trust Co. of N.Y. v. York, 326 U.S. 99, 108-09 (1945); Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941); see also Sun Oil Co. v. Wortman, 486 U.S. 717, 726-27 (1988). New York has a "borrowing statute," CPLR 202, which provides that "an action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state [i.e., New York] or the place without the state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of the state the time

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[13] The injunctive and declaratory relief claim does not address claims for personal injury but rather alleged environmental contamination, and thus need not be considered further here. See Complaint, ¶¶ 327, 328.C.i. Furthermore, it is well-established that a declaratory judgment is a remedy and its availability does not create an independent cause of action. Keene Corp. v. Fiorelli (In re Joint E. & S. Dist. Asbestos Litig.), 14 F.3d 726, 731 (2d Cir. 1993); Richards v. Select Ins. Co., 40 F. Supp. 2d 163, 169 (S.D.N.Y. 1999). Similarly, there is no "injunctive" cause of action under New York or federal law. Reuben H. Donnelley Corp. v. Mark I Mktg. Corp., 893 F. Supp. 285, 293 (S.D.N.Y. 1995).

[14] Plaintiffs also purport to assert some or all of these claims "under the laws of the United States [and] Vietnam." See, e.g., Complaint, ¶ 281. It well-established, however, that there is no general federal common law applicable to claims between private litigants. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938); Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2761 (2004). As to plaintiffs' invocation of Vietnamese law, even if Vietnamese law could somehow be deemed to govern by virtue of the applicable choice of law principles, and even if plaintiffs were able to prove the content of Vietnamese law through submission of admissible evidence (see, e.g., Torah Soft Ltd. v. Drosnin, 224 F. Supp. 2d 704, 712-13 (S.D.N.Y. 2002)), those claims would still be barred – by virtue of New York's borrowing statute – by the same New York statutes of limitations, even if the Vietnamese limitations periods were longer than those of New York. See discussion infra in Section B.1.; see also Smith Barney, Harris Upham & Co. v. Luckie, 245 A.D.2d 17, 18-19, 665 N.Y.S.2d 74, 75-76 (1st Dep't 1997), cert. denied sub nom., 525 U.S. 874 (1998).

limited by the laws of the state shall apply." N.Y. C.P.L.R. 202 (McKinney 2003 & Supp. 2004). Here, the plaintiffs' causes of action accrued outside of New York, since plaintiffs allege that they were injured in Vietnam when they were exposed to Agent Orange in Vietnam. See Proforma Partners, L.P. v. Skadden Arps Slate Meagher & Flom, LLP, 280 A.D.2d 303, 303, 720 N.Y.S.2d 139, 140 (1st Dep't) ("[g]enerally, 'a cause of action [sounding in tort] accrues at the time and in the place of injury'") (citation omitted), lv. to appeal denied, 96 N.Y.2d 722, 759 N.E.2d 373, 733 N.Y.S.2d 374 (2001); Stuart v. American Cyanamid Co., 158 F.3d 622, 627 (2d Cir. 1998), cert. denied, 526 U.S. 1065 (1999). It is also undisputed that none of the plaintiffs is a resident of New York.

Thus, CPLR 202 requires that plaintiffs' claims be timely under the limitations periods of both New York and Vietnam. See N.Y. C.P.L.R. 202. CPLR 202 also renders inapplicable "modern choice-of-law" considerations; "CPLR 202 is to be applied as written, without recourse to a conflict of law analysis." Ledwith v. Sears, Roebuck & Co., 231 A.D.2d 17, 24, 660 N.Y.S.2d 402, 406 (1st Dep't 1997) (citing 1 Jack B. Weinstein, et al., NewYork Civil Practice: CPLR ¶ 202.04 (2004)). As described below, the vast majority of plaintiffs' claims are untimely under the applicable New York statutes of limitations, and those claims must therefore be dismissed.[15]

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[15] It may well be that any claims not time-barred under the New York statutes of limitations are time-barred by Vietnamese statutes of limitations. However, in view of the time and expense that would be entailed in obtaining the required proof of Vietnamese law (see Fed. R. Civ. P. 44.1), defendants, for purposes of this motion and without prejudice to their right to address Vietnamese limitations periods at some future time, base this motion on the New York limitations periods only.

2. The Relevant New York Limitations Provisions

a. Tort Claims (Other than Intentional Torts)

In New York, claims for negligent infliction of emotional distress, negligence, strict products liability and public nuisance are generally governed by CPLR 214(4) and (5), which require that the action be commenced within three years. In the case of so-called "latent injuries" or "toxic torts," unless CPLR 214-c (addressed below) applies, the limitations period accrues from the "date of injury," meaning the date when the substance in question was first introduced into the plaintiff's body. See Snyder v. Town Insulation, Inc., 81 N.Y.2d 429, 432-35, 615 N.E.2d 999, 1000-02, 599 N.Y.S.2d 515, 516-18 (1993); Goyette v. Mallinkrodt, Inc., 204 A.D.2d 881, 882-83, 612 N.Y.S.2d 474, 475 (3d Dep't), lv. to appeal denied, 84 N.Y.2d 807, 645 N.E.2d 1216, 621 N.Y.S.2d 516 (1994). Thus, under CPLR 214, the claims of every plaintiff are barred, since the plaintiffs all were exposed to Agent Orange long before January 30, 2001 – the date that is three years prior to the filing of this action.

In 1986, the New York Legislature abandoned the date-of-injury rule and "adopted a rather complicated date-of-discovery rule for virtually all toxic torts" by enacting CPLR 214-c.[16] Avery v. Shulman, 171 A.D.2d 912, 913, 566 N.Y.S.2d 785, 786 (3d Dep't

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[16] Section 214-c states in relevant part:

> 1. In this section: "exposure" means direct or indirect exposure by absorption, contact, ingestion, inhalation, implantation or injection.
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> 2. Notwithstanding the provisions of section 214, the three year period within which an action to recover damages for personal injury or injury to property caused by the latent effects of exposure to any substance or combination of substances, in any form, upon or within the body or upon or within property must be commenced shall be computed from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier.
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> 6. This section shall be applicable to acts, omissions or failures occurring prior to, on or after July first, nineteen hundred eighty-six,

1991). However, as described below, Section 214-c does not save most of the plaintiffs' claims.[17]

First, as the New York Court of Appeals made clear in Wetherill v. Eli Lilly & Co. (In re New York County DES Litigation), 89 N.Y.2d 506, 678 N.E.2d 474, 655 N.Y.S.2d 862 (1997), when the Legislature used the phrase "discovery of the injury" in CPLR 214-c(2), "it meant discovery of the physical condition and not . . . the more complex concept of discovery of both the condition and the nonorganic etiology of that condition." Id. at 866, 678 N.E.2d at 478, 655 N.Y.S.2d at 514. Second, under CPLR 214-c(6), the new "date of discovery" rule is not applicable where "the tortious act occurred prior to July 1, 1986, the injury [i.e., the physical condition itself] caused by that act was discovered prior to July 1, 1986 and the applicable period of limitation expired prior to July 1, 1986." Avery, 171 A.D.2d at 913, 566 N.Y.S.2d at 786.

In Forte v. Weiner, 214 A.D.2d 397, 624 N.Y.S.2d 596 (1st Dep't), lv. to appeal dismissed, 86 N.Y.2d 855, 659 N.E.2d 773, 635 N.Y.S.2d 950 (1995), for example, the court

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> except that this section shall not be applicable to any act, omission or failure:
>
> (a) which occurred prior to July first, nineteen hundred eighty-six, and
>
> (b) which caused or contributed to an injury that either was discovered or through the exercise of reasonable diligence should have been discovered prior to such date, and
>
> (c) an action for which was or would have been barred because the applicable period of limitation had expired prior to such date.

N.Y. C.P.L.R. 214-c.

[17] CPLR 214-b states that "an action to recover damages for personal injury caused by contact with or exposure to phenoxy herbicides while serving as a member of the armed forces of the United States in Indo-China from [January 1, 1962 through May 7, 1975], may be commenced within two years from the date of the discovery of such injury, or within two years from the date when through the exercise of reasonable diligence the cause of such injury should have been discovered, whichever is later." (Emphasis added). Since none of the plaintiffs allege that they ever served as members of the armed forces of the United States, whether in Vietnam or anywhere else in Indo-China, CPLR 214-b does not apply. Even if CPLR 214-b did apply, that would not change the outcome. See discussion in Section A.5.b. above.

held that despite the enactment of CPLR 214-c, plaintiff's claim was time-barred where the decedent's exposure to the harmful substance in question occurred in 1972, she discovered her injury in 1983 and the statute of limitations expired in 1975. Id. at 399, 624 N.Y.S.2d at 597. Similarly, in Goyette, the plaintiff's exposure had occurred prior to July 1, 1986, the plaintiff had discovered her injuries prior to that date, and the then applicable statute of limitations had expired in 1978, three years after first exposure to the substance in question. The court thus found that "[b]ecause all three criteria of CPLR 214-c(6) have been met, the three-year Statute of Limitations governing plaintiff's claim is measured not from the date of discovery, but rather from the date of injury [i.e., the date of first exposure]." 204 A.D.2d at 883, 612 N.Y.S.2d at 476.

Here, as described in Section B.3. below with reference to the individual plaintiffs' specific claims, the vast majority of the plaintiffs do not "qualify" for the benefits of CPLR 214-c's "date of discovery" rule since they were exposed to Agent Orange by no later than the end of the war on April 30, 1975, their injuries manifested (i.e., were "discovered") prior to July 1, 1986, and the applicable three-year limitations period expired by no later than April 30, 1978 (i.e., three years after the end of the war). Furthermore, even as to those plaintiffs who do "qualify" for application of CPLR 214-c, most of their claims are barred because the injuries manifested on or before January 30, 2001 – the date three years prior to the filing of this action.

b. Intentional Tort Claims

CPLR 215(3) provides that an action to recover damages for assault or battery shall be commenced within one year. N.Y. C.P.L.R. 215(3). This one-year statute of limitations also applies to claims for intentional infliction of emotional distress. Weisman v. Weisman, 108 A.D.2d 853, 853-54, 485 N.Y.S.2d 570, 570-71 (2d Dep't 1985); see also Lettis v. United States

Postal Serv., 39 F. Supp. 2d 181, 204 (E.D.N.Y. 1998); Overall v. Klotz, 846 F. Supp. 297, 300 n.1 (S.D.N.Y. 1994), aff'd, 52 F.3d 398 (2d Cir. 1995).

An assault is "an intentional placing of another person in fear of imminent harmful or offensive contact," while a battery is "an intentional wrongful physical contact with another person without consent." United Nat'l Ins. Co. v. Waterfront N.Y. Realty Corp., 994 F.2d 105, 108 (2d Cir. 1993). A battery claim accrues immediately upon the occurrence of the "nonconsensual offensive conduct." Corcoran v. New York Power Auth., No. 95 Civ. 5357, 1997 WL 603739, at *5 (S.D.N.Y. Sept. 29, 1997) (citing Plaza v. Estate of Wisser, 211 A.D.2d 111, 118, 626 N.Y.S.2d 446, 451 (1st Dep't 1995)),[18] aff'd, 202 F.3d 530 (2d Cir. 1999), cert. denied, 529 U.S. 1109 (2000). A claim for intentional infliction of emotional distress accrues when the plaintiff has suffered the alleged severe emotional distress. Dana v. Oak Park Marina, Inc., 230 A.D.2d 204, 210, 660 N.Y.S.2d 906, 911 (4th Dep't 1997). Furthermore, the discovery rule set forth in CPLR 214-c cannot be invoked to extend the limitations period for claims subject to the one-year statute of limitations set forth in CPLR 215. See Plaza, 211 A.D.2d at 118, 626 N.Y.S.2d at 454; Corcoran, 1997 WL 603739, at *5; see also Ross v. Louise Wise Servs., Inc., 4 Misc. 3d 279, 283-84, 777 N.Y.S.2d 618, 621-22 (Sup. Ct. N.Y. Co. 2004) (holding that the discovery rule set forth in CPLR § 203(g) is not applicable to plaintiff's intentional tort claims).

Thus, all of plaintiffs' intentional tort claims based on injuries that occurred prior to January 30, 2003 are barred by New York's one-year statute of limitations.

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[18] A claim for assault presumably accrues upon the plaintiff being placed in fear of imminent harmful or offensive conduct. See Reid v. City of New York, 736 F. Supp. 21, 25 (E.D.N.Y. 1990) (assault claim accrues once the assault is completed).

c. **Wrongful Death**

Section 5-4.1 of the New York Estates, Powers and Trusts Law ("EPTL") provides in relevant part that:

> The personal representative, duly appointed in this state or any other jurisdiction, of a decedent who is survived by distributees may maintain an action to recover damages for a wrongful act, neglect or default which caused the decedent's death against a person who would have been liable to the decedent by reason of such wrongful conduct if death had not ensued. Such an action must be commenced within two years after the decedent's death.

N.Y. Est. Powers & Trusts Law § 5-4.1 (McKinney 1999 & Supp. 2004). Thus, the two-year limitations period for a wrongful death action "starts to run upon the death of the decedent." Dunefsky v. Montefiore Hosp. Med. Ctr., 162 A.D.2d 300, 300, 556 N.Y.S.2d 645, 645 (1st Dep't 1990). Furthermore, the two-year limitations period applies regardless of when the person suing on the decedent's behalf discovered the cause of death or the nature of the underlying conduct of the defendants. See Morano v. St. Francis Hosp., 100 Misc. 2d 621, 624-25, 420 N.Y.S.2d 92, 95 (Sup. Ct. Dutchess Co. 1979).

Thus, in this action, any claim for wrongful death is time barred unless the decedent died after January 30, 2002, the date two years prior to the commencement of this action.

d. **Unjust Enrichment**

As their Twelfth Claim for Relief, plaintiffs allege an equitable claim for unjust enrichment, contending that defendants have been unjustly enriched to the plaintiffs' detriment because defendants have received profits from "unlawful activities". Complaint, ¶ 321. The allegedly "unlawful activities" were the production and supply of Agent Orange. Complaint, ¶¶ 322, 324.

As a general rule, the equitable claim of unjust enrichment is governed by New York's residual six-year statute of limitations (CPLR 213(1)), which "starts to run upon the occurrence of the wrongful act giving rise to a duty of restitution." Congregation Yetev Lev D'Satmar, Inc. v. 26 Adar N.B. Corp., 192 A.D.2d 501, 503, 596 N.Y.S.2d 435, 437 (2d Dep't 1993) (citations omitted); Town of Oyster Bay v. Occidental Chem. Corp., 987 F. Supp. 182, 210 (E.D.N.Y. 1997). Here, it is undisputed that the defendants' production and supply of Agent Orange to the United States ceased by no later than the end of 1969. Thus, if CPLR 213(1) were to be applied, the limitations period for any claim based on unjust enrichment expired by no later than April 30, 1981, six years after the end of the war on April 30, 1975 (see discussion of tolling for war in Section B.2.e. below).

Furthermore, under the facts alleged here, even if the six-year statute of limitations did not bar plaintiffs' claim for unjust enrichment, that claim would still be barred by the New York statutes of limitations applicable to plaintiffs' legal claims, which are discussed in Sections B.2.a.-c. above. In this case, plaintiffs' legal and unjust enrichment claims are both based on the same conduct – defendants' production and sale of Agent Orange. In such instances, "the statute of limitations governing the legal remedies will control the equitable remedies as well," at least to the extent the limitations period applicable to the legal claims has expired. See Leeming v. Dean Witter Reynolds Inc., 676 F. Supp. 541, 545 (S.D.N.Y. 1988). This rule is based on the well-established principle that "[a]n equitable claim cannot proceed where the plaintiff has had and let pass an adequate alternative remedy at law." Norris v. Grosvenor Mktg. Ltd., 803 F.2d 1281, 1287 (2d Cir. 1986); Glynwill Invs., N.V. v. Prudential Sec., Inc., No. 92 Civ. 9267, 1997 WL 12802, at *2 (S.D.N.Y. Jan. 14, 1997).

In sum, to the extent a plaintiff's unjust enrichment claim is not barred by the statutes of limitations applicable to that plaintiff's legal claims, it would still be barred by New

York's residual six-year statute of limitations, which required that the unjust enrichment claim be filed by no later than April 30, 1981.

e. New York Tolling Provisions

Minors. CPLR 208 provides in relevant part that

> If a person entitled to commence an action is under a disability because of infancy or insanity at the time the cause of action accrues, and the time otherwise limited for commencing the action is three years or more and expires no later than three years after the disability ceases, or the person under the disability dies, the time within which the action must be commenced shall be extended to three years after the disability ceases or the person under the disability dies, whichever event first occurs; if the time otherwise limited is less than three years, the time shall be extended by the period of disability. The time within which the action must be commenced shall not be extended by this provision beyond ten years after the cause of action accrues, except in any action . . . where the person was under a disability due to infancy.

N.Y. C.P.L.R. 208. An "infant" is any person under the age of eighteen. N.Y. C.P.L.R. 105(j). "Insanity" for purposes of CPLR 208 encompasses "only those individuals who are unable to protect their legal rights because of an over-all inability to function in society." McCarthy v. Volkswagen of Am., Inc., 55 N.Y.2d 543, 548, 435 N.E.2d 1072, 1075, 450 N.Y.S.2d 457, 460 (1982). Thus, when an infant reaches eighteen, the tolling of a limitations period of three years ends and is "reset to expire three years after the minor's eighteenth birthday." Calcutti v. SBU, Inc., 224 F. Supp. 2d 691, 697 (S.D.N.Y. 2002) (citing N.Y. C.P.L.R. 208). When an infant or insane person dies, the tolling also ends. In addition, in the case of an insane person, the statute of limitations will expire no longer than ten years after the cause of action accrues, regardless of whether the person remains unable to function in society. McCarthy, 55 N.Y.2d at 546 n.2, 435 N.E.2d at 1073 n.2, 450 N.Y.S.2d at 458 n.2.

Accordingly, the claims of any plaintiff alleging birth defects who was born prior to January 30, 1983 (18 years + 3 years prior to January 30, 2004) are barred by the statute of limitations. In addition, claims on behalf of deceased children who died prior to January 30, 2001 (3 years prior to January 30, 2004) are also barred by the statute of limitations.

War. CPLR 209(a) reads in pertinent part:

> Where a cause of action, whether originally accrued in favor of a resident or non-resident of the state, accrued in a foreign country with which the United States or any of its allies were then or subsequently at war, or territory then or subsequently occupied by the government of such foreign country, the time which elapsed between the commencement of the war, or of such occupation, and the termination of the hostilities with such country, or of such occupation, is not a part of the time within which the action must be commenced.

N.Y. C.P.L.R. 209(a). Thus, any tolling of New York statutes of limitations based on CPLR 209(a) ceased on April 30, 1975, when the hostilities in Vietnam ended.

In Ngoc Dung Thi Tran v. Citibank, N.A., 586 F. Supp. 203 (S.D.N.Y. 1983), the plaintiff was a former citizen and resident of South Vietnam who had deposited funds in a Citibank branch in Saigon. On April 24, 1975, Citibank closed the branch and, after the government of South Vietnam fell to communist forces, all foreign bank branches were confiscated by the new Vietnamese government. Id. at 203-04. The plaintiff became a naturalized citizen of the United States in 1981 and thereafter filed suit in 1983 to recover her deposit. Id. at 204. The plaintiff contended that the statute of limitations had been tolled by CPLR 209(a) because the territory of the United States' ally, South Vietnam, had been occupied, and the United States government had not yet "recognized the communist forces as the legitimate government of the territory." Id. at 206 n.1. In holding that the plaintiff's action was time barred under New York law, Judge Haight rejected plaintiff's contention, stating:

> [Section] 209(a) does not contemplate the ultimate triumph of a government which the United States recognizes, with a concomitant indefinite suspension of the statute of limitations. Under the plain wording of the statute, the "termination of hostilities" puts an end to the tolling of the statute. It is not suggested that hostilities continued in [what] used to be South Vietnam within six years of the filing of the suit.

Id. Similarly, in Lord, Day & Lord, 134 F. Supp. 2d at 565, Judge Batts, after noting that every court to consider the question had reached the same conclusion, held that to the extent CPLR 209(a) or (b) applied to the situation presented, "its tolling provisions ceased to operate upon the termination of military conflict with Vietnam."

Thus, CPLR 209 cannot affect the outcome here, since more than 28 years passed between the termination of hostilities in Vietnam in April 1975 and plaintiffs' filing of suit in January 2004.[19]

3. Application of New York Statutes of Limitations to Plaintiffs' Claims

Phan Thi Phi Phi ("Phi"). Phi alleges that following her exposure to Agent Orange in 1966 through July 1971, she suffered miscarriages in December 1971, July 1972, November 1972 and July 1973. Complaint, ¶¶ 119, 121-23, 125-26. All of Phi's claims are time-barred, since the limitations period expired by April 30, 1978, three years after the termination of hostilities, and her miscarriages all occurred many years prior to July 1, 1986.

Nguyen Van Quy ("Quy") and Vu Thi Loan ("Loan"), Individually and as Parents and Natural Guardians of Nguyen Quang Trung ("Trung") and Nguyen Thi Thuy Nga ("Nga").

Quy alleges exposure to Agent Orange from 1972 through 1975. Complaint, ¶¶ 129-31. During those years, Quy experienced headaches, exhaustion and skin rashes. Complaint, ¶ 132. By 1985, Quy had to stop working because of worsening spells of weakness

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[19] In addition, as discussed in Section A.3. above, the Department of the Treasury's designation of North Vietnam and South Vietnam as foreign countries subject to the Foreign Assets Control Regulations cannot serve as a basis for tolling the running of the New York statutes of limitations.

and exhaustion. Complaint, ¶¶ 134-37. In October 2003, Quy was diagnosed with stomach cancer, liver damage, and was found to have fluid in his lung. At the very least, Quy's claims for headaches, exhaustion, weakness and skin rashes are barred, since those conditions all manifested prior to July 1, 1986 and the limitations period had expired by April 30, 1978, three years after the termination of hostilities.

In 1983 or 1984, the pregnancy of Quy's first wife ended in a stillbirth. Complaint, ¶ 135. Any claim related to that pregnancy became time-barred by April 30, 1978, three years after the termination of hostilities, since Quy's first exposure to Agent Orange occurred in 1972.

Duong Quynh Hoa ("Hoa"), Individually and as Administratrix of the Estate of Her Deceased Child, Huynh Trung Son ("Son"). Hoa's child, Son, was born developmentally disabled in 1970 and died in 1971. Complaint, ¶¶ 151-52. Thus, the limitations periods for any claims on behalf of Son expired by April 30, 1977, two years after the date the war ended. Hoa had miscarriages in 1971 and 1972, at which point she decided not to become pregnant again. Complaint, ¶¶ 154-56. The deadline for any claims relating to Hoa's miscarriages or her ability to have healthy children expired by April 30, 1978, even assuming her first exposure to Agent Orange did not occur until the date she gave birth.

Sometime "after the end of the war," presumably in the late 1970s, Hoa began to experience itchiness and rashes on her skin. Complaint, ¶ 153. Any claim based on itchiness or rashes expired by April 30, 1978, since Hoa's first exposure to Agent Orange occurred prior to the end of the war. In 1985, after bouts of weakness and fainting spells, Hoa was diagnosed with diabetes. Complaint, ¶ 157. The limitations period for Hoa's diabetes claim also expired by April 30, 1978. In 1998, Hoa was diagnosed with breast cancer. Complaint, ¶ 159. The

limitations period for that claim expired prior to the end of 2001. In sum, all claims of Hoa and Son are barred by the applicable statutes of limitations.

Ho Kan Hai ("Hai"), Individually and as Parent and Natural Guardian of Her Child, Nguyen Van Hoang ("Hoang"). Hai alleges that since 1972, she has been a farmer living in the Aluoi Valley, and that on unspecified dates, she has had four miscarriages and surgery to remove ovarian tumors. Complaint, ¶¶ 163. Since Hai has failed to specify the dates, the Court should presume that the injuries manifested by no later than July 1, 1986. Accordingly, all of Hai's claims are barred.

Ho Thi Le ("Le"), Individually and as Administratrix of the Estate of Her Dead Husband, Ho Xuan Bat ("Bat"). In 1980, Le gave birth to her first child, who died in 1982. In or about 1981, Le had a miscarriage In 1982, she gave birth to another child, who died at 16 days of age. Complaint, ¶¶ 168-69. The limitations period for any claims relating to the deaths of Le's two children expired by no later than the end of 1984. The limitations period for any claim relating to Le's miscarriage expired by April 30, 1978.

Nguyen Muoi ("Muoi") and Nguyen Dinh Thanh ("Thanh"). Muoi, who was born in October 1983, at some time prior to 1999 began experiencing "severe pain in his mid-section and back, making it extremely difficult for him to move." Complaint, ¶ 175. By 1999, he "realized that he had a serious health problem." Complaint, ¶ 175. Accordingly, the statute of limitations for any claims relating to Muoi's condition had expired by the end of 2002. The fact that Muoi's health problem allegedly was not formally diagnosed as spina bifida until July 18, 2003 (see Complaint, ¶ 176) cannot serve to extend the limitations period. See Krogmann v. Glens Falls City Sch. Dist., 231 A.D.2d 76, 78, 661 N.Y.S.2d 82, 83 (3d Dep't) ("discovery" of injury occurred "when plaintiff began to suffer from the collection of physical symptoms upon which her complaint is premised," not when those ailments "were definitively linked to a

particular diagnosis"), lv. to appeal dismissed, 91 N.Y.2d 848, 690 N.E.2d 492, 667 N.Y.S.2d 683 (1997). The Complaint is not clear as to the basis for any claim asserted by Muoi's father, Thanh, but any claim by Thanh would be similarly barred.

Dang Thi Hong Nhut ("Nhut"). Nhut suffered miscarriages in 1974 and 1975. Complaint, ¶¶ 183-84. In 1977, a pregnancy was terminated when an ultrasound examination determined that the fetus had spina bifida and other deformities. Complaint, ¶ 185. In 1980, Nhut suffered another miscarriage. Complaint, ¶ 186. The limitations periods for claims based on Nhut's miscarriages and the termination of her pregnancy in 1977 all expired by three years after the termination of the war, i.e., by April 30, 1978, since Nhut's first exposure to Agent Orange occurred prior to the end of the war.

Nguyen Thi Thu ("Thu"), Individually and as Parent and Natural Guardian of Nguyen Son Linh ("Linh") and Nguyen Son Tra ("Tra"). Thu alleges that she had a miscarriage on an unspecified date. Complaint, ¶ 193. However, since Thu also alleges that she gave birth to four children, two of whom were born in 1987 and 1990, respectively, the miscarriage presumably occurred well prior to January 30, 2001 (the date three years prior to the commencement of this action), even if it occurred on or after July 1, 1986. See CPLR 214-c(6). Accordingly, Thu's claims based on her miscarriage are barred by the applicable statutes of limitations.

Le Thi Vinh ("Vinh"). Sometime prior to 1986, Vinh began to experience fatigue, joint pain and swollen glands and also suffered two miscarriages. Complaint, ¶ 204. Thus, any claims based on these conditions expired by April 30, 1978, three years after the end of the war.

Nguyen Thi Nham ("Nham") and Nguyen Minh Chau ("Chau"). Prior to 1981, Chau gave birth to a child who was born prematurely and died after one month, and to a second

child who was born with birth defects and died after ten days. Complaint, ¶ 210. The deadline for asserting any claims relating to Chau's two deceased children expired two years after the children's respective deaths – i.e., by no later than the end of 1982.

Nham's son, Chau, was born in 1981 and is alleged to suffer from chloracne. Since Chau reached the age of 18 by no later than December 31, 1999, Chau's deadline for filing suit expired no later than three years thereafter, i.e., on December 31, 2002.

Nguyen Thi Thoi ("Thoi"). Thoi's first child, who was born in 1967, died in 1970. The limitations period within which to file any claim related to that death expired by two years after the end of the war, i.e., by April 30, 1977. Complaint, ¶ 215. Thoi thereafter suffered a miscarriage, which presumably occurred in the early 1970s. Id. Any claim relating to that miscarriage became time barred by three years after the end of the war, i.e., by April 30, 1978. Thoi also alleges that she suffers from "frequent headaches, fatigue and joint pain." Id. Since Thoi does not allege the date of onset of these conditions, the Court should presume that they first occurred well prior to July 1, 1986. Thus, the deadline for filing any claim relating to those conditions expired by April 30, 1978. See Complaint, ¶¶ 213-15.

Nguyen Long Van ("Van"), Thong Thi Tu ("Tu") and Nguyen Thang Loi ("Loi"). In the three years 1967, 1968 and 1969, Tu gave birth to three boys, each of whom died within a day or less after birth. Complaint, ¶¶ 222-24. Any claims relating to the deceased children became time-barred by no later than April 30, 1978, the date three years after the end of the war. In 1970, Tu gave birth to Loi, who was born with deformed feet and is developmentally disabled. Complaint, ¶ 225. Any claim by Loi became time-barred in 1991, three years after Loi reached the age of majority. In 1997, Tu was diagnosed with diabetes. Complaint, ¶ 227. Tu's claim for diabetes became time-barred three years later, in 2000.

CONCLUSION

For the reasons set forth above, the undersigned defendants respectfully request that this Court issue an Order: (A) granting summary judgment dismissing the above-described personal injury claims of the individual plaintiffs on the ground that those claims are barred by the applicable statutes of limitations; (B) awarding them the costs and disbursements incurred by them in connection with this motion, including reasonable attorneys' fees; and (C) granting such other and further relief as the Court may deem just and proper.

Dated: New York, New York
November 2, 2004

Respectfully submitted,

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Certificate of Service

I hereby certify that on November 2, 2004 the foregoing document was filed with the Clerk of the Court and served in accordance with the Federal Rules of Civil Procedure, and/or the Eastern District's Local Rules, and/or the Eastern District's Rules on Electronic Service upon the following parties and participants:

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