

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK**

IN RE: "AGENT ORANGE" PRODUCT LIABILITY LITIGATION	)	MDL No. 381
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	)	)
THE VIETNAM ASSOCIATION FOR VICTIMS OF AGENT ORANGE/DIOXIN, et al,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 04 CV 0400 (JBW)
	)	
THE DOW CHEMICAL COMPANY, et al,	)	
	)	
Defendants.	)	

**PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS'  
MOTION FOR PARTIAL SUMMARY JUDGMENT  
DISMISSING PERSONAL INJURY CLAIMS OF INDIVIDUAL  
PLAINTIFFS BASED ON STATUTES OF LIMITATIONS<sup>1</sup>**

**I.**

**INTRODUCTION**

The individual plaintiffs who assert personal injury claims in this case are now and at all relevant times have been Vietnamese citizens residing in Vietnam. Between 1975 and 1994, when the United States and Vietnam resumed an economic trading relationship, Vietnam was on the list of blocked states subject to the Treasury Department's Foreign

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<sup>1</sup> This response is submitted on behalf of the plaintiffs as to whom defendants have moved for summary judgment on statute of limitations grounds. It should be noted that defendants did not move for summary judgment as to all of the plaintiffs, nor as to all of the claims of some of the plaintiffs. This response is also directed to the Motion For Summary Judgment filed by Riverdale Chemical to the extent it adopts and asserts the other defendants' arguments in support of summary judgment based on statute of limitations grounds.

Asset Control Regulations promulgated under the Trading With the Enemy Act, 50 U.S.C. App. § 5(b). The entire predicate of defendants' statute of limitations argument is that the individual Vietnamese plaintiffs could have somehow hired American lawyers on a contingency fee basis to pursue a massive class action at some time before Vietnam was removed from the Treasury Department's list of blocked states in 1994. Because the Foreign Asset Control Regulations legally, politically, and practically barred the courthouse door against such lawsuits filed in the United States by Vietnamese citizens residing in Vietnam, the predicate for defendants' motion for summary judgment based on statute of limitations grounds is incorrect as a matter of law. See 31 C.F.R. § 500 et seq.

Defendants' statute of limitations arguments are also based upon supposedly undisputed facts that are without support in the record, and that are directly contradicted by the evidence submitted by plaintiffs. In particular, throughout their brief defendants make factual claims about *when* individual plaintiffs knew or should have known about their injuries and the causes for those injuries -- the date that all parties concede is the appropriate date for the commencement of the limitations period as to plaintiffs' federal claims. Defendants' factual assertions about the dates that the various plaintiffs discovered the nature and cause of their injuries are drawn from remarkably bald mischaracterizations of statements made in plaintiffs' second amended class action complaint. Defendants' supposedly "undisputed" facts are, therefore, without evidentiary support and cannot form the factual basis for a grant of summary judgment under Rule 56. Additionally, plaintiffs have submitted sworn declarations directly contradicting defendants' reading of plaintiffs' complaint (a reading that may most charitably be

described as wishful thinking, if not outright fiction).

Defendants' motion should be denied.

## II.

### STATEMENT OF FACTS

#### A. Plaintiffs Lacked Knowledge Of The Cause Of Their Injuries Until Very Recently.<sup>2</sup>

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<sup>2</sup> All parties agree that the commencement of the limitations period under federal law is triggered by the plaintiff's discovery of facts putting plaintiff on notice of her injury *and its cause*. In their Rule 56.1 statement, defendant's claim that each plaintiff's allegations in the second amended complaint establish at least when the plaintiff knew of their being exposed to Agent Orange -- a legally irrelevant date in any case. It is, however, typical of how defendants play fast and loose with the facts that *in not one single instance* does the second amended complaint support defendants' contentions as to when plaintiffs knew they were exposed to Agent Orange. *Not one*. One example is illustrative. At paragraphs 118-127 of the second amended complaint, plaintiffs detail the facts relating to plaintiff Phan Thi Phi Phi ("Phi"). Dr. Phi was a physician. These paragraphs detail where she worked during the war; what food she ate; and what water she drank. The complaint details which areas were heavily affected by herbicide spraying, and alleges that Dr. Phi was, in fact, exposed to herbicides. But there is not a word in these paragraphs, or anywhere else in the complaint, as to when Dr. Phi *discovered* she had been exposed to Agent Orange. Not one word. Undeterred by the facts, defendants cite these paragraphs in the Rule 56.1 statement as supporting the statement that "prior to January 30, 1994, Phi believed" she had been exposed to Agent Orange. (Rule 56.1 Statement, ¶ 1).

Defendants' statement of facts supporting summary judgment is drawn in its entirety from two sources: plaintiffs' second amended class action complaint and the affidavit of Michael M. Gordon, which attaches and purports to authenticate a number of media stories, primarily radio broadcasts and articles published in the newspaper Nhan Dan. Defendants claim with regard to every single plaintiff as to whom they move for summary judgment that these articles standing alone put plaintiffs on sufficient notice of the cause of their injuries as to commence the running of the limitations period "prior to January 30, 1994."

Defendants' conclusions are not supported by the evidence. At least during 1965 through 1967, U.S. aircraft dropped leaflets in the Vietnamese language on areas affected by herbicide spray. (Exhibit 1 (Merrill Dec. ¶ 3)). These leaflets expressly stated that the herbicides sprayed by U.S. forces were *not* harmful to humans. (Exhibit 1 (Merrill Dec. ¶ 4 and Exs. thereto)). Indeed, it was believed at the time by the U.S. soldiers fighting in Vietnam (a group with presumably greater knowledge about such matters than the indigenous population) that neither the local civilian population nor GIs were in any danger from the spraying because they believed the spray was not a danger to humans. (Exhibit 2 (Kelly Dec.. ¶¶ 2-6)).

And in fact the presumption based on media stories is incorrect as to the individual plaintiffs. Plaintiff Nguyen Thi Thoi, for example, did not know, and had no reason to know, that his illnesses were possibly the result of being contaminated by Agent Orange until 2000. (Exhibit 3 (Thoi Dec. ¶¶ 3-4)). He was a plain laborer who had no time to read newspapers and seldom watched television. (Id. ¶ 3). He first learned he had possibly

having been contaminated by Agent Orange in 2000. (Id. ¶ 4).

Similarly, plaintiff Dang Hong Nhut did not know, and had no reason to know, that her illnesses and miscarriages were the result of exposure to Agent Orange or other herbicides until 2002. (Ex. 4 (Nhut Dec. ¶ 3)). Neither did plaintiff Nguyen Thi Nham, (Ex. 5 (Nham Dec. ¶ 2), or Le Thi Vinh (who lived in the countryside and rarely read newspapers or watched television) (Ex. 6 (Vinh. Dec. ¶ 5)). Indeed, plaintiff Le Thi Vinh had not even heard about Agent Orange until 2002. (Id.). Because of the lack of availability to and interest in the media, and because of the widespread lack of information coupled with disinformation spread by the U.S. government and others about Agent Orange, *none* of the plaintiffs knew or had reason to know that any of their illnesses, or those of their respective families, were caused by Agent Orange or other herbicides until at the very earliest 1996 or 1997. (Ex. 1 (Merrill Dec. ¶¶ 2-4 and Exhibits thereto)); Buckingham, *Operation Ranch Hand*, p. 64; Ex. 2 (Kelly Dec. ¶¶ 3-6); Ex. 3 (Thoi Dec. ¶¶ 3-4); Ex. 4 (Nhut Dec. ¶¶ 2-3); Ex. 5 (Nham Dec. ¶¶ 2-3); Ex. 6 (Vinh Dec. ¶ 5); Ex. 7 (Le Dec. ¶ 4); Ex. 8 (Quy ¶¶ 3-5); Ex. 9 (Loan Dec. ¶¶ 3-5); Ex. 10 (Tu Dec. ¶¶ 3-4); Ex. 11 (Hoa Dec. ¶¶ 3-5)).

**B. Plaintiffs Could Not Have Hired Counsel Before The Embargo Was Lifted.**

Before Vietnam was removed from the list of blocked states under the Trading With The Enemy Act in 1994, counsel representing these plaintiffs would not have entered into a contingency fee contract to represent any of the plaintiffs in this case. (Ex. 14 (Kokkoris Dec.¶ 4-5). This is true, first, because a reasonable lawyer would not have risked

exposing himself or herself to criminal penalties or loss of licensure by entering into what could be deemed a "contract" or "agreement" prohibited by the Treasury Department's Foreign Assets Control Regulations. (Id. ¶ 4). Second, the regulations clearly barring the payment of U.S. attorneys by Vietnamese nationals, as well as the enforcement of any judgment obtained on behalf of such Vietnamese nationals, meant that the risk of the attorney not getting paid, even if victorious, would be entirely too great. (Id. ¶ 5).

None of the individual plaintiffs could have, at any time, afforded to prosecute a lawsuit against these defendants by paying an attorney what a court in this country would hold is a reasonable hourly rate for legal services. (Id. ¶ 6).

**C. None Of The Plaintiffs Believed The Embargo Would Allow Them To File Suit Before 1994.**

Plaintiff Ho Thi Le did not understand in 2002, or at any time before then, that it was possible for her to assert claims in U.S. courts against U.S. companies for injuries sustained during the war. (Id. ¶ 5). Similarly, even after Nguyen Van Quy saw a doctor in 2002, he did not understand he had any right to sue U.S. companies for injuries suffered during the war. Plaintiff Vu Thi Loan did not understand until after 2003 that she had any right to sue U.S. companies based on injuries caused during the war because of her lack of knowledge and education. (Id. ¶ 6). Plaintiff Dang Hong Nhut did not believe that the embargo of Vietnam by the U.S. would have allowed her to bring suit in the U.S. at any time prior to 1994. (Id. ¶¶ 4-5)

In fact, because of the embargo and lack of information available to them, *none* of the plaintiffs believed, or had reason to believe, that it was possible to sue the defendants

based on their involvement in herbicide contamination in Vietnam until 2002 or after. (Ex. 3 (Thoi Dec. ¶ 4); Ex. 4 (Nhut Dec. ¶ 5); Ex. 5 (Nham Dec. ¶ 4); Ex. 6 (Vinh Dec. ¶ 6); Ex. 7 (Le Dec. ¶ 5); Ex. 8 (Quy ¶ 6); Ex. 9 (Loan Dec. ¶ 6); Ex. 10 (Tu Dec. ¶ 5); Ex. 11 (Hoa Dec. ¶ 6); Ex. 12 (Vo Thanh Hai Dec. ¶ 3); Ex. 13 (Nguyen Thi Hai Dec. ¶ 6)).

### **III.**

#### **ARGUMENT**

##### **A. None Of Plaintiffs' Federal Claims Are Barred By The Statute Of Limitations.**

###### **1. The Applicable Statute Of Limitations Is Not In Controversy.**

Defendants correctly identify the statute of limitations applicable to all of plaintiffs' federal claims under the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350, and the Torture Victim Protection Act of 1991 ("TVPA"), 28 U.S.C. § 1350 (note), which is the ten-year statute of limitations contained in the TVPA. Plaintiffs agree that this is the applicable limitations period for their federal claims. Plaintiffs strongly disagree, however, with defendants' conclusion that this statute bars all federal personal injury claims of plaintiffs

who discovered their injury and its cause before January 30, 1994.<sup>3</sup>

**2. The Treasury Department's Foreign Asset Control Regulations Barred Plaintiffs From Filing This Lawsuit Until Vietnam Was Removed From The List Of Restricted States in 1994.**

The statute of limitations did not begin to run for any of the plaintiffs or class members, including any who discovered the existence and cause of their injury in the 1970s or 1980s, until the Treasury Department removed Vietnam from its list of blocked states in early 1994. Defendants have anticipated and cryptically responded to this obvious tolling issue in their opening brief. Defendants state that the Foreign Assets Control Regulations “nowhere purport to bar a citizen” of Vietnam “from bringing a personal injury lawsuit in the courts of the United States.” (Def. Br. at 8). It is true that the

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<sup>3</sup> Defendants' brief is, in places, a masterpiece of sleight of hand. Defendants in one breath concede that the limitations period under the TVPA begins to run at the time when the plaintiff either knows or should have known of his or her injury *and its cause*, but in the next breath defendants argue, without any legal support, that a “strict date of injury accrual rule” should apply instead. (Def. Br. 5 n.4). It is enough to say that the cases cited *by defendants*, and other cases as well, unanimously hold that the TVPA's limitations period begins to run at the date of discovery of the injury and its cause. Defendants' faint footnoted suggestion that a draconian “strict date of injury accrual rule” should be applied is without any legal support and, in view of the unanimity of decisions on the subject, borders on the frivolous.

words “personal injury lawsuit” do not appear in the Regulations, but defendants’ glib conclusion that the Regulations did not impede these Vietnamese plaintiffs’ ability to bring this action is simply incorrect. To understand why this is true, one must look at the regulations themselves, something defendants understandably failed to do in their opening brief.

The Office of Foreign Assets Control, a branch of the Treasury Department, administers the Foreign Assets Control Regulations. The Office of Foreign Assets Control is the branch of the executive department entrusted with carrying out economic warfare, punitive sanctions, and trade sanctions against the enemies of the United States – which, until 1994, included Vietnam. The regulations administered by this powerful branch of our government in fact prohibit a broad range of transactions. See 31 C.F.R. §§ 500.201 et seq. The regulations provide that *all* of the transactions listed in the regulations “are prohibited” if “such transactions are by, or on behalf of, or pursuant to the direction of any designated foreign country, *or any national thereof*, or such transactions involve property in which any designated foreign country, *or any national thereof*, has at any time on or since the effective of this section had any interest of any nature whatsoever, direct or indirect.” 31 C.F.R. § 500.201(a) (emphasis supplied). The list of prohibited transactions include:

- (1) All transfers of credit and all payments between, by, through, or to any banking institution or banking institutions wheresoever located, with respect to any property subject to the jurisdiction of the United States or by any person (including a banking institution) subject to the jurisdiction of the United States;
- (2) All transactions in foreign exchange by any person within the United

States; and

(3) The exportation or withdrawal from the United States of gold or silver coin or bullion, currency or securities, or the earmarking of any such property, by any person within the United States.

31 C.F.R. § 500.201. Thus, the regulations restricted the right of Vietnamese nationals to engage in any transfer of money in the United States, whether such money is in the form of credit, payment, foreign exchange, or precious metals. The regulations further require any “property” subject to the above restrictions, including “currency, bank deposit . . . bank accounts . . . undisputed and either liquidated or matured debts, claims, obligations or other evidence of indebtedness,” to be held in domestic bank accounts subject to the blocking powers of the Treasury Department. 31 C.F.R. § 500.205.

Most sweeping of all, and at the heart of the issue now before the Court, is the regulations’ definition of “transfer,” which is broadly defined to include:

any actual or purported act or transaction, whether or not evidenced by writing, and whether or not done or performed within the United States, the purpose, intent, or effect of which is to create, surrender, release, transfer, or alter, directly or indirectly, any right, remedy, power, privilege, or interest with respect to any property and without limitation upon the foregoing shall include the making, execution or delivery of any assignment, power, conveyance, check, declaration, deed, deed of trust, power of attorney, power of appointment, bill of sale, mortgage, receipt, agreement, contract, certificate, gift, sale, affidavit or statement; the appointment of any agent

trustee, or other fiduciary; the creation or transfer of any lien; the issuance, docketing, filing or the levy of or under any judgment, decree, attachment, execution, or other judicial or administrative process or order, or the service of any garnishment; the acquisition of any interest of any nature whatsoever by reason of a judgment or decree of any foreign country; the fulfillment of any condition, or the exercise of any power of appointment, power of attorney, or other power.

31 C.F.R. § 500.310. “Transfer,” therefore, means more than just the wiring of money or writing of checks. Id. It includes any transaction that alters the legal position of Vietnamese parties with respect to money or property held in the United States. Id. Any “contract” or “agreement” is prohibited without special Treasury permission or license. Id. A Vietnamese citizen prior to 1994 could not give a power of attorney or appoint an agent trustee or other fiduciary; write a check; make a deed; or deliver any power without Treasury Department permission. Id.

Plaintiffs will concede that this laundry list of prohibited and restricted transactions does not specifically include “filing a personal injury lawsuit.” Plaintiffs also recognize that defendants have cited cases, though none controlling in this court, holding that the Foreign Assets Control Regulations do not prohibit the filing of a lawsuit, but only the execution upon any resulting judgment. But defendants have utterly failed to explain how these plaintiffs could have hired attorneys, without any assurance of their ever being paid, without running directly afoul of the definition of “transfer” contained in 31 C.F.R. § 500.310. The very act of hiring a lawyer is an “agreement” and a “contract” specifically

prohibited by the regulations. "Under New York law, the relationship of an attorney and client is contractual, and the rules governing contract formation determine whether such a relationship has been created." E.g., Catizone v. Wolff, 71 F. Supp.2d 365, 368 (S.D.N.Y.1999) (internal quotations omitted). In fact, under New York rules governing the professional conduct of attorneys, contingency fee arrangements, like the kind that would be essentially required to prosecute a plaintiff's case of this magnitude, are not only contracts, but must be in writing. New York's Code of Professional Responsibility section 2-106(d) requires a lawyer who has been employed "in a contingent fee matter" to "[p]romptly . . . provide the client with a writing stating the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal." Code of Prof. Resp., N.Y [Prof. Resp.] ¶ 2-106. See also Liner Tech. Inc. v. Hayes, 624 N.Y.S.2d 284, 285 (3d Dept. 1995) ("contingency fee agreement[s] . . . must be in writing").

Indeed, the Office of Foreign Assets Control has specifically taken this very position, arguing that even the bare formation of an attorney-client relationship constitutes a "transfer" that is prohibited without specific government approval. American Airways Charters, Inc. v. Regan, 746 F.2d 865 (D.C. Cir. 1984). Regan, which involved whether a Florida corporation designated as "a Cuban national" under the Trading With The Enemy Act could hire a lawyer without Treasury Department approval, is the only case addressing the issue. The D.C. Circuit in Regan held that the Treasury Department's position was not authorized by the enabling legislation, particularly in light of "due process" concerns implicated by placing limits on the right to hire counsel. 746 F.2d at 872-73. Neither the

Second Circuit nor the Supreme Court have addressed whether the Treasury Department's prohibition of hiring an attorney without a license is consistent with the enabling legislation or the U.S. Constitution, nor has any other court. Anne Beck & Silvia Tonova, "No Legal Representation Without Governmental 'Intervention,'" 17 Geo. J. Legal Ethics 597, 608 (2004).

Thus, before the date that the D.C. Circuit handed down the Regan decision in 1984, a potential Vietnamese litigant considering whether to hire a U.S. lawyer to represent her in a lawsuit filed in the Eastern District of New York had before her only the Treasury Department's regulations clearly barring her from entering into a "contract" or "agreement" to hire a U.S. lawyer. After the D.C. Circuit decided Regan in 1984, such a litigant could now consider a circuit decision from a different circuit, without binding force in this circuit, that never questioned the clear meaning of the regulations themselves, but merely held that the regulations as enforced by the Treasury Department were not authorized by Congress's enabling legislation in view of "due process" accorded to a Florida corporation. We submit that both before and after Regan a Vietnamese national living in Vietnam, where the Due Process Clause of the Fourteenth Amendment to the United States Constitution is not applicable, would reasonably conclude that the long-standing regulations of the Treasury Department prohibited the unlicensed hiring of an attorney.

That's hurdle number one. Even should a potential Vietnamese litigant hire a lawyer either through a discretionary license issued by the Treasury Department or in risky reliance upon the non-binding and unique decision in Regan, she would face a second

hurdle: how to *pay* that lawyer to perform legal services in what this Court knows is a massive, complex, and expensive lawsuit. There is absolutely no disputing that a Vietnamese national prior to 1994 could not *pay* her attorney without government approval. Such payment would constitute a naked transfer falling squarely within the heart of the Treasury Department's regulations. The D.C. Circuit in Regan stated that it is "doubtful whether any of the exclusively economic purposes legitimately served by the Act would be advanced" by barring the bare formation of the attorney-client relation, since Cuba would not economically benefit if "AAC is allowed to retain—although *not to pay*—counsel without government license." 746 F.2d at 872 (citations omitted; emphasis supplied).

So our quixotic imaginary pre-1994 Vietnamese plaintiff must hire a lawyer in the face of possibly unenforceable regulations barring even the bare formation of the attorney-client relationship, as well as indisputedly enforceable regulations barring the payment of such an attorney. Where would she find such a lawyer? None of the plaintiffs could have afforded to hire a lawyer at an hourly rate to prosecute this massive and hotly-disputed case. (Ex. 14 (Kokkoris Dec. ¶ 6). Like so many indigent plaintiffs before her, the Vietnamese plaintiff would have had to rely upon the contingency fee contract, that great leveler in our American system of jurisprudence. Unfortunately, no contingency fee plaintiff lawyer would have taken this case, either. (Id. ¶ 4-5). This is so because even if the lawsuit were allowed to be filed, as defendants contend, the attorney would have had to undertake a case that is complex and expensive without any reasonable expectation of ever being able to collect a judgment, and hence a fee. (Id. ¶ 5); see 31 C.F.R. § 500.310 (specifically barring "the issuance, docketing, filing or the levy of or under any judgment,

decree, attachment, execution, or other judicial or administrative process or order, or the service of any garnishment”). The potential risk that there would be no payment, or payment delayed for a substantial period of time, even should the underlying lawsuit succeed in producing a favorable judgment in plaintiff’s favor, would be far too great for any reasonable attorney to undertake. (Id.). Additionally, an attorney taking such a case faced the real prospect of *criminal* penalties for violating the TWEA. (Id. ¶ 4).

Therefore, because the Foreign Assets Control Regulations barred all of the Vietnamese plaintiffs from hiring and paying an attorney, and because no plaintiffs’ attorney would have taken this case on a contingency fee basis until such time as Vietnam was taken off the list of blocked states, none of the statutes of limitations began running for any of the plaintiffs until after February 3, 2004. The federal claims asserted in this lawsuit are timely with respect to all of the plaintiffs because this action was filed within ten years of that date, which all the parties concede is the applicable limitations period for the federal claims. 28 U.S.C. § 1350 (note § 2(c)). To hold otherwise would be to punish plaintiffs for failing to do the impossible.

**B. All The Statutes Of Limitations Were Tolled During The Disability Or Minority Of The Plaintiffs.**

It is a bedrock principle of American law that statutes of limitations generally are tolled during any period in which a party is disabled or lacks capacity to bring suit, including any period in which the party is a minor. Strignano ex rel. Strignano v. Jamaica Hosp., 694 N.Y.S.2d 857 (1999) (applying CPLR § 208); Pickett v. Brown, 462 U.S. 1, 16 n.15 (1983) (“statutes of limitations generally are tolled during a child’s minority”). Federal

courts borrowing state statutes of limitations apply the typical state tolling provisions as a matter of course. E.g. Nieves-Marquez v. Puerto Rico, 353 F.3d 108 (1st Cir. 2003) (applying tolling rules for minors in case brought under the Americans with Disabilities Act and the Rehabilitation Act); Papa v. United States, 281 F.3d 1004 (9th Cir. 2002) (applying tolling rules in Bivens action). The policy justification for such tolling is that it is unfair to bar claims by those lacking the legal capacity and maturity to make the decision to file a lawsuit.

In the face of this well-established principle that statutes of limitations do not run against minors, applied just as often in federal as in state court, defendants claim that it “is well-settled that a *federal statute of limitations* ‘is not tolled during the period of a putative plaintiff’s minority.’” (Def. Br. 11 (emphasis supplied)). That is incorrect. The cases to which defendants cite for this broad principle purportedly governing all “federal statutes of limitations” *all* deal with the Federal Tort Claims Act (“FTCA”), which has a unique and jurisdictional statute of limitations provision. E.g. McCall ex rel. Estate of Bess v. United States, 310 F.3d 984 (7th Cir. 2002), cert. denied, 538 U.S. 946 (2003). Courts construing the FTCA “are not free to construe the FTCA’s statute of limitations broadly” because “the FTCA waives the immunity of the United States and its statute of limitations is a condition of that waiver.” McCall, 310 F.3d at 988. Because the FTCA’s statute of limitations is jurisdictional in nature,<sup>4</sup> and inextricably intertwined with the scope of Congress’s waiver of the United States’ sovereign immunity, the cases refusing to allow tolling of the statute of

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<sup>4</sup> As we demonstrate in subsection D, *infra*, the statute of limitations under the TVPA is emphatically *not* jurisdiction, subject, as it is, to concepts such as equitable tolling

limitations during the minority of a child injured by a tort committed by an agent of the United States are simply not relevant.

Defendants do not cite *any* authority other than the inapplicable FTCA cases in support of their argument that the statutes of limitations were not tolled during the minority of any of the plaintiffs. Defendants have not pointed to a single case outside of the FTCA context in which the federal courts have refused to follow the general rule that statutes of limitations are tolled during the time of a plaintiff's minority. Defendants certainly have not cited to any cases where any court has rejected tolling for minor plaintiffs in cases brought under the ATCA or the TVPA. Accordingly, defendants effort to bar the claims of minors without giving them the equitable benefit of tolling during their minority should be rejected.

**C. Defendants Have Failed To Meet Their Burden Of Showing That Any Of The Plaintiffs Knew Or Should Have Known Of The Cause Of Their Condition Over Ten Years Prior To The Filing Of The Complaint.**

Even if the statute of limitations was somehow not tolled during the period that Vietnam was on the list of blocked states under the Treasury Department's Foreign Asset Control Regulations, defendants asserting a statute of limitations defense must nevertheless prove that each plaintiff's cause of action accrued more than ten years prior to the filing of this lawsuit. The parties are in agreement as to the legal standard applicable to this issue – the statute of limitations does not begin to run until the plaintiff discovers both the injury *and its cause*. United States v. Kubrick, 444 U.S. 111 (1979);

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designed to ameliorate the harsh effect of such statutes.

Kronisch v. United States, 150 F.3d 112 (2d Cir. 1998), see Def. Br. at 4. Accrual is “postponed until the plaintiff has or with reasonable diligence should have discovered the critical facts of both his injury and its cause.” Kronisch, 150 F.3d at 121. And while a plaintiff has a duty to make inquiries based upon information she receives, a “claim does not accrue when a person has a mere hunch, hint, suspicion, or rumor of a claim.” Id.

Defendants’ essential argument is that publicity in Vietnam, primarily radio broadcasts and articles published in the newspaper Nhan Dan, put plaintiffs on sufficient notice that their injuries were caused by the dioxin contained in Agent Orange to trigger the running of the statute of limitations. Such arguments, which seek to give presumptive effect to “public” matters plaintiffs may or may not have seen, or even matters plaintiffs actually did see that at best may have given rise to “suspicions,” have been summarily rejected by the Courts. See Stoleson v. United States, 629 F.2d 1265, 1270 (7th Cir.1980) (no accrual of cause of action based on plaintiff’s reading of union newspaper article and suggestion by occupational safety specialist when medical science had not yet established a relationship between occupational exposure to nitroglycerin and cardiovascular problems); Gould v. United States, 684 F.Supp. 508, 512 (N.D.Ill.1988) (statute of limitations not triggered by mere suspicions in combination with receipt of medical records when physician reviewing records could not determine cause of injury); Thompson v. United States, 642 F.Supp. 762, 767 (N.D.Ill.1986) (no accrual of cause of action based on plaintiff reading material which raised suspicion and contacting attorney to look into matter, when autopsy report not received until several months later).

Defendants claim that the “widespread publicity” in the essentially agrarian, poverty-

stricken, and war-torn countryside of post-war Vietnam is analogous to the situation faced by the Fifth Circuit in Winters v. Diamond Shamrock Chemicals Co., 149 F.3d 387 (5th Cir. 1998), cert. denied, 526 U.S. 1034 (1999). The Fifth Circuit held in Winters that the widespread media coverage *in the United States* of the Agent Orange controversy during the 1980s was sufficient to put the plaintiff in that case on notice of her claims, triggering the commencement of the statute of limitations period. The Fifth Circuit presumed that the plaintiff “surely had sufficient knowledge in the mid-1980s” to give rise to a duty on plaintiff’s part to “make an inquiry that would lead to discovery of the cause of action.” But the Fifth Circuit had more than a mere presumption in the record before it, though that is unmentioned in defendants’ brief. The Court in Winters described the evidence as follows:

Winters testified that she first thought that she might have been exposed to Agent Orange while she had been working as a nurse in Saigon when she read newspaper reports in the 80s of the defoliant's use in Vietnam. She also testified that she may have seen on the news during that same time the publicity about veterans who were suing for cancer that was allegedly caused by Agent Orange. She said, however, that she did not "follow" the reports about the claims and that she never read of any reported link between Agent Orange and NHL until the 1991 article.

149 F.3d at 403-04. Thus, Ms. Winters actually saw news reports putting her on notice of the potential link between Agent Orange and her conditions, but failed to make any reasonable inquiries based on that knowledge actually imparted to her by those reports.

Here, in stark contrast, because of the lack of availability of and interest in the

media, and because of the widespread lack of information coupled with disinformation spread by the U.S. government and others about Agent Orange, *none* of the plaintiffs knew or had reason to know that any of their illnesses, or those of their respective families, were caused by Agent Orange or other herbicides until at the very earliest 1996 or 1997. (Ex. 1 (Merrill Dec. ¶¶ 2-4 and Exhibits thereto)); Buckingham, *Operation Ranch Hand*, p. 64; Ex. 2 (Kelly Dec. ¶¶ 3-6); Ex. 3 (Thoi Dec. ¶¶ 3-4); Ex. 4 (Nhut Dec. ¶¶ 2-3); Ex. 5 (Nham Dec. ¶¶ 2-3); Ex. 6 (Vinh Dec. ¶ 5); Ex. 7 (Le Dec. ¶ 4); Ex. 8 (Quy ¶¶ 3-5); Ex. 9 (Loan Dec. ¶¶ 3-5); Ex. 10 (Tu Dec. ¶¶ 3-4); Ex. 11 (Hoa Dec. ¶¶ 3-5)). The plaintiffs in war-torn Vietnam did not have daily access to news media, unlike citizens living in 1980s America. Thus, the plaintiffs did not have *actual* knowledge of media reports linking their diseases to dioxin, and in the context of their lives, which are very different from the lives led by U.S. citizens, there is no basis to impute such knowledge to them. At a *minimum*, plaintiffs' evidence creates a genuine issue of material fact on the statute of limitations issue, precluding summary judgment.

**D. The Circumstances Faced By Plaintiffs Equitably Tolloed The Statutes Of Limitations.**

We have detailed the circumstances in the United States that essentially barred the courthouse door to these plaintiffs until relations with Vietnam were normalized in 1994. It would give the Court an incomplete picture of plaintiffs' plight, however, to omit the very real impediments faced by the plaintiffs in their own country. Quite simply, because of the economic and political realities existing in Vietnam during this period, none of the plaintiffs had the opportunity to file a lawsuit in the U.S. to redress their injuries at anytime prior to

1994, even if U.S. law did not bar them from hiring an attorney or prosecuting a lawsuit. For example, plaintiff Ho Thi Le did not understand in 2002, or at any time before then, that it was possible for her to assert claims in U.S. courts against U.S. companies for injuries sustained during the war. (Id. ¶ 5). Similarly, even after Nguyen Van Quy saw a doctor in 2002, he did not understand he had any right to sue U.S. companies for injuries suffered during the war. Plaintiff Vu Thi Loan did not understand until after 2003 that she had any right to sue U.S. companies based on injuries caused during the war because of her lack of knowledge and education. (Id. ¶ 6). Plaintiff Dang Hong Nhut did not believe that the embargo of Vietnam by the U.S. would have allowed her to bring suit in the U.S. at any time prior to 1994. (Id. ¶¶ 4-5)

In fact, because of the embargo and lack of information available to them, *none* of the plaintiffs believed, or had reason to believe, that it was possible to sue the defendants based on their involvement in herbicide contamination in Vietnam until 2002 or after. (Ex. 3 (Thoi Dec. ¶ 4); Ex. 4 (Nhut Dec. ¶ 5); Ex. 5 (Nham Dec. ¶ 4); Ex. 6 (Vinh Dec. ¶ 6); Ex. 7 (Le Dec. ¶ 5); Ex. 8 (Quy ¶ 6); Ex. 9 (Loan Dec. ¶ 6); Ex. 10 (Tu Dec. ¶ 5); Ex. 11 (Hoa Dec. ¶ 6); Ex. 12 (Vo Thanh Hai Dec. ¶ 3); Ex. 13 (Nguyen Thi Hai Dec. ¶ 6).

Let's return to our imaginary pre-1994 potential Vietnamese plaintiff. Unless she was possessed of an extraordinary amount of information not generally available to the Vietnamese public, she would never have come up against the American legal impediments we discussed at length above. In these unique circumstances, this Court, sitting in equity, should hold that the statutes of limitations were equitably tolled. The courts have not hesitated to apply the doctrine of equitable tolling to the 10-year statute of

limitations applicable under the ATCA and the TVPA. Hilao v. Estate of Marcos, 103 F.3d 767, 773 (9th Cir. 1996); Doe v. Saravia, 2004 WL 2913256, slip op. at \*32 (E.D. Cal., Nov. 24, 2004); Estate of Cabello v. Fernandez-Larios, 157 F. Supp.2d 1345, 1367 (S.D. Fla. 2001). This is consistent with Congressional intent. The House Report on the TVPA states: “A ten year statute of limitations insures that the Federal Courts will not have to hear stale claims. In some instances, such as where a defendant fraudulently conceals his or her identification or whereabouts from the claimant, *equitable tolling remedies may apply to preserve a claimant's rights*. H.R.Rep. No. 102367, 102d Cong., 1st Sess., at 5 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 88 (emphasis supplied).

Equitable tolling is not limited to such circumstances, however. It generally applies to “extraordinary circumstances outside the plaintiff’s control” rendering it “impossible to timely assert the claim.” Cabello, *supra*, 157 F. Supp.2d at 1367. It would be difficult to imagine more “extraordinary circumstances” than those faced by the plaintiffs in this case. These individuals resided in a poverty-stricken, war-torn nation hostile to the United States, with which it had just ended a war. None of them possessed the sort of legal sophistication that Americans have come to take for granted in this country. They lived in a nation listed as an *enemy* of the United States.<sup>5</sup> That listing had the effect, as we have demonstrated, of barring any commerce whatsoever between Americans and Vietnamese

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<sup>5</sup> The “policy” of the Trading With the Enemy Act is “not new.” Standard Oil Co. v. Markham, 64 F. Supp. 656, 665 (S.D.N.Y. 1945). It is “designed to cripple the enemy’s commerce, to capture his property and to decrease his capacity for prolonging hostilities through the use of private resources.” *Id.* Thus, placing countries like Vietnam or Cuba or Iraq on the list of blocked states under the TWEA is a decision to conduct economic *warfare* against those countries.

nationals. In these “extraordinary circumstances,” as supported by the legal status of Vietnam prior to 1994 and by the evidence contained in the record, we submit that it was literally “impossible” for any of the individual plaintiffs to assert their claims at any time before 1994. Cabello, supra, 157 F. Supp.2d at 1367.

Additional support for applying equitable tolling in this case is provided by the conduct of the defendants and the government in denying the dangers of Agent Orange, and in fact directly (and falsely) claiming that Agent Orange and other herbicides did not pose any risk of harm to humans. (See, e.g., Ex. 1 (Merrill Dec. ¶ 4) (describing propaganda leaflets dropped in Vietnam denying the dangers of Agent Orange)). Even the U.S. soldiers fighting in Vietnam believed the herbicides to be harmless, and presumably repeated that belief to others. (Ex. 2 (Kelly Dec. ¶¶ 2-6)). Obviously this Court (of all courts) is aware that the defendants steadfastly denied that any of these herbicides caused harm to humans throughout the 1970s, 1980s, and 1990s. In these circumstances, and in the atmosphere of disinformation fomented by the defendants, the statute of limitations should be equitably tolled. Defendants should not be rewarded for hiding the truth for so long. To time-bar plaintiffs’ claims in these circumstances would not only punish them for failing to do the impossible, it would reward the defendants for their lies. Equity should not allow such a result.

#### **IV.**

#### **CONCLUSION**

For the reasons we have explained, none of the plaintiffs’ federal claims are barred by the statute of limitations. None of the statutes of limitations for the minor plaintiffs’

claims began running until after they reached the age of majority. Accordingly, defendants' motion for summary judgment based on statutes of limitations grounds should be denied in its entirety.

Respectfully submitted,

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