SAJIDA BANO, HASEENA BI, SUNIL KUMAR, DR. STANLEY NORTON, ASAD KHAN, SHIVNARAYAN MAITHIL, DEVENDRA KUMAR YADAV, BHOPAL GAS PEEDIT MAHILA UDYOGSANGATHAN (BGPMUS), GAS PEEDIT NIRASHRIT PENSION BHOGI SANGHARSHMORCHA (GPNPBSM), BHOPAL GAS PEEDIT MAHILA STATIONERYKARMACHARI SANGH (BGPMSKS), BHOPAL GAS PEEDIT SANGHARASHSAHAYOG SAMITI (BGPSSS), and BHOPAL GROUP FOR INFORMATION ANDACTION (BGIA), on behalf of themselves and all others similarly situated, Plaintiffs, -against-UNION CARBIDE CORPORATION and WARREN ANDERSON, Defendants.

99 Civ. 11329 (JFK)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

March 18, 2003, Decided

March 18, 2003, Filed

PRIOR HISTORY

Bano v. Union Carbide Corp., 273 F.3d 120, 2001 U.S. App. LEXIS 24488 (2d Cir. N.Y., 2001)

DISPOSITION

Defendants' motion pursuant to Rules 12(b)(1), 12(b)(6) and/or 56 of the Federal Rules of Civil Procedure to dismiss Counts 9 through15 of the Amended Complaint was granted in its entirety. Claims against Andersen were dismissed.

COUNSEL

For Plaintiffs: Kenneth F. McCallion, H. Rajan Sharma, Of Counsel, McCALLION & ASSOCIATES, LLP, LAW OFFICES OF CURTISV. TRINKO, New York, New York.

For Plaintiffs: Richard L. Herz, Of Counsel, EARTHRIGHTS INTERNATIONAL, Washington, DC.

For Defendants: William A Krohley, Paul F. Doyle, Antonia F. Giuliana, Of Counsel, KELLEY DRYE & WARREN LLP, New York, NewYork.

JUDGES
JOHN F. KEENAN, United States District Judge.

OPINIONBY
JOHN F. KEENAN

OPINION

OPINION AND ORDER

JOHN F. KEENAN, United States District Judge
Defendants Union Carbide Corporation ("UCC") and Warren Anderson ("Anderson") move pursuant to Rules 12(b)(1), 12(b)(6)and/or 56 of the Federal Rules of Civil Procedure to dismiss Counts 9 through 15 of the Amended Complaint.

For the reasons set forth below, defendants' motion is granted in its entirety.

Procedural History

On November 15, 1999, plaintiffs filed a class action complaint against defendants asserting claims under the Alien Tort ClaimsAct, 28 U.S.C. § 1350, for alleged human rights violations arising out of the Bhopal gas Disaster in India on December 2-3,1984. See In re Union Carbide Corp. Gas Plant Disaster, 634 F. Supp. 842, 844 (1986). On January 4, 2000, plaintiffs amended theircomplaint to add claims under New York State common law for alleged environmental pollution in and around the Bhopalplant. On August 28, 2000, this Court granted defendants' motion to dismiss and/or for summary judgment and dismissedplaintiffs' Amended Complaint in its entirety. Bano v. Union Carbide Corp., 2000 U.S. Dist. LEXIS 12326, No. 99 Civ.11329, 2000 WL 1225789 (S.D.N.Y. Aug. 28, 2000).

The Second Circuit affirmed the dismissal of Counts 1 through 8 of the Amended Complaint alleging claims arising out of theBhopal Disaster. Bano, et al. v. Union Carbide, et al., 273 F.3d 120, 122 (2d Cir. 2001). The Circuit Court remanded the state lawenvironmental claims contained in Counts 9 through 15 of the Amended Complaint (the "environmental claims"). Id. at 122,132-33.

Those claims are the subject of this motion.

Factual Background

The Union Carbide India Limited ("UCIL") Bhopal plant began operations as a formulations plant in 1969 on land leased from theIndian State of Madhya Pradesh,

comprising 88 acres. See Am. Compl. P 77. UCIL was incorporated under Indian law and50.9% of its stock was owned by the defendant corporation. In re Union Carbide Corp., 634 F. Supp. at 844. Pesticides wereimported from Union Carbide in the United States and formulated in Bhopal into a saleable product. Am. Compl. P77. In 1979-1980, UCC decided to back-integrate the UCIL plant to manufacture pesticides. Defs.' Rule 56.1 Stat. P 1. During the manufactureof pesticides, hazardous wastes were generated and dumped within the plant's premises. Three solar evaporation ponds located onthe plant site were used for the disposal and treatment of chemical wastes. Id. P 1.

On night of December 2-3, 1984, a deadly gas leak from UCC's facility killed thousands of people in Bhopal, India and maimedseveral thousand ("the Disaster"). Am. Compl. P 50. Immediately after the Disaster, the UCIL plant was closed by order ofthe Indian government and placed under the control of the Indian Central Bureau of Investigation ("CBI"). Id. P 2. The plantnever resumed normal operations, and all activity at the site was closely monitored and controlled by the CBI, the Indiancourts and the Madhya Pradesh Pollution Control Board. Id.; Krohley Decl. 5/6/02 P 3.

In April 1990, the National Environmental Engineering Research Institute ("NEERI") produced a report finding that nogroundwater contamination had been caused by the solar evaporation ponds. Am Compl. P 4. The report concluded that: thesoil within 2.5km of the solar evaporation ponds was not contaminated by the ponds; the water in the test wells outside thearea of the ponds was within drinking water standards; the water quality of water tested within a 10km radius of the plantindicated no contamination from the ponds. See Krohley Decl. P 4. The work recommended by the report was undertaken byUCIL and later completed by the renamed company under new ownership following the sale of Union Carbide's shares in UCIL.Id. P 4.

On September 9, 1994, Union Carbide sold all of its UCIL shares to McLeod Russell (India) Limited. Id. P 5. McLeod Russellrenamed UCIL "Eveready Industries India Limited" ("EIIL"). Id. Following the sale, Union Carbide had no involvement inEIIL's continuing remediation work at the former UCIL plant site. Id.; Krohley Decl. P 6.

In October 1997, NEERI issued a report finding contamination within the former UCIL plant, specifically in its waste disposalareas, but finding no groundwater contamination outside the plant. Id. Krohley Decl. P 6. On July 7, 1998 the plant site was turned overby EIIL to the State of Madhya Pradesh at the request of the state government, which terminated the leases originallygranted to UCIL because the land was no longer being used to operate a factory, an express condition of the leases. Id. P 7; P 8. On July28, 1998, the Madhya Pradesh Pollution Control Board announced that there had not been any off-site contamination causedby the operations of the plant. Id. P 8.

On November 29, 1999, Greenpeace issued a report stating that "massive environmental contamination, including contaminationof the drinking water of

residents in the nearby communities, entirely unrelated to the Bhopal Disaster, has taken place at the UCILsite where large amounts of toxic chemicals and by-products from the factory's original manufacturing processes continue topollute the land and water." Am. Compl. P 95. The report also indicated that "by approximately 1998, the Indian government haddetected offsite contaminants and posted warning signs reading "water unfit for consumption" and "do not use for drinking"at wells north of the plant." Am. Compl. P 103.

The Present Motion

Plaintiffs are one individual, Haseena Bi ("Bi"), who was named as a plaintiff in the Amended Complaint, and three organizationsthe Bhopal Gas Peedit Mahila Udyog Sabgathan, the Gas Peedit Nirashrit Pension Bhogi Sangharsh Morcha,Bhopal, and the Bhopal Gas Peedit Mahila Stationery Karmachari Sangh. See Am. Compl. PP 5-8, 28-30. Bi alleges personal injuries basedon alleged suffering from various ailments which she attributed to contamination of the local well water near her home inAtal Ayub Nagar, located next to the Bhopal plant. Her home is approximately 400 meters (1,312 feet; approximately one quartermile) from the perimeter compound of the plant. McCallion Let. Dec. 10, 2002. The hand-pump she used to get water wasapproximately 200 meters (656.17 feet) from the perimeter of the plant. Id. Bi claims that moving to Atal Ayub Nagar in 1990she "began having chronic abdominal pains, severe burning sensations in her stomach as well as all over her body and recurrent,bleeding rashes on her limbs ever since she moved [there]." Am. Compl. PP 6-7. Bi and her family "had long suspectedthat these illnesses and physical problems were caused by the water which they used for drinking and washing", Am.Compl. P 7, which had a "strong, noxious smell of chemicals with an oily layer on top." Bi Aff. P 8. Bi and her family usedwater from a hand-pump and well in the area. Am. Compl. P 8. On November 29, 1999, Greenpeace tested water from this well and foundit was contaminated. Id. Plaintiff organizations "seek redress for Defendants' severe pollution of their land and drinking water,which has caused Plaintiffs serious health problems. Defendants caused this pollution by recklessly dumping, storing and abandoninglarge quantities of highly toxic pollutants at its plant in Bhopal, India, despite knowing that these pollutants werelikely to contaminate their neighbors' water and land." Am. Compl. PP 95-105; Pl.'s Opp. Br. at 1. The remaining environmentalclaims seek relief under New York common law for negligence, public nuisance, private nuisance, strict liability,medical monitoring, trespass and equitable relief. See Am. Compl. PP 180-213.

Defendants contend that Union Carbide has not owned any stock in UCIL for over seven years and the Madhya Pradesh stategovernment has had exclusive ownership, possession and control of the land for nearly four years, including 1999, the yearin which Greenpeace first claimed to have found groundwater contamination at the former UCIL plant site. Therefore, defendantsurge, plaintiffs' claims should be dismissed.

Jurisdiction in this case is based on diversity pursuant to 28 U.S.C. § 1332 because there is complete diversity between theparties and the matter in controversy exceeds $ 75,000 exclusive of costs and interests.

Venue is proper pursuant to 28 U.S.C. § 1391(a) because defendants do business within the District and/or own property withinthis District pursuant to § 1391(b).

For the reasons set forth below, defendants' motion is granted in its entirety.

DISCUSSION

I. New York Common Law, Not the Law of India, Applies to the Environmental Claims

Defendants argue that New York common law does not extend to claims for harm suffered in India claiming that "Indian law mayapply to the claims, but plaintiffs have disavowed reliance on such law." Defs'. Br. at 7. Plaintiffs' original complaint statedthat their causes of action arose under the laws of India. See Compl. P 33 (plaintiffs' "causes of action arise under, among others, the ...Laws of the Republic of India."). By contrast, in the Amended Complaint, plaintiffs state that "no remedy is available toplaintiffs under the laws of India or before any court in their domestic jurisdiction." Am. Compl. P 139.

The Court is required on a Rule 12(b)(6) motion to draw all reasonable inferences in plaintiffs' favor. See Northrop v. Hoffman ofSimsbury, Inc., 134 F.3d 41, 43 (2d Cir. 1997). "Under the liberal pleading principles established by Rule 8 of the Federal Rules ofCivil Procedure, in ruling on a 12(b)(6) motion "the failure in a complaint to cite a statute, or to cite the correct one, in no wayaffects the merits of a claim. Factual allegations alone are what matters." Id. at 46 (citation omitted). Plaintiffs argue that thisCourt is free to apply Indian law, notwithstanding any pleading defects in the Amended Complaint.

New York law applies in cases in which the harm occurs abroad, and where there is no conflict with the law of the foreignjurisdiction. Employers Ins. of Wausau v. Duplan Corp., 899 F. Supp. 1112, 1118-19 (S.D.N.Y. 1995).

This case has been the subject of extensive litigation at the district and appellate levels, as well as abroad. See generally Bano,273 F.3d at 122-25 (detailing the history of litigation surrounding the Disaster). The complaint here has been amended allowingplaintiffs an additional opportunity to carefully consider their claims, how to frame them and under which law(s) topursue them. In doing so, they chose to remove India from their legal bases on which to make their claims. That deliberate choice weighson the Court's analysis. While normally given latitude, plaintiffs' pleading defects cannot be tolerated at this point in suchlengthy and extensive litigation. The Amended Complaint was filed in 2000; plaintiffs cannot claim to have been unfamiliarwith choice of law provisions and the relief available to them in different forums at that time. The Court finds thatplaintiffs cannot proceed under Indian law. New York law applies to the environmental claims.

II. Bi's Environmental Claims Seeking Money Damages are Barred by the Statute of Limitations

The timeliness of a claim based on diversity jurisdiction is governed by the statute of limitations for the state in which the courtsits. Stuart v. Am. Cyanamid Co., 158 F.3d 622, 626-27 (2d Cir. 1988). Therefore, New York law is the appropriate law fordetermining the timeliness of plaintiff's claims. Weiss v. LaSuisse, 161 F. Supp. 2d 305, 313-14 (S.D.N.Y. 2001).

A. Statute of Limitations Under N.Y.C.P.L.R. 214-c(2)

Under N.Y.C.P.L.R. 214-c(2), there is a three year statute of limitations for latent injuries resulting from toxic exposure. Id. Ms. Biacknowledges that her personal injury claims are barred if the claims are "latent", not patent.

The statute provides that the three year limitations period for an action to recover for "the latent effects of exposure to anysubstance ... shall be computed from the date of discovery of the injury by the plaintiff or from the date when through theexercise of reasonable diligence such injury [*12] should have been discovered by the plaintiff, whichever is earlier." Id.;Bartlett v. Moore Bus. Forms, Inc., 2000 U.S. Dist. LEXIS 8686, 2000 WL 362022, at *4 (N.D.N.Y. Mar. 30, 2000). New Yorkcourts have held that "discovery of the injury" occurs "when the injured party discovers the primary condition on which theclaim is based." Id.; In re: New York County DES Litig. (Wetherill v. Eli Lilly & Co.), 89 N.Y.2d 506, 509, 655 N.Y.S.2d 862, 678N.E.2d 474 (1997). "Injury" refers to "an actual illness, physical condition, or other similarly discoverable objectivemanifestation of the damage [or symptoms] caused by previous exposure to an injurious substance and not to thediscovery of the nonorganic, nonbiological cause of the symptoms or the particular toxic substance to which plaintiff wasexposed." Pompa v. Burroughs Wellcome Co., 259 A.D.2d 18, 696 N.Y.S.2d 587, 590-91 (N.Y. App. Div. 1999) (citationsomitted). New York courts dismiss toxic exposure claims where the pleadings or record demonstrate that plaintiffdiscovered or should have discovered her injury more than three years prior to the filing of the complaint. See, e.g., Harleyv. 135 East 83rd Owners Corp. et al., 238 A.D.2d 136, 137-38, 655 N.Y.S.2d 507 (N.Y. App. Div. 1997) (dismissing plaintiff'sclaims under CPLR 214-c(2) and 214-c(4) where her symptoms began in December 1987, the cause was discovered inMarch 1990, but the complaint was not filed until January 1993). The statute does not begin to run upon the discovery of thecause of the injuries; rather, the discovery of "the primary condition on which the claim is based" starts the statute oflimitations running. Wetherill, 89 N.Y.2d at 509 (emphasis added).

Because CPLR 214-c applies only to latent injuries, whether the statute applies here centers on whether Bi's injuries are patent orlatent. Plaintiffs contend that Bi's alleged injury is patent, i.e., there was no interval between the exposure and the resultingharm. Defendants argue the injuries are latent, i.e., that the adverse effects of exposure to a toxin did not immediately manifestthemselves after the exposure took

place. Bi acknowledges that there was an interval between the exposure and harm thatfollowed. She claims that "within a few weeks of moving into Atal Ayub Nagar" in 1990, Bi Aff. P 5, she "began havingchronic abdominal pains, severe burning sensations in her stomach as well as all over her body and recurrent, bleedingrashes on her limbs ever since she moved [there]." Am. Compl. PP 6-7. Bi and her family "had long suspected that theseillnesses and physical problems were caused by the water which they used for drinking and washing", Am. Compl. P 7,which had a "strong, noxious smell of chemicals with an oily layer on top." Bi Aff. P 8. Bi and her family used water from a hand-pump and well in the area. Am. Compl. P 8. On November 29, 1999, Greenpeace tested water from this well and found it wascontaminated. Id.

According to the Seventh Edition of Black's Law Dictionary, 1999, latent means "concealed; dormant" and patent means"obvious; apparent." BLACK'S LAW DICTIONARY 887, 1147 (7th ed. 1999). The alleged injuries here did not manifestthemselves at the time of exposure which would have rendered them obvious. Rather, they showed themselves later andhence were concealed.

The Court finds that Bi's injuries are latent. While I recognize that the period between exposure and manifestation was not of greatduration, the injuries did not manifest themselves immediately. Therefore, the statute of limitations began to run not uponexposure to the toxins, but after the latent injury manifested itself. Under N.Y.C.P.L.R. 214-c(2), Bi was required to file a claimby 1993, three years after she moved to Atal Ayub Nagar and began suffering from these ailments. The Amended Complaintwas filed on January 4, 2000, some ten years after she first discovered her injuries. Bi's claims filed are therefore time-barred.

B. Statute of Limitations Under N.Y.C.P.L.R. 214-c(4)

Defendants argue that Bi's damages claims are also barred under N.Y.C.P.L.R. 214-c(4), which contains an exception to the threeyear limitations period. Id. That provision extends the limitations period where the plaintiff was aware of the injury but therewas a justifiable delay in the discovery of its cause because the technical knowledge was not available. Id. Section 214-c(4)provides that within five years after the date the injury was or should have been discovered, a plaintiff may commence anaction within one year of the discovery of the cause of the injury, provided that the plaintiff alleges and proves that "technical,scientific or medical knowledge and information sufficient to ascertain the cause of his injury had not been discovered,identified or determined prior to the expiration of the period within which the action or claim would have beenauthorized." Bartlett, 2000 U.S. Dist. LEXIS 8686, 2000 WL 362022, at *5 (quoting CPLR 214-c(4)).

Bi alleges that she discovered her injuries in 1990. See Am. Compl. PP 6-7. Assuming that this exception applied, herenvironmental claims should have been filed by 1996. Her suit was brought on January 24, 2000; therefore, it is also barred under CPLR 214-c(4).

Nonetheless, if this Court found that Bi's injuries were patent, they would still be time-barred. Where the injury is patent, CPLR214 applies. Dabb v. Nynex Corp., 262 A.D.2d 1079, 691 N.Y.S.2d 840, 841 (N.Y. App. Div. 1999). Under that provision, a personalinjury action must be commenced within three years of the date of accrual, i.e., the date of the injury. N.Y.C.P.L.R. 214(5). This traditionalrule applies "even where the result is to deprive injured plaintiffs of their day in court." Blanco v. Am. Tel. & Tel. Co.,223 A.D.2d 156, 646 N.Y.S.2d 99, 103 (N.Y. App. Div. 1996). Bi's stated that her injuries manifested in 1990; therefore, her suitshould have commenced by 1993. Because her suit was filed in 2000, it is time-barred.

Bi's argument that the continuing tort doctrine preserves her personal injury claims fails. Section 214 also has a continuing wrongexception that treats continuing harms as creating separate, successive causes of action. Plaintiff claims that because Bialleges patent and continuing harms, her claims should not be dismissed. Am. Compl. P 104 ("the spread of contaminants isworsening caused by the continued and ongoing release of chemicals from materials which remain dumped or stored on site.")Plaintiff claims that Bi under the continuing harm doctrine her action was timely filed. However, her claim fails as thatdoctrine preserves claims for damage to property, not to persons. See, e.g., Dabb, 262 A.D.2d 1079, 691 N.Y.S.2d 840 (applyingthe continuing wrong doctrine to trespass and nuisance claims for electrical damage to plaintiff's property); Nalley v.Gen. Elec. Co., 165 Misc. 2d 803, 630 N.Y.S.2d 452 (Sup. Ct. 1995) (applying the doctrine to trespass and nuisance claims basedon noxious odors).

Bi's claims for property damage are also barred by CPLR 214-c. Plaintiff claims that "nothing in the record suggests that Bi shouldhave discovered damage to her property before the 1999 Greenpeace/Exeter study." Pls'. Mem. Opp. at 12-13. However, Bi'spersonal injury and property claims both stem from groundwater contamination. It is nonsensical to assert that Bi's personalinjuries which manifested themselves in 1990 and to which she attributes the cause to be the well water should be viewedseparately from her property damage claims. Bi also cannot claim the benefit of the continuing tort doctrine here as it onlyapplies to property actions seeking injunctive relief, not to those seeking damages. Dabb, 691 N.Y.S. 2d at 842. Bi's claims forproperty damage are dismissed.

C. Equitable tolling

Plaintiffs argue alternatively that Bi's personal injury claims should be equitably tolled because Union Carbide fraudulentlyconcealed the contamination. Am. Compl. P 139 ("any statute of limitations is tolled on the grounds of fraudulentconcealment since Union Carbide, despite knowledge of the scale of contamination at the UCIL facility, not only failedto take remedial actions but withheld this information from publication.") Plaintiffs bear the burden of establishing thattolling applies. Park Assoc. v. Crescent Park Assoc., Inc., 159 A.D.2d 460, 552 N.Y.S.2d 314, 315 (N.Y. App. Div. 1990).

Equitable estoppel applies where plaintiff was induced by fraud, misrepresentation or deception to refrain from filing a timelyaction. Farkas v. Farkas, 168 F.3d 638, 642 (2d Cir. 1999); Simcuski v. Saeli, 44 N.Y.2d 442, 448-49, 406 N.Y.S.2d 259, 377N.E.2d 713 (N.Y. 1978). Underlying this rule is "the principle that a wrongdoer should not be able to take refuge behind the shield of hisown wrong is a truism." Stencils v. Chiappa, 18 N.Y.2d 125, 127, 272 N.Y.S.2d 337, 219 N.E.2d 169 (1966). Where no fiduciaryrelationship exists between the parties that would place an obligation of disclosure on defendants, plaintiffs must showactual misrepresentation by the defendant. Jordan v. Ford Motor Co., 73 A.D.2d 422, 426 N.Y.S.2d 359, 360-61 (N.Y. App.Div. 1980) (statute of limitations not tolled unless "there was a fiduciary relationship which gave defendant an obligation to informplaintiff of facts underlying the claim.") (emphasis added); Gleason v. Spota, 194 A.D.2d 764, 599 N.Y.S.2d 297, 299 (2dDept. 1993). Such a fiduciary relationship is not alleged or present here.

The Amended Complaint does not allege that Union Carbide made any misrepresentation to plaintiffs. Instead, plaintiffs onlyclaim that Union Carbide withheld information regarding the "scale of contamination at the UCIL facility." Am. Compl. P 139;Defs'. Br. at 14 (emphasis added). Such concealment does not rise to the requisite level of misrepresentation. Had defendantspublished inaccurate information leading Bi to believe the cause of her injuries was wholly unrelated to anycontamination at the plant, estoppel would apply. However, the documents cited by plaintiffs to prove affirmative wrongdoingare almost all internal correspondence and not representations to the public refuting their claim of fraudulentconcealment. See Sharma Aff. Exh. 28-31. Exhibit 27 is a document prepared by UCC dated May 16, 1990 sent to thestate government. See Exh. 27 (describing press reports appearing in the Times of India on that date which claimed that samples fromthe Bhopal plant evaporation ponds were found to be contaminated). The other memoranda were internal documents notdistributed to the public.

Additionally, equitable estoppel will not toll a limitations statute where a plaintiff possesses timely knowledge sufficient to placeher under a duty to make inquiry and learn all the relevant facts before the applicable statute of limitations expires. Gleason,599 N.Y.S.2d at 299 (citations omitted). Bi discovered her injuries in 1990, during the limitations period, putting her onnotice to uncover the cause. Therefore, if there was any concealment, it did not frustrate the discovery of her cause of action.See Defs' Mem. Supp. Summ. J. at 15. Bi was in no way induced or prevented from filing her claims based on any actions byUCC. Certainly she was not deceived for the entire ten year interval between discovery of her alleged injuries and filing of thecomplaint. The Court finds that there is no basis for tolling the statute of limitations.

III. Plaintiff Organizations Lack Standing to Bring Damages Claims. Under the test set forth in Hunt v. Washington State AppleCider Adver. Comm'n, 432 U.S. 333, 53 L. Ed. 2d 383, 97 S. Ct. 2434 (1977), to file a lawsuit on behalf of its membership

underthe doctrine of associational standing, an organization must demonstrate that: (1) its members would otherwise havestanding to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3)neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. Id. at 343.

An organization lacks standing to sue for money damages on behalf of its members if "the damage claims are not common to theentire membership, nor shared by all in equal degree," so that "both the fact and extent of injury would require individualizedproof." Warth v. Seldin, 422 U.S. 490, 515-16, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975). The third element bars suitswhere the claims asserted or relief requested requires the participation of individual members of the lawsuit. United Food &Commercial Workers Union Local 751 v. Brown Group Inc., 517 U.S. 544, 546, 134 L. Ed. 2d 758, 116 S. Ct. 1529 (1996) (citingHunt, 432 U.S. at 343); see also Sun City Taxpayers' Assoc. v. Citizens Utilities Co., 45 F.3d 58, 61 (2d Cir. 1995) (finding thatplaintiff failed the third prong of the Hunt test because recovery would require individualized proof by members).

Plaintiff organizations fail to meet the third prong of this test. The damages claims here are not common to the entire membershipand determining the extent of injury would require individualized proof requiring the participation of individualmembers. The contamination of each member's property would have to be assessed as well as the required remediationprocedures. The exposure took place over a thirty one year period. Logically the members were exposed in differentways and amounts. The amount of damages each member would be entitled to would vary based on amount of landowned, proximity to plant and other variables. The damage to their property would be similarly varied and difficult, if notimpossible, to ascertain. See Sun City, 45 F.3d at 61 (complaint covered 10 year period and each resident's injuries would differdepending upon the amount of utility services consumed and the uses to which those services were put); American Fed'n ofRailroad Police, Inc. v. National Railroad Passenger Corp., 832 F.2d 14, 16 (2d Cir. 1987) (finding that an association lackedstanding because any injury would have been peculiar to the individual member of the association). Therefore, theindividual members here would be required as parties if the suit were allowed to proceed and the member plaintiffs have nostanding to proceed in their absence. Accordingly, plaintiff organizations' money damage claims are dismissed.

IV. The Injunctive Relief Requested Regarding Property is Infeasible and Inappropriate

Plaintiffs seek an injunction to remediate off-site soil and groundwater contamination in addition to remediation of the formerUCIL plant. Am. Compl. PP 213, 100. The plant site is an 88 acre tract of land located over 8,000 miles from the United States in Bhopal,India. The Bhopal plant site is owned by and in the exclusive possession of the Indian State of Madhya Pradesh, notdefendants who have had no connection with the plant for 8 1/2 years.

Plaintiffs argue that this Court can nonetheless order this relief regardless of the property's location or ownership because

(1) the Court has jurisdiction in personam over defendants;

(2) Madhya Pradesh's present ownership and control of the site are not dispositive because State authorities requested that UCIL'ssuccessor continue the on-site rehabilitation activities begun by Union Carbide after the lease had been terminated;

(3) India's environmental policy is consistent with the relief requested and an injunction would support India's interest in regulating itsown environment;

(4) Union Carbide has not shown that the Court would be faced with an extended duty of supervision since it has provided noevidence suggesting how long remediation would take.

(5) The Court's supervision burden could be balanced by UCC's ready compliance, appointment of a Special Master or other thirdparty.

A court will not grant equitable relief where it "appears to be impossible or impracticable." United States v. American CyanamidCo., 556 F. Supp. 361, 373 (S.D.N.Y. 1983), rev'd on other grounds, 719 F.2d 558 (2d Cir. 1983). UCC now has noconnection with the property and has not had any control over it for several years. Ordering remediation by defendants wouldbe ineffectual as they have no means or authority to carry it out. To attempt to require UCC to be involved in theremediation effort would be futile. While plaintiffs correctly acknowledge that the Indian government would cooperate withany measures imposed, that cooperation does not mandate this Court to order remediation by UCC. The Court does not wish to directa foreign government as to how that state should address its own environmental issues. This Court would have no controlover any remediation process ordered. This would render the injunctive relief ineffectual. Plaintiffs' claim for injunctiverelief is denied.
V. Plaintiff's Request An Injunction Requiring Medical Monitoring

Plaintiffs seek to recover "the costs of a medical monitoring program." Am. Compl. P 205. The Court finds that medical monitoringis not a feasible remedy and one which would face insurmountable hurdles. Locating thousands of people who haveresided 8,000 miles away in Bhopal, India, over a span of more than thirty years would be nigh impossible. Plaintiffs claimthat the affected population can readily be identified as cancer and immune deficiencies are diseases capable of early detectionthrough screening. The Court finds that the effort required to identify those citizens to be monitored would be limitless.This task would be extremely onerous on defendants, if not impossible.
Further, defendants voluntarily built a hospital in Bhopal with the proceeds of the sale of Union Carbide's UCIL shares. Theycontend that this meets their obligation to the citizens of Bhopal. Proving the adage that no good deed goes unpunished,plaintiff are not satisfied by the hospital's existence. They complain that there is no evidence that

the hospital builtby UCC in Bhopal provides medical monitoring. This complaint would better be addressed to the hospital administrative staff. Thiscontribution goes far to satisfy any further obligation defendants have to the citizens of Bhopal. Requiring medical monitoring is an extraordinary remedy requiring extensive factual research and imposes a potentially indefiniteduty upon defendants to care for a population for which it has already made substantial efforts. Balancing this requestagainst the fact that defendants have already built the hospital shows this request not to be equitable. Plaintiffs' requestfor an injunction requiring medical monitoring is denied.

CONCLUSION

Plaintiffs' claims are untimely and directed at improper parties. Union Carbide has met its obligations to clean up thecontamination in and near the Bhopal plant. Having sold their shares long ago and having no connection to or authority over the plant, theycannot be held responsible at this time. The claims against Andersen are also dismissed.

Defendants' motion is granted in its entirety. This case is closed and the Court directs the Clerk of the Court to remove it from itsactive docket.

SO ORDERED.

Dated: March 18, 2003
JOHN F. KEENAN
United States District Judge