14-3087-cv

United States Court of Appeals

for the

Second Circuit

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(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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Plaintiffs-Appellants,

– v. –

UNION CARBIDE CORPORATION, MADHYA PRADESH STATE,

Defendants-Appellees,

WARREN ANDERSON,

Defendant.

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INTRODUCTION AND SUMMARY OF ARGUMENT

Union Carbide Corp. ("UCC") wants this Court to believe that "[t]his case is identical in all material respects to *Sahu I*," Defendant-Appellee's Brief ("DB") at 12-13, and thus to ignore the critical and dispositive ways in which the record here is different. The district court acknowledged that Plaintiffs submitted new evidence intended "to fill the gaps in the *Sahu I* plaintiffs' proof" and that accordingly, it had to "start[] fresh." SPA8-9 (internal quotation omitted). Despite UCC's repeated suggestions to the contrary, this Court must consider this case on its own merits.

UCC has ample reason to hope the Court will ignore the new evidence in *this* record. Bhopal project manager L.J. Couvaras, who oversaw the detail design, swore that he worked for UCC. And two leading experts independently concluded that UCC's inappropriate manufacturing process and inadequate waste disposal strategy caused the harm. For UCC to prevail, this Court would have to conclude that no rational juror could believe any of that evidence. So, in a further attempt to convince this Court not to consider the evidence, UCC claims it is not evidence at all. It is, of course, and it easily supports liability

under established tort standards.

Couvaras and two others – UCIL general manager Edward Munoz and plant operator T.R. Chauhan – testified that Couvaras was a UCC employee. That creates a genuine issue as to whether Couvaras was a UCC employee. UCC claims Couvaras's declaration is not evidence because it is conclusory and uncorroborated. It is neither. Couvaras testified to specific, relevant facts: that UCC employed him while he was at Bhopal, and that he was sent to be the project manager to manage the detail design and construction that would implement UCC's proprietary design. And although corroboration is unnecessary, Couvaras's declaration is corroborated by two other witnesses.

UCC also asks this Court to ignore Plaintiffs' experts' conclusions that UCC's MIC process and waste disposal strategy caused the harm. Defendant does not deny that Drs. Exner and von Lindern are eminently qualified; putting "experts" in quotes does not impeach their qualifications. Nonetheless, UCC asserts that this expert testimony is not evidence, because the court does not need it to understand documents. Every bit of that is wrong. The question is whether expert evidence would be *helpful* to a *jury*. Experts may draw conclusions

about ultimate issues, and those conclusions are themselves evidence. Courts on summary judgment cannot ignore expert evidence because they believe they already understand other evidence. The expert testimony must be credited and cannot be weighed, just like any other evidence. UCC's claim that because *Sahu I* was decided without experts, the court can discount such record evidence here is just a plea for this Court to ignore the new evidence in this case.

UCC can be held liable for providing its MIC process based on critical evidence, not at bar in *Sahu I*, that UCC did so despite knowing it was unsuitable for the site, which lacked adequate means for waste disposal. UCC concedes that the district court did not consider this new evidence. But Plaintiffs' new evidence is precisely the kind this Court recently found sufficient in *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 725 F.3d 65 (2d Cir. 2013) ("MTBE").

UCC was also responsible for the failure of the waste disposal system. New evidence shows that UCC's waste disposal strategy – storing toxins in ponds above Bhopal's aquifer – was a cause of the hazard. UCC does not dispute, as this Court specifically acknowledged in *Sahu I*, that such evidence suffices. While UCC denies that it

mandated that UCIL use ponds, negligently advising UCIL to do so is enough for liability. Regardless, evidence in *this* record shows UCIL had to follow UCC's disposal strategy. UCC's claim that the experts implicated UCIL's implementation as the cause of the hazard is difficult to fathom. The experts explicitly concluded that UCC's "high risk" idea to use ponds was to blame. Plaintiffs' evidence fills the gap identified in the record by this Court in *Sahu I*.

MTBE speaks clearly: a party can be liable for pollution even if it did not control the handling of the toxins. UCC cannot reconcile this with the district court's decision, which cut off liability based on the factually erroneous finding that UCC's disposal strategy was not mandatory.

UCC's attempts to distinguish *MTBE* are unpersuasive. Plaintiffs present evidence that UCC knew of the likelihood that its process and waste disposal strategy would lead to the contamination of Bhopal's water. That is all *MTBE* requires. UCC argues that they alerted UCIL to the disposal problem and therefore cannot be held liable. But *MTBE* did not create any such defense, and this Court should not create one here. Regardless, UCIL actually followed UCC's disposal strategy; UCC

cannot blame UCIL for doing what it said.

UCC's argument that if Plaintiffs prevail here they still should not be allowed to preserve Couvaras's testimony, even though he is an elderly, central witness, is just another attempt to exclude critical evidence, this time from trial.

The court below clearly discounted Plaintiffs' evidence. So UCC invites this Court on a trip through the looking-glass, to a world in which Couvaras's sworn, corroborated statement and the experts' considered conclusions are not evidence, and only the *Sahu I* record exists. This Court should not accept such flights of fancy, and should keep to the ordinary summary judgment rules.

ARGUMENT

I. Whether Couvaras worked for UCC is a disputed fact.

The district court accepted that if project manager L.J. Couvaras, who approved the plant's detail design, worked for UCC, UCC can be held liable. Because UCC cannot dispute that, it asserts that Couvaras's sworn testimony that he was employed by UCC is not evidence. DB20.

After preventing further factual development by successfully opposing a Rule 56(d) deposition of this third-party, UCC now argues

that the Couvaras declaration lacks "concrete particulars." DB28. But they fail to identify what "particulars" Couvaras should have included to establish the simple proposition that he remained employed by UCC.

Couvaras noted that UCIL was UCC's subsidiary, that he "was a UCC employee assigned to UCIL from 1971 to the end of 1981," and that UCIL provided the other staff to execute the project. Couvaras, ¶¶1-3, A3298. Indeed, he provides more information than necessary. By explaining that he was sent as project manager to "implement the project" "based on proprietary UCC design," he provides details as to *why* the project manager was a UCC employee.

None of the cases UCC cites support its argument that Couvaras's testimony can be ignored. The statement that "conclusory allegations" will not defeat summary judgment where the movant sets forth a documentary case, *Scott v. Coughlin*, 344 F.3d 282, 287 (2d Cir. 2003), has no bearing here. As explained in Plaintiffs' opening brief and below, UCC's "documentary case" is exceedingly weak. PB32-33. And the principle UCC cites does not apply where specific and sworn *facts* exist to create a dispute. 344 F.3d at 289.

Likewise, in *SEC v. Research Automation Corp.*, 585 F.2d 31, 33

(2d Cir. 1978), the nonmovants' affidavit was completely unresponsive, and was contradicted by the affiant's own statements. 585 F.3d at 34. Couvaras's declaration, by contrast, speaks directly to the critical issue, and does not contradict his prior statements.

Although Couvaras's testimony need not be corroborated, it is, by testimony that the district court largely ignored. PB33-35. Sworn declarations by two additional witnesses – including Munoz, UCIL's General Manager – confirm that, during his time as Project Manager, Couvaras was working for UCC, not UCIL. PB27-28, 33-34.[1]

The Couvaras, Chauhan and Munoz declarations are more than a mere "scintilla of evidence" that Couvaras worked for UCC; their evidence is hardly "so slight" that no rational juror could believe their testimony. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); *FDIC v. Great Am. Ins. Co.*, 607 F.3d 288, 292 (2d Cir. 2010). Because

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[1] In a footnote, UCC argues that Chauhan began his employment after Couvaras became Project Manager. But since they overlapped for years, that has no bearing on whether Chauhan knew UCC employed Couvaras. DB25 n.7.

Munoz declared that UCC "selected the Union Carbide corporation employee who acted as the Project Manager." A2899. UCC's argument that Munoz does not explicitly say Couvaras was employed by UCC when he was in Bhopal asks the Court to read the declaration in the light most favorable to UCC.

the court cannot weigh the evidence, that precludes summary judgment.

Undeterred, UCC argues that the documentary evidence showing that Couvaras worked for UCIL is so overwhelming that Couvaras's own testimony must be discounted. Even if there were circumstances in which a person's own corroborated testimony about who employed him could be discounted, that is not so here.

First, while UCC accepts that Couvaras was a UCC employee before and after his time in Bhopal, they point to no document showing that Couvaras accepted a transfer of his employer to UCIL – for example, a contract signed by Couvaras indicating this.

Second, the documents on which UCC relies are subject to multiple interpretations and suffer from credibility problems. UCC relies primarily on inferences it draws from the Definition of Services, which does not mention Couvaras but states vaguely that UCC "would provide 'a project manager on loan to UCIL.'" *See e.g.*, DB22, 24. But the document admits of the interpretation that UCC would *assign* a project manager to UCIL *who continued to be employed by UCC*. And even if that inference could be read against Plaintiffs, the document is hardly

conclusive, because it cannot establish what actually happened. Many of the other documents, for example, UCIL Engineering Group reports that say they were approved by Couvaras, would admit this same interpretation; they do not remotely purport to address who employed him. To conclude that these documents show Couvaras necessarily was employed by UCIL – to such a degree that they allow Couvaras's own testimony to be ignored – the district court impermissibly drew inferences in UCC's favor.

And UCC's documents have significant credibility problems, which the district court ignored. *See* PB31-33. On summary judgment, UCC cannot undermine Couvaras's testimony simply by attacking his credibility, but Plaintiffs can create a dispute of fact by identifying credibility concerns. Wright & Miller, FED. PRAC. & PROC. § 2738 (3d ed.).

Third, Couvaras's position as a UCC employee is consistent with his role in the approval of the plant's detail design, *e.g.* PB36, given the abundant evidence, including the Definition of Services, showing that all design decisions had to be approved by UCC. PB10-14, 35-36. A2681; A2684-2685.

II. Plaintiffs' new expert declarations are new, material evidence.

An expert declaration *is* evidence. Indeed, UCC does not deny that, in pollution cases, summary judgment is regularly denied based on expert testimony even though it would be granted absent such testimony. PB42 & n.9 (collecting cases); *BF Goodrich v. Betkoski*, 99 F.3d 505 (2d Cir. 1996). UCC nonetheless claims that Plaintiffs' expert evidence – which was not before the court in *Sahu I* and which establishes UCC's liability – somehow is not new, material evidence. DB28-29. UCC is incorrect.

The expert evidence was admitted, and must be considered just like any other record evidence, and not be weighed against other evidence. *In re Joint Eastern & Southern Dist. Asbestos Litig.*, 52 F.3d 1124, 1133 (2d Cir. 1995).

Plaintiffs' experts did not merely "rehash" the documents in *Sahu I*. DB29. They drew factual *conclusions* from the documents: that UCC provided a manufacturing process that was inappropriate for the Bhopal site; that UCC provided the "high risk" disposal strategy to store the wastes from that process in ponds above Bhopal's aquifer; and that UCC's process and strategy were the primary causes of the

contamination of the local drinking water. That is an expert's ordinary role. *See* Fed. R. Evid. 702 Advisory Committee Note (experts may "suggest[] the inference which should be drawn from applying the specialized knowledge to the facts."); Fed. R. Evid. 704(a) (expert may give opinion embracing an ultimate issue). Plaintiffs' experts' conclusions are thus record evidence that the Court must consider.

Experts are expressly permitted to draw conclusions from other record evidence, Fed. R. Evid. 703; such reliance does not permit the court to afford the expert's conclusions less weight, or to substitute its own judgment for the expert's. Regardless, Dr. Exner based his conclusions in part on two on-site investigations he personally conducted at the Bhopal facility. Exner ¶2, A3300.

UCC's argument that the absence of expert evidence in *Sahu I* shows the "court" does not "need" expert testimony to "understand the[] documents" misconstrues a court's proper role on summary judgment in several ways. DB29.

First, as the district court recognized, because new evidence had been presented, it needed to "start fresh." SPA9. And under Rule 702, expert testimony can be used to "help the trier of fact" not just

"understand the evidence" but also "determine a fact in issue" – in other words, an expert's conclusions *are* evidence. It would be remarkable to conclude that new evidence is not "needed" because summary judgment would have been granted in the absence of that evidence.

UCC's arguments, and the district court's opinion, cannot be reconciled with *BF Goodrich*. 99 F.3d 505. There, as here, the party opposing summary judgment in a pollution case relied on a well-regarded waste disposal expert. *Id.* at 524. This Court reversed summary judgment, because the district court "did not place much weight on the affidavit." *Id.* at 525. "[T]here was only one expert opinion before the court, and the court was obliged not to ignore it." *Id.*

Second, the fact that courts granted summary judgment in *Sahu I* without the benefit of expert testimony does not prove such testimony cannot help explain the documents; it merely established that a court cannot find UCC liable based on these documents without the benefit of expert testimony. It is no different from a case in which a court, lacking expertise, could not find sufficient evidence of causation from medical records, but could do so with the benefit of expert testimony.

UCC's speculation that the *court* does not need expert testimony

assumes that the court is the factfinder. But a jury is. The question is not whether the court needs expert assistance, but whether a jury could believe the experts' conclusions.

Third, the standard for admitting expert evidence is not whether the court believes it *needs* it, but whether it would "help" the factfinder. Fed. R. Evid. 702. "[D]etermining whether such evidence will assist the jury" involves "a common sense inquiry into whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding." *United States v. Locascio*, 6 F.3d 924, 936 (2d Cir. 1993) (internal quotation marks omitted) (quoting Fed. R. Evid. 702, advisory committee note).

Surely an "untrained layman" is not "qualified" to assess such things as the viability of pollution control methods, the elements of waste management, the responsibilities of various engineers in a multi-stage design process or the cause of the pollution at Bhopal. *See BF Goodrich*, 99 F.3d at 526-27 (holding "[e]xpert testimony was essential

in this complex environmental litigation").[2]

Given that the expert evidence is properly in the record, this Court must credit it, because a jury could do so. Affording the expert testimony less weight than other evidence would be weighing the evidence. But that is precisely the error the district court made and UCC encourages this Court to repeat. PB39-44.

UCC improperly attempts to refute Drs. von Lindern and Exner's conclusions by counter-interpreting the documents. *See Sierra Club*, 2007 U.S. Dist. LEXIS 100219, at *17-18 (holding that "[a]lthough an expert might be able to draw that conclusion, where the issue involves a highly complex [pollution control] device, [a party]'s counsel cannot"). It is for a jury to decide whether Plaintiffs' experts' interpretation of the documents is more persuasive than UCC's.

As this Court has held, "if [defendant] honestly believe[s] this [expert] evidence is weak, [it] should cross-examine [the experts] vigorously at trial and present contrary evidence to refute [their] findings and conclusions. This is the traditional and appropriate means

[2] *Accord Denny v. Westfield State Coll.*, 880 F.2d 1465, 1471 (1st Cir. 1989); *Sierra Club v. Ga. Power Co.*, No. 3:02-CV-151, 2007 U.S. Dist. LEXIS 100219, at *13-19, (N.D. Ga. Jan. 11, 2007).

of attacking admissible evidence with which one disagrees." *BF Goodrich*, 99 F.3d at 525-26. Summary judgment is not. *Id.* at 526-27.

III. Plaintiffs' expert declarations and other evidence permit a jury to find UCC liable.

Plaintiffs' experts concluded that UCC provided the leading causes of the pollution, namely, the manufacturing process that produced the toxins and that was inappropriate for the site, and the waste disposal strategy that failed to deal with these toxins. Each expert did so by applying his considerable expertise to a careful review of the relevant documents. And Dr. Exner's conclusions were also based upon his own on-site investigations. Plaintiffs' experts have not "ignor[ed] or misread[]" the documents. DB34 (quoting SPA36). Their conclusions are well-supported in the documentary record. UCC bears the high burden to show that no rational person could agree with Drs. Exner and von Lindern; that is, that both of these leading experts' conclusions are not just wrong, but irrational. UCC comes nowhere close to meeting their burden.

A. Plaintiffs provided expert and other evidence that UCC's MIC manufacturing process was inappropriate for the site.

UCC's argument that providing the manufacturing process was

not tortious conduct ignores *MTBE*, and once again asks this Court to discount the evidence. DB29-30, 33-34. There is no serious dispute that toxic waste from UCC's MIC process contaminated Plaintiffs' water, that the process came from UCC, and that UCIL could not alter that process without UCC's approval. Plaintiffs, however, have also presented evidence that UCC provided the MIC process even though adequate waste disposal options for that process were not available at the site. PB39-40. Under *MTBE,* providing a process that was inherently unfit for adequate waste disposal, with full knowledge of the risk, is tortious conduct. PB49-50.[3]

UCC relies on the district court's holding in *Sahu I*, DB29-30, 40-41, but in that case, there was no expert evidence that UCC's MIC process was inappropriate. The expert evidence here is precisely the "specific indication that the technology … caused pollution" that the district court in *Sahu I* required. DB30 (quoting *Sahu v. Union Carbide*

[3] At one point, UCC asserts that the only waste from the MIC process was hydrochloric acid, which was neutralized into "salt" before being sent to the ponds. DB12. UCC neglects to mention that the process's wastes also included organic "residue." A398; A550; A704; A1384; A1397; *see also* A390; A397 (wastestream was "toxic and acidic"). Organochlorine pesticides and benzenes (another organic) were later found in both the ponds and drinking water. A2227; PB9.

Corp., 04 Civ. 8225 (JFK), 2012 WL2422757, at *10 (S.D.N.Y. June 26, 2012)).

UCC admits that the district court ruled in this case *without considering* that evidence. DB41. Instead, the district court found only that, "[a]s in *Sahu I*," Plaintiffs cannot hold UCC liable "upon a mere showing that UCC provided the MIC process." SPA29; *accord* DB33 (district court "reaffirm[ed]" that holding from *Sahu I*).

The problem for UCC is that Plaintiffs' argument is based on *more* than UCC's mere provision of waste-producing technology; it also rests on evidence that UCC's MIC process was inappropriate for the site. UCC never disputes that if the MIC process was inappropriate, a jury can find it liable.

UCC's assertion that it cannot be liable for the MIC process because UCIL was responsible for waste disposal facilities under the Definition of Services, DB31-32, is a non sequitur. UCC's tort liabilities to third parties are governed by its conduct. Its agreement with UCIL cannot, and did not purport to absolve UCC of the manufacturing process designer's "inherent responsibility" to consider and account for wastes. PB42-43; von Lindern ¶10, A3311.

UCC attacks Plaintiffs' experts' showing that, because the manufacturing process determines the wastes, and thus the efficacy of waste disposal, it is, from an engineering perspective, part of waste management. PB42-43; von Lindern ¶11, A3311-3312. Plaintiffs, of course, do not *need* to show this; under *MTBE*, UCC need not have had any involvement in waste management. PB45-47. Regardless, the experts' conclusion is not a "legal theor[y]." DB31. It is a fact about the design process and the design of this plant. Nor does this evidence "gloss over" traditional tort requirements. DB31 (quoting SPA27). The fact that UCC's MIC design was a *waste management* failure, is further evidence – in addition to the fact that the process was inappropriate – that UCC was a proximate cause of the harm.

That leaves UCC with only its vociferous claim that Dr. von Lindern "expresses no opinion" as to whether UCC's MIC process was inappropriate for the Bhopal site. DB41-42 (accusing counsel of "a total fabrication"). But Dr. von Lindern specified in detail why the MIC process was unsuitable. von Lindern ¶¶21, 26-28, 42, 62-65, A3314-3315, A3318, 3323-3324; PB19, 40.

The MIC process was essentially the same as that UCC used at its

Institute, WV facility. So Dr. von Lindern compared the two plants, just as UCC itself had done in the design stages. *Id.*; PB19, 39-40. Part of UCC's waste strategy at Institute was to dump significant amounts of wastes into an adjacent river. *Id.* ¶26, A3315. Dr. von Lindern (and UCC's own engineers) recognized that the lack of a river at Bhopal posed a major waste disposal problem. *Id.* ¶26-27, 64, A3315, A3324. And based on his extensive experience, Dr. von Lindern concluded that siting the same manufacturing process at Bhopal, was "high risk," in part because the site lacked a river. *Id.* ¶64, A3324; PB40. Dr. von Lindern's testimony is evidence that it was tortious to provide the manufacturing process *because* it shows that it could not be safely used at Bhopal.

While UCC pretends Dr. von Lindern never reached these conclusions, this Court cannot. A jury can agree with Dr. von Lindern that UCC's MIC process was inappropriate.

Nor can UCC distract attention from Dr. von Lindern's conclusions by citing *Sahu I.* DB41-42. There was no expert evidence in that case that the MIC process was inappropriate. And even if UCIL was aware of the risks, the process would not be any less inappropriate.

UCC's claim that it is immune because it "spoke up" is addressed in Section III.D., *infra*.

UCC moves the goal posts when it argues, without authority, that Plaintiffs must show that it was "impossible" to design an effective disposal system at Bhopal. DB42. As in *MTBE*, UCC is liable if it knew that pollution was "likely." 725 F.3d at 121; *see also* PB45 (proximate cause requires only foreseeability). Plaintiffs have presented evidence of exactly that. Section III.C., *infra*. Indeed, UCC's own engineers raised doubts about "whether the soil conditions at the site lend themselves to constructing ponds economically with completely impervious bottoms that would prevent seepage." A2244.

A jury could surely find that, by providing the MIC process – and forbidding UCIL from changing it without approval – despite having every reason to know that it was inappropriate for Bhopal, UCC committed tortious conduct. PB37.

B. Plaintiffs' experts' conclusion that UCC determined the waste disposal strategy is amply supported in the documents.

UCC does not deny that under *MTBE*, UCC need not have provided a final or mandatory waste disposal strategy to be held liable.

PB54. There is also no question that UCC provided a waste strategy that included storing toxins in ponds. Thus, the "idea to use" ponds, *Sahu v. Union Carbide Corp.*, 528 F. App'x 96, 102 (2d Cir. 2013) ("Sahu I"), came from UCC. And UCIL relied on UCC's plans. PB18, Exner ¶9, A3301. That is sufficient for liability. Plaintiffs, however, also present evidence UCC's strategy was mandatory. PB25, 56-61.

UCC's general response, that back-integration "was a UCIL project from beginning to end and that UCC's role was very limited," DB35, is belied by the documents it cites. The Capital Budget Proposal mandates that: "To the extent feasible UCC will provide the necessary technology and process design and will review any technology and design developed outside UCC." A372; PB56. Similarly, the Definition of Services expressly affords final approval authority over design to UCC. PB13-14, 35-36. Dr. von Lindern was not unreasonable to conclude UCC had the final word; that is exactly what these documents say. *Id.*

UCC's specific claim that it did not determine the waste disposal strategy is also contrary to the record. As UCC itself notes, the Definition of Services provision requiring UCC approval for any design changes relates to the "process designs" UCC supplied. DB40 (quoting

A2684-2686). That proves *Plaintiffs'* point. Consistent with industry practice, UCC's strategy for handling wastes was part of UCC's process design. Exner ¶¶3-4, 7, 9-11, A3300-3301; von Lindern ¶¶10, 29, A3311, A3315-3316; PB15, 51.

Similarly, the Design Services Agreement required UCC to provide "Process Flow Diagrams." A2672. A "process flow diagram" includes the waste disposal strategy, as it did here. Exner ¶¶3-4, A3300, A434-437. This document too shows that the waste disposal strategy was UCC's responsibility.

In the absence of this expert testimony explaining what "process design" means in this specialized field, it is not surprising courts previously concluded that these documents did not show UCC's authority over the waste disposal strategy. But this is an area appropriate for expert testimony, and the experts concluded that the waste disposal strategy was part of UCC's "process design." And because the Definition of Services barred UCIL from changing the process design without UCC approval, a jury could conclude, as the experts did, that UCC's waste strategy was mandatory.

UCC's citation to this Court's finding that UCIL designed the

waste disposal system, the Definition of Services's statement that UCIL will have primary responsibility for designing *facilities* for waste disposal, and the Definition of Facilities, is a red herring. DB35-36 (citing 528 F. App'x at 102, A2683, A2433). Plaintiffs do not claim that UCC provided the disposal system's "design." UCIL did the on-site detail design, but did so based on UCC's strategy and specifications. PB15-16, 56-57. And, as detailed in the next section, UCC's strategy was the cause of the hazard.

UCC argues as if the Definition of Services was issued at the outset of the design process. DB35-36. It was not. The design was done in phases. von Lindern ¶¶32-63; A3316-3324; Exner ¶¶3-5, A3300-3301. Early on, UCC determined the waste disposal strategy. PB51; von Lindern ¶¶16, 23-24, 28-29, A3312-3316; Exner ¶¶3-4, 11, A3300-3301. When the Definition of Services was issued (July 1973, A2673), UCC had *already* set that strategy, and had *already* rejected UCIL's attempt to change UCC's pond concept. PB58; A2267 (June, 1973). The Definition of Services merely guided the *final* design process. von Lindern ¶43, A3319. It addressed the detail design; the procedure for "sound implementation of the U.S. technology." A2673. And the

Definition of Services made clear that UCIL could *not* revise UCC's design, including its disposal strategy, without UCC approval. PB13-14, 18, 35-36.

Dr. von Lindern's conclusion that UCC played the "dominant role" in developing the waste management strategy, von Lindern ¶17, A3313, is amply supported. PB51-52. That conclusion was based on his careful review of the documents at each design stage. von Lindern ¶¶32-63, A3316-3324. And Dr. Exner, who also independently reviewed the documents, confirmed that UCC specified the pond strategy. Exner ¶¶3-4, 9, 11, A3300-3302. A jury could agree.

UCC's attack on Dr. von Lindern's conclusion that UCC provided the "Final Design Basis" for the ponds ignores his actual testimony and UCIL's own design. DB 36-37 (citing von Lindern ¶42, A3318). UCC repeats the district court's erroneous statement that the July 21, 1972, memo was merely "a preliminary evaluation … of the waste disposal problems for the [plant]" DB36 (quoting A431-433). But the memo also set forth the pond-based disposal strategy. And UCC does not respond to Plaintiffs' showing that UCC revised the July, 1972 memo and flow diagrams. PB57 (citing A2268, 2274-2277).

More importantly, Dr. von Lindern testified that UCC provided the *basis* for final design, (*i.e.* the strategy), not the final design itself. von Lindern, ¶17, A3313. That is clearly so. Under the Design Services Agreement, UCC had to provide "all" information "necessary" for the detail design of the plant. A2671. Indeed, as UCC and the district court both recognize, detail design just implements general process design. DB33 (citing SPA28). UCC cannot cite a single document showing UCIL even considered a waste management strategy not based on the use of ponds. And, when UCIL proposed a different type of pond, UCC shot UCIL down. PB18, 56-57.

Indeed, UCIL explicitly listed the "design basis" for its plans, and UCC's July 1972 "Preliminary" report is listed first. A2289, A2295, A2301 ("from UCC Engineering Department"); PB16, 57-58.[4]

In claiming UCIL changed the ponds' size and lining, DB38-39 (quoting SPA33), UCC ignores Plaintiffs' evidence that no such "changes" were made. PB58-59. At best, the district court ruled despite conflicting evidence.

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[4] Drs. Von Lindern and Exner each reviewed both UCC's plans and UCIL's. von Lindern, A3326, Exner, A3302. They reference these documents by their designations below: A2722-2725 for A2274-2277; A2737-2750 for A2289-2302.

UCC likewise fails to refute Plaintiffs' evidence that UCC's waste disposal strategy was mandatory, and could only be changed with UCC's approval. PB10-15, 18, 27-28, 35-36, 56-61. Plaintiffs cite all kinds of evidence, including a wealth of documents and the declaration of UCIL's Safety Superintendent. *Id.* UCC, however, focuses on Dr. von Lindern's declaration, DB40, a subset of Plaintiffs' evidence.

UCC asserts that the "only document [Dr. von Lindern] cites is a section of the Definition of Services" DB40. But that document confirms that UCC's disposal strategy *was* mandatory. And Dr. von Lindern also based his conclusion that UCC retained "the authority to overrule UCIL proposed modifications" on the fact that UCC *actually did* overrule UCIL. von Lindern ¶¶30, 48-51, A3316, A3320-3321; PB18, 58.

In sum, this record contains plenty of evidence that UCC provided the waste management strategy, including the idea to use ponds. And there is abundant evidence that UCC's strategy was mandatory. But even if it was not, that would not absolve UCC under *MTBE* and ordinary tort standards. PB54-56.

C. UCC's "high risk" idea to store toxins in ponds above the aquifer was a cause of the water pollution.

UCC does not dispute that under this Court's holding in *Sahu I*, if "the mere idea to use evaporation ponds as a means to dispose of wastewater was a cause of the hazardous conditions," UCC can be held liable. DB43 (quoting 528 F. App'x at 102). There, the courts simply did not find evidence of this fact. But these Plaintiffs' expert testimony fills the gap. *See* PB17, 53.

Both experts identified the idea of storing toxins in ponds at Bhopal as a cause of the harm, PB53; the ponds were an inadequate substitute for a river; and ponds typically leak. *Id.* UCC claims that the experts said that the problem with the ponds was "improper design and implementation," DB43, but they provide no citation and the experts said no such thing.

Dr. von Lindern was clear that the central pillar of UCC's waste disposal strategy was its idea to store toxins in ponds and that "UCC's high-risk . . . strategy ultimately resulted in . . . groundwater contamination." von Lindern, ¶¶21, 39, 64, 66, A3313-3314, A3317-3318, A3324, A3325. Contrary to UCC's assertions, von Lindern did not blame UCIL's design or implementation, but placed the blame squarely on UCC. Similarly, Dr. Exner found that aspects of UCC's process

design – including the ponds – contributed to the pollution, Exner, ¶¶10-11, A3301, a conclusion UCC ignores.

Dr. Exner also concluded, based on his vast experience with chemical ponds throughout the world, that despite supposedly impermeable clay or plastic linings, such ponds often leak. Exner, ¶11, A3301-3302. UCC's observation that this passage was not specifically referencing the Bhopal site misses Dr. Exner's point. DB43-44. The risk of leakage is *inherent* in using ponds, no matter how they are lined or implemented. This means that the idea to store toxins in ponds above Bhopal's drinking water aquifer created a hazardous condition.

Thus, Plaintiffs do not claim, as UCC asserts, that the defect in the ponds was the liner. DB39. And although UCC correctly points out that this Court in *Sahu I* stated that leaks in the liner did not establish that the idea for ponds was a cause of the hazard, DB 44 (citing 528 F. App'x at 102), that is irrelevant here. Dr. Exner's conclusion that ponds are inherently risky was based on his experience, not the fact that the Bhopal pond leaked. Thus, in *this* case, there is expert evidence, unavailable to this Court in *Sahu I*, that using a pond above an aquifer is a hazard. And, after conducting two on-site investigations, Dr. Exner

blamed UCC's idea for the ponds, not the liner. Exner, ¶¶10-11, A3301.

UCC's reliance on the district court's holding that UCIL departed from UCC's vision for the ponds' size and lining asks this Court to weigh the evidence three separate times. DB43. First, the Court would have to disregard the evidence that UCIL did not change the size or liner. PB58-59. Second, it would have to ignore the evidence that UCIL had no authority to change UCC's design without UCC approval. PB18.

Third, even if UCIL made such changes, and did so independently, UCC would have this Court usurp the jury's role by weighing and dismissing the expert evidence that using a pond above a drinking water aquifer was risky. An injury can have more than one cause; UCC bears the burden to show that UCIL's implementation was the *sole* cause of the hazard. PB45-46. But UCC presents no evidence that it was even *a* cause. PB60. Plaintiffs' experts, by contrast, show, as this Court required, that the idea to use ponds was "*a* cause" of the hazard. 528 F. App'x at 102 (emphasis added).

D. This Court's decision in MTBE supports liability.

Plaintiffs do not claim that *MTBE* establishes a different standard than this Court applied in *Sahu I*. DB 44; PB 36-37. Rather, Plaintiffs

show that the district court below misapplied *MTBE* when it held that only the party with final authority over waste handling can be liable. PB24, 46-47, 54.

UCC focuses on *MTBE*'s reference to "additional tortious conduct," but does not contend that *MTBE* created any new, heightened liability requirement. *MTBE* merely rejected Exxon's *preemption* argument because ordinary tort liability requires conduct beyond adding MTBE to gasoline. 725 F.3d at 97-98; PB47-48. This Court was clear that Exxon's lack of control over the gasoline did not render the manufacture of MTBE-laden gasoline too remote. *MTBE*, 725 F.3d at 120-21.

Indeed, there is, if anything, more tortious conduct here. UCC not only provided the MIC process, for which it is liable under MTBE; it also provided the strategy for handling toxins, whereas Exxon did not. UCC refers to Exxon's knowledge that MTBE-laden gas would likely spill into the City's water supply. DB45. UCC had the *same* knowledge of the likelihood of leakage at Bhopal. When UCC provided its MIC process, it knew there was no river for waste disposal at the site, that the disposal system at Institute was inadequate and that its strategy for Bhopal was worse, and that there was serious doubt that effective

ponds could be built economically at Bhopal. There is no dispute that UCC was aware of the likelihood of a spill.

As in *MTBE*, Plaintiffs are not suing UCC just because it sold a manufacturing process to UCIL. Rather, UCC committed torts that injured the Plaintiffs by providing an inappropriate process, including an inadequate waste design strategy, knowing of the likelihood of contamination. PB48.

UCC nonetheless argues that it is immune from liability because it "spoke up." DB46-47. But even if UCIL knew the plant needed an appropriate waste disposal system, that does not insulate UCC from liability.

First, Plaintiffs' evidence creates a material dispute about whether UCIL could change UCC's disposal strategy without UCC's approval. PB18, 58. And the evidence shows that UCIL did what UCC said: it employed ponds and there is evidence they had clay linings as UCC instructed. PB59. It makes little sense for UCC to claim immunity, simply because it admitted to UCIL that its plan had risks, when UCIL had no opportunity to change UCC's plan.

Second, even if UCC's strategy was not mandatory, Plaintiffs have

shown that under ordinary tort standards, a party is liable where it gives negligent safety advice that the advisee relies on, even if the advisee had authority to ignore it. PB54-56. It was "high risk" to suggest using the MIC process and solar evaporation ponds at Bhopal. von Lindern ¶64, A3324: PB21. UCC cannot now claim immunity for warning UCIL when UCIL followed UCC's advice. Is UCC suggesting that it is not liable because UCIL, which lacked experience with making MIC, should not have trusted UCC?

Third, UCC has not shown that a warning defeats Plaintiffs' negligence, nuisance, trespass or strict liability claims, none of which are predicated on a duty to warn. For example, as the district court recognized, where the nuisance is created through an unreasonably dangerous activity – like MIC manufacture – there is liability regardless of fault. SPA15.

UCC's argument entails that Exxon would have been free from all liability if it had simply told gas stations "do not store gasoline containing MTBE in tanks that leak." Nothing in this Court's decision supports that conclusion. Exxon's lack of warnings to gas station operators was relevant only to the failure-to-warn claim. 725 F.3d at

123-25. Exxon's public nuisance liability, for example, was due to the likelihood that Exxon's actions would ultimately contribute to water pollution. UCC's warnings to UCIL are not an affirmative defense.

Even if an adequate warning *were* a defense, the adequacy of UCC's warning would be a question for the jury. *Lancaster Silo & Block Co. v. N. Propane Gas. Co.*, 75 A.D.2d 55, 64-65 (4th Dep't 1980). "General" warnings do not suffice; in *MTBE* warnings about the risk of spilling gasoline that did not address the "special risks" of MTBE were insufficient. 725 F.3d at 123-24. The sufficiency of UCC's warnings is clearly in dispute. UCC, for example, failed to warn UCIL about the frequency of malfunctions or how to correct them. von Lindern ¶31, A3316. Moreover, in *MTBE*, this Court rejected Exxon's argument that it did not have to warn the City or the general public, and UCC certainly never warned Bhopal or its residents. 725 F.3d at 123.

Finally, *City of Bloomington v. Westinghouse Elec. Corp.*, 891 F.2d 611 (7th Cir. 1989), is inapposite. New York has rejected *Bloomington*'s Indiana law rule requiring "control" over the product, *State v. Fermenta ASC Corp.*, 616 N.Y.S.2d 702, 705 (Sup. Ct. Suffolk Cnty. 1994) (explicitly declining to follow *Bloomington*), as *MTBE* confirms.

Moreover, in *Bloomington*, Monsanto did not know that its PCBs "would [be] deposit[ed] on city property." *Id.* at 706. And the Seventh Circuit focused on Monsanto's *efforts* to effect safe disposal, not merely a warning. 891 F.2d at 614. Here, UCC knew that pollution was likely to occur, and there are factual disputes regarding the efforts they took to avoid this. And there is evidence that UCC actually exercised control.

IV. Plaintiffs should be permitted to preserve Couvaras's testimony.

UCC claims that if summary judgment is reversed, Plaintiffs still should be barred from preserving Couvaras's testimony for trial. That is untenable.

UCC's argument that "age alone" does not require a preservation deposition misses the mark. DB49. Couvaras is a key witness. And the district court abused its discretion by failing to even consider his age. PB62.

At any rate, courts have repeatedly recognized that advanced age increases the chance that testimony will be lost and granted depositions, especially when significant time has elapsed since the incidents in question. *See, e.g.*, *Texaco, Inc. v. Borda,* 383 F.2d 607, 609 (3d Cir.1967); *Tennison v. Henry*, 203 F.R.D. 435, 442-43 (N.D. Cal.

2001).

The deponent need not be the only source of the information. DB49. The testimony need only "throw[] a different, greater, or additional light on a key issue." *In re Bay Cnty. Middlegrounds Landfill Site v. Kuhlman Elec. Corp. ("Bay Cnty.")*, 171 F.3d 1044, 1047 (6th Cir. 1999); *Deiulemar Compagnia di Navigazione S.P.A. v. M/V Allegra*, 198 F.3d 473, 487 (4th Cir. 1999).

United States v. Int'l Longshoremen's Ass'n, No. CV-05-3212, 2007 U.S. Dist. LEXIS 70686 (E.D.N.Y. Sept. 24, 2007) is inapposite. The court denied a deposition – without prejudice – mostly because "[t]he plaintiff provide[d] no clue . . . what evidence would be lost and what prejudice would be suffered." *Id*. at *5. And, the witness had already testified under oath. *Id*. at *6. Neither is true here.

Like UCC, the appellant in *Bay Cnty*. "seize[d] on the phrase 'unique knowledge'" in *Penn Mut. Life Ins. Co. v. United States,* 68 F.3d 1371, 1375 (D.C. Cir.1995). 171 F.3d at 1046-48. But the Sixth Circuit found, as *Penn Mutual* also had, that the standard is a need for "'testimony that cannot easily be accommodated by other . . . witnesses.'" *Id.* (quoting 68 F.3d at 1375). The evidence need not be

"absolutely unique." *Id.*

It is true that Couvaras's testimony is not wholly "unique." There is other evidence that Mr. Couvaras worked for UCC. But that is not a reason to deny a preservation deposition, it is a reason to reverse summary judgment.

CONCLUSION

The judicial process is supposed to be a search for the truth. By asking this Court to shut its eyes to Plaintiffs' evidence, that is exactly what UCC seeks to avoid. A rational jury considering the record in this case could find UCC liable. This Court should reverse summary judgment and permit Plaintiffs to preserve Couvaras's testimony.

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