12-2983-cv

United States Court of Appeals

for the

Second Circuit

JANKI BAI SAHU, on behalf of herself, her family, as guardian of her minor children, and all others similarly situated, SHANTI BAI, on behalf of herself, her family, as guardian of her minor children, and all others similarly situated,

(For Continuation of Caption See Inside Cover)

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

BRIEF FOR PLAINTIFFS-APPELLANTS

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Plaintiffs-Appellants,

– v. –

UNION CARBIDE CORPORATION, WARREN ANDERSON,

Defendants-Appellees.

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I. INTRODUCTION

Plaintiffs-Appellants—members of thirteen families and their minor children—seek redress for the severe pollution of their drinking water and that of thousands of their neighbors. Defendants Union Carbide Corporation ("UCC") and Warren Anderson, acting through and together with UCC's subsidiary Union Carbide India Limited ("UCIL"), caused this pollution at the UCIL facility in Bhopal, India. From the plant's design until a decade after it closed, UCC participated in the conduct that polluted the groundwater.

Pesticides and chlorinated benzenes from the plant continue to leach into the local drinking water, causing serious health problems for Plaintiffs and other nearby residents. The Government of India has asked the U.S. courts to order UCC to pay for a clean-up. Because UCC refuses to submit to jurisdiction in India, UCC's home is the only available forum. The groundwater contamination is unrelated to the 1984 "Gas Disaster" at the same plant.

This case returns to this Court after a grant of summary judgment. The Court vacated the district court's prior dismissal on the same motion, because in *sua sponte* converting UCC's motion to dismiss into one for summary judgment, the district court failed to give Plaintiffs an opportunity to respond and present all pertinent evidence. *Sahu v. Union Carbide Corp.*, 548 F.3d 59 (2d Cir. 2008). Similar errors taint the district court's judgment on remand. Dismissal was based on arguments not raised in UCC's motion, without affording Plaintiffs an opportunity to respond.

Furthermore, the court denied Plaintiffs discovery into critical issues—and denied all depositions—and then decided those same issues against Plaintiffs.

The district court acknowledged that anyone *participating* in the creation of a nuisance is liable, but required Plaintiffs to show that UCC actually *controlled* plant design and remediation. The court also misapplied the standard for agency liability, and failed to consider aiding and abetting at all.

The "corporate relationship at issue here" went beyond parent-subsidiary. UCC was a licensor of its proprietary technology to UCIL for the manufacture of UCC's patented pesticides. UCC also provided technical expertise and guidance to UCIL in operating its licensed technology pursuant to a Technical Services Agreement. UCC furnished technical services to UCIL for the first five years of the plant's operation. UCIL simply could not have conducted its business without UCC's technology and ongoing technical assistance.

Among numerous others, the court committed at least three dispositive factual errors: it (i) ignored the fact that UCC provided the most polluting technology at the plant—the MIC unit—despite foreseeing the risk to the community water supply; (ii) discounted the fact that UCC drafted the waste treatment plan that included solar evaporation ponds to handle wastes from UCC's MIC unit, despite doubts about whether safe ponds could be built economically—doubts that proved prescient when a less effective liner was used to cut costs and when the ponds eventually failed; and

(iii) improperly exonerated UCC's participation as a "principal party" to the incomplete site rehabilitation that created a toxic landfill and thus a continuing source of water pollution.

Each of these forms of participation independently suffices to defeat summary judgment. Taken together, along with numerous other facts detailed below, there is no doubt that a reasonable jury could find for the Plaintiffs.

II. STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. § 1332; there is complete diversity and the amount in controversy exceeds $75,000. This Court has jurisdiction under 28 U.S.C. §1292(a)(1), since Plaintiffs appeal from a final decision granting summary judgment on all claims. The Notice of Appeal was timely filed on July 25, 2012 in accordance with Fed. R. App. P. 4(a)(1). A3722.

III. ISSUES PRESENTED

1. Did the district court deprive Plaintiffs of an opportunity to respond by granting summary judgment based on arguments that Defendants' motion did not raise, and by barring basic discovery and then granting summary judgment on the precise questions that discovery addressed?

2. (a) Anyone who participates in the creation of a nuisance is liable. The district court required that UCC control the activities that created the nuisance. (b) The court dismissed concerted action liability without considering aiding-or-abetting. (c) No

special relationship is required where negligence liability is based on defendant's own acts. The court required a special relationship. Did the court apply the wrong standards?

3. Plaintiffs presented evidence that Defendants transferred the polluting technology, approved all plant technology and participated in the design of the waste disposal system and in the site rehabilitation project. In finding this evidence insufficient, did the district court resolve disputed issues of fact against the non-movant?

4. This Court has repeatedly held that where a district court reaches firm conclusions based on a limited record, but must consider an expanded record on remand, reassignment may be required to avoid the appearance of prejudgment. Prior to the dismissal at bar, the district court considered the same summary judgment motion three times on a limited record, but then refused to reassign. Did deciding these issues a fourth time risk the appearance of prejudgment?

IV. STATEMENT OF THE CASE

Plaintiffs appeal from Judge John F. Keenan's June 26, 2012 order granting summary judgment, *Sahu v. Union Carbide Corp.*, No. 04 Civ. 8825 (JFK), 2012 U.S. Dist. LEXIS 91066 (S.D.N.Y. June 26, 2012), SPA67, and certain aspects of prior orders. *Sahu v. Union Carbide Corp.*, 262 F.R.D. 308, 314 (S.D.N.Y. 2009), SPA27, at SPA31; *Sahu v. Union Carbide Corp.*, No. 04 Civ. 8825 (JFK), 2010 U.S.

Dist. LEXIS 23860 (S.D.N.Y. Mar. 15, 2010), SPA43; *Sahu v. Union Carbide Corp.*, No. 04 Civ. 8825 (JFK), 2010 U.S. Dist. LEXIS 134445 (S.D.N.Y. Dec. 20, 2010), SPA60; *Sahu v. Union Carbide Corp.*, No. 04 Civ. 8825 (JFK), 2010 U.S. Dist. LEXIS 11984 (S.D.N.Y. Feb. 11, 2010), SPA38; *Sahu v. Union Carbide Corp.*, 746 F. Supp. 2d 609 (S.D.N.Y. 2010), SPA54.

Plaintiffs filed this personal injury class action in 2004, after the personal injury claims of the class representative in *Bano v. Union Carbide Corp.* were dismissed as time-barred. 361 F.3d 696 (2d Cir. 2004).

Bano, filed in 1999, asserted gas disaster claims as well as water pollution claims for personal injury and property damage. That action was also heard by Judge Keenan. The district court dismissed the case in its entirety, but this Court reversed dismissal of plaintiffs' water pollution claims, because the district court failed to address them. *Bano v. Union Carbide Corp.*, 273 F.3d 120, 132-133 (2d Cir. 2001). On remand, the district court granted summary judgment to the defendants, concluding that the named plaintiff's damages claims were time barred, that plaintiff organizations lacked standing, and that injunctive relief would be impractical. *Bano v. Union Carbide Corp.*, No. 99 Civ. 11329 JFK, 2003 U.S. Dist. LEXIS 4097 (S.D.N.Y. Mar. 18, 2003). This Court reversed in part, holding that the named plaintiff's property claims were not time-barred, declining to address medical

monitoring, and remanding off-site injunctive relief claims and class certification. *Bano*, 361 F.3d at 712-16.

On remand, India "formally urge[d]" the district court to order remediation of the plant, paid for by UCC, stating that it and the State of Madhya Pradesh "will cooperate with any such relief." A3384.

On plaintiff's motion for class certification, the district court dismissed the case, finding that the plaintiff did not own the land at issue, and that class-wide injunctive relief was improper. *Bano v. Union Carbide Corp.*, No. 99 Civ. 11329 (JFK), 2005 WL 2464589 at *4 (S.D.N.Y. Oct. 5, 2005). That decision was affirmed by summary order. *Bano v. Union Carbide Corp.*, 198 Fed. Appx. 32 (2d Cir. 2006).

Prior to the district court's last dismissal in *Bano*, Plaintiffs filed this personal injury class action. A14. Defendants sought summary judgment on veil-piercing liability, and Fed. R. Civ. P. 12(b)(6) dismissal of all other liability theories and injunctive relief. A1238.

The district court *sua sponte* converted the 12(b)(6) motion to summary judgment, and dismissed the direct liability and injunctive relief claims. SPA1-8. The court stayed summary judgment on veil-piercing pending limited discovery, but barred all discovery "regarding the corporate relationship, independence or control of UCIL by UCC" as irrelevant to the single ground on which Defendants moved: that

UCIL's successor "EIIL is a financially viable corporation, fully capable of responding to plaintiffs' claims." SPA10, at n.1; *accord* SPA31.

The district court also barred all depositions, permitting only document discovery concerning "EIIL and its ability to respond financially to Plaintiffs' claims." *Id.* The court subsequently granted summary judgment on veil-piercing. SPA13-21.

Plaintiffs appealed, and this Court vacated. *Sahu*, 548 F.3d at 70 (remanding for "what would appear to be relatively limited further proceedings in connection with consideration of summary judgment"). The Court held that Plaintiffs were not given notice that the motion to dismiss would be converted to summary judgment, and thus were denied the opportunity to seek discovery or present all evidence, *id.* at 66-70, and that the dismissal of the veil-piercing claims relied, in part, on the improper dismissal of the other claims. *Id.* at 70.

On remand, Defendants chose to stand on their original motion, and provided no Rule 56.1 statement. Under Rule 56(f), (now (d)), Plaintiffs sought documents from UCC and a third-party (Arthur D. Little, Inc.), requests for admissions, and depositions. The court denied all discovery except ten document requests directed to UCC, concluding that the rest were not relevant to summary judgment, cumulative of discovery previously obtained here or in *Bano*, overbroad, or unduly burdensome. SPA27-35; SPA43-48. The court recognized that Plaintiffs could defeat summary

judgment if discovery yielded documents supporting their claims, but reiterated "after renewed, independent consideration" its conclusion that the then-existing record did not do so. SPA30.

Plaintiffs filed another Rule 56(f) application on November 22, 2010, requesting documents related to UCC sub-entities and depositions, including a Rule 30(b)(6) deposition to follow-up on information obtained from a former manager at the Bhopal plant. The district court denied all of the requests. SPA60-64.

Plaintiffs also respectfully requested that the district court reassign this action or appoint a Magistrate to issue a Recommendation, noting that the court had made factual findings on the pending motion on three prior occasions—all based on a limited record. Plaintiffs cited Second Circuit cases finding that, in like circumstances, no judge could overcome the appearance of prejudgment in evaluating the expanded record. The district court denied the motion, concluding that reassignment was unnecessary. SPA38-42.

The court granted summary judgment on all claims, without conducting a hearing. SPA67-84. The court found insufficient evidence to support liability on any theory, and that equitable relief is impracticable.

Plaintiffs timely appealed. A3722.

V. STATEMENT OF FACTS

A. Plaintiffs' Drinking Water Contains Chemicals From The UCIL Plant.

Plaintiffs and their minor children live or lived in the working-class neighborhoods surrounding the Bhopal plant. A14-66 at ¶¶4, 7, 10, 14, 20, 24, 27, 30, 33, 37-38, 42, 45. The drinking water in these communities is polluted with chlorinated benzenes and organochlorine carbamate pesticides. A2678. According to a 2009 study, toxins found at the plant-site and the associated solar evaporation ponds "match[] the chemicals found in the groundwater sample[s] in the colonies outside the factory premises. There is no other source. . . ." *Id*.

These toxins continue to leach into the water, contaminating residential wells up to three kilometers away at levels averaging twelve, and ranging as high as fifty-nine times the legal limit. A2677-2678. Local authorities have declared over 100 wells unfit for human consumption. A2665.

Due to their economic circumstances, residents including Plaintiffs have little choice but to bathe in, cook with and drink "chemical-laced" water. *Id.*; A14-66 at ¶¶11, 16, 21-30. Most Plaintiffs depend on community wells. *Id.* at ¶¶54-58. Others installed wells on their own land. *Id.* at ¶¶15, 36. None have reliable alternatives to using contaminated well-water. *Id.* at ¶¶54-58.

The toxins leaching from the facility are known to cause a host of health problems, including reproductive and neurological impairments, respiratory tract irritation, skin lesions, headaches, and cancers. A2665-2669. Plaintiffs suffer from many of these ailments. The three generations of the Sultan family, for example: Qamar, the family matriarch, has pain and swelling in her limbs, breathlessness, and has undergone a hysterectomy. Her daughter-in-law, Sahista, reached menopause in her twenties. Qamar's son Shoyab has swelling, rashes and cysts. Qamar's minor grandson Adib has skin problems, severe headaches and stomachaches. A19-20 at ¶¶14-19.

B. UCC Participated in The Acts and Decisions That Caused The Pollution of Plaintiffs' Drinking Water.

1. Defendants Approved The Manufacture of Pesticides at The Bhopal Plant.

In 1966, UCC sent its executive, Edward Munoz, to India to investigate the feasibility of establishing a pesticide plant. A3370 at ¶2. After Munoz found it viable, UCC approved the project and assigned Munoz to work at UCIL as General Manager of the Agricultural Products Division. *Id.* at ¶4.

The Bhopal plant was built in 1969 to produce "Sevin," UCC's patented pesticide. SPA69. Originally, the plant mixed components imported from UCC and its U.S. affiliates. SPA69. "[T]o sustain sales growth" despite India's requirement that "local manufacture replace imports," UCIL hoped to back-integrate the plant to

manufacture Sevin, but needed UCC's approval. A105. UCIL sought that approval in a 1973 Capital Budget Proposal (CBP) submitted to UCC's "Management Committee," including Defendant Anderson. A96-150. The cover letter from UCC subsidiary Union Carbide Eastern (UCE) noted: "[T]his project has the support of UCC Worldwide Agricultural Policy Committee and the U.S. Agricultural Chemicals Division, and is endorsed by [UCE]. It has been reviewed by the Law, Finance and Environmental Affairs Departments." A96-97. The proposal also noted UCIL's conclusion that "the business risk . . . [is] acceptable" and that "UCC concurs." *Id.* at A116. In December, 1973, UCC's management endorsed the proposal. A172-174.

India required that back-integration be funded in part through the local sale of new UCIL stock, which would dilute UCC's ownership. A99-100. Thus, the CBP was contingent on India allowing reduced investment, so that UCC could retain majority control, *id.*; *see also* A1605-1606, as was UCC policy. A2873-2878. As Anderson stated, "[s]uppose we were a 40 percent owned company . . . do we want to participate around the world where you have less than absolute control?" A3045.

By 1977, changed market conditions and construction cost overruns called the back-integration project into question. A1604-1605. The 1977 CBP seeking UCC's approval to proceed noted that "a decision to drop the project w[ould] materially

affect UCIL's chances of retaining a UCC equity of 51%." A1604. The project went forward.

2. UCC Oversaw The Plant's Design.

a. "[T]he plant in India was built under our design criteria..."

All technology at the plant either originated from or was approved by UCC: "[t]o the extent feasible UCC will provide the necessary technology and process design and will review any technology and design developed outside UCC." A97. Thus, Anderson admitted that the plant:

> was built under our design criteria, . . . [with] every safety feature in it that we have over here . . . . [I]t doesn't look the same, but it is the same in terms of design criteria. The pipes are different. It was constructed in India, designed in India, but with our design criteria.

A2967. Anderson elsewhere elaborated that "our safety standards in the US are identical to that in India . . . Same equipment, same design, same everything." A3366.

As Munoz described, UCC Engineering had "primary responsibility" for plant engineering, performed the conceptual design work and prepared the design containing all information needed for mechanical design, erection, start-up and operation. A3371; *see also* A3113. UCIL's Kamal Krishna Pareek confirmed that "key decisions regarding design . . . and safety" were made by UCC, the basic design was drafted or approved by UCC, and any design changes had to be approved by UCC. A3375-3376. Thus, UC Eastern represented to a U.S. government agency that

"[k]now-how for the project is being provided by [UCC]," that "basic process design" came from UCC, and that UCC's "know-how, technical support, and majority ownership of UCIL provide assurance of technical competence." A3489-3492. UCC had "responsibility for the ultimate performance of the designs [it] provided." A3134.

This is not to say UCC provided all of the design. "By Government requirement all possible work in engineering and construction w[as to] be done in India with UCIL assuming an overall responsibility for implementation of the project." A97.[1] Thus, UCIL was responsible for "detailed engineering" to implement UCC's "basic process design," A3489, and for "modify[ing]" UCC's design to adapt "to the equipment and materials available in India." A3138. However, UCIL's activities were "complementary" to UCC's, so "that the U.S. technology may be translated into a soundly designed plant." A3127; A3130-3135. UCIL was required to "maintain[] the technical integrity" of UCC's process designs. A3137.

This division of labor made UCC's oversight critical. UCC transferred some of its "more sophisticated and exacting processes . . . especially with regard to corrosivity and the handling of highly toxic materials." A3127. However, design UCC would normally perform as an extension of process design was to be done in

[1] A 1973 memo stated that UCIL "is responsible for the overall venture. This includes responsibility for the plant design and construction," which included specific "activities"; notably the "contracting" of detailed design and field construction, and the project management. A3128. These were distinct from UCC's duties. A3127; A3130-A3135.

whole or in part in India. *Id*. This necessitated "extra effort in providing the initial technology services and in maintaining particular thoroughness in communications between India and the U.S." *Id*.

UCC implemented safeguards to ensure that it would approve all design. It loaned UCIL a UCC employee to act as Project Manager to oversee the design and construction, including "Detail Engineering." A3372; A121; *accord* A3129. Design reports drafted in India, including waste disposal system design, were approved by this Project Manager, L.J. Couvaras. *E.g.*, A2879.

UCC also assigned a UCC engineer for design liaison and assistance through start-up. A120. UCC monitored detailed engineering and construction from the U.S. A3372. UCC even incorporated new equipment into the design. A1637. Moreover, UCC established procedures to ensure changes to UCC's design were made with UCC's "participation and approval." A3137-3138. Thus a UCC engineer would maintain "active contact" with UCIL engineers, provide assistance as needed and ensure no major safety problems were introduced during detailed design. A3134-3135. UCC needed to "participat[e]. . . in initiating major changes" and "[r]eview and approve all changes" to UCC design. A3134; A3138.

UCC appointed a "Steering Committee" to resolve major problems affecting the quality, cost, or scheduling of project work. A3128.

In sum, UCC's oversight and approval were necessary because the manufacture of UCC's pesticide was based on a technology transfer from UCC. A1156-1157. UCIL lacked experience dealing with MIC. *Id.* UCIL required UCC's technical help to build and operate UCC's proprietary processes. A120.

b. UCC participated in the design of the plant's failed waste disposal system.

(1) Over-all waste system design.

UCC drafted the "over-all summary diagram" of waste disposal requirements. A2713. In July 1972, UCC Engineering created a preliminary "waste disposal" design, A155-162, which it later revised. A2716; A2722-2725. A mid-1973 UCC memo stated that "UCIL will have the primary responsibilities for designing and providing [waste disposal] facilities for . . . the process units designed in the United States." A3136. But, as UCIL told local officials, the design work would be done by a consultant "under the guidance of our Principals' [*i.e.* UCC's] Engineering Department," A2752, and the proposed disposal methods "are in use at the plant of the Principals of [UCIL], in the United States." A2754. UCIL's 1973 diagrams were explicitly based upon UCC's 1972 design. A2737-2750, *especially* A2737, A2743 and A2749.

UCC also reviewed information and plans sent by UCIL. A2714. It noted that it had no further obligation to provide general waste disposal information, other than reviews requested by UCIL, after providing those comments and the underground

waste collection design noted below. A2713. UCC remained responsible for approving waste system design. *See infra* p.18.

(2) Solar evaporation ponds.

UCC's MIC technology produced acidic wastes, but the Bhopal plant lacked a river for disposal of these wastes; this posed a "major disposal problem." *See infra* pp.21-22. Thus, UCC's 1972 waste disposal plan included solar evaporation ponds (SEPs) to hold contaminated wastewater. A158.

After UCC planned the ponds, UCIL suggested "a somewhat different concept" for their operation. A2715. The 1973 CPB, however, later reflected *UCC*'s concept, not UCIL's.[2]

UCC helped design the SEPs' geometry. UCC engineers initially proposed a "22-acre" SEP as the "minimum," and warned that: "if the proposed pond geometry is selected, new ponds will have to be constructed at one to two-year intervals." A158. In May 1973, UCC-designed experiments showed that the ponds needed to be larger. A2715. Thus, UCC engineers noted that "the smallest [proper] pond area is 35 acres." A2715. However, they also stated that "[u]ndersizing" had "advantages," including lower capital costs. A2716. Ultimately, the system had two ponds totaling 22 acres, and an emergency pond (#3) to be used during repairs. A230; A347. The

[2] In UCC's 1972 design, evaporation balanced inflow; a pond's life ended when it filled with solids. A2715; A158. In January 1973, UCIL proposed that inflow would exceed evaporation; ponds would store solution. A2715. The December 1973 CBP followed UCC's concept. A123; *see also* A152.

SEPs were planned to be used over "an estimated life of 4 years," A230, and were actually used for six, (1978-84). A271.

In 1977, prior to construction, UCIL emphasized that it wanted to reduce pond costs "as much as possible" and therefore would accept "certain Seepage/effluent from the Pond." A3508-3510. Accordingly, cheaper materials were used, including polyurethane instead of clay for the lining that was meant to prevent groundwater pollution. *Id.* This memo was sent to, among others, Couvaras (LJC), the UCC employee and on-site project manager responsible for approving all design changes. A3510; *supra* p.14.

The lining ultimately failed; the ponds leaked, *infra* pp.21-26, and the soil under Ponds 1 and 2 have long been polluted, A671; *see also* A969-970; A978-979, including with toxins found in the drinking water. A2675-2778.

(3) Underground waste collection system.

UCC provided design "for the underground waste collection system in each U.S. process area." A3131. UCC drafted final design for the MIC and SEVIN units' wastewater collection systems, including "all necessary functions of design," and "requirements for detail design." A177-180; A205. "[P]rimary responsibility" belonged to UCC. A205. Although UCC would need information from and consult with others, "UCC . . . will determine the . . . method of disposal of the wastewater. . . and will establish plans for future waste loads." A205. UCC designed the drain

under the Sevin plant, A205, which was highly polluted, A964; A973-976, with toxins also found in the groundwater. A2667-2668.

(4) Pits and landfill.

UCC's 1972 design included acid neutralization pits based on those at UCC's Institute, West Virginia plant. A157-160. UCC later sent design for the pits. A2726-36. The pits were needed to treat the wastes produced by UCC's MIC technology. A229.

UCC's 1972 design contemplated dumping some of the pits' wastes, and other wastes, into a landfill. A160. Ultimately, over 20% of the plant-site was used for dumping waste, the landfill (and acid pits) were polluted,[3] and runoff was of "great concern." A365. UCC oversaw UCIL's waste handling through mandatory audits. A243; A271.

(5) UCC approval was required.

All UCIL design required UCC review. A97. Thus, waste disposal engineering not done by UCC required UCC's approval. For example, UCC mandated that *all* MIC and Sevin unit wastewater system design be provided or approved by UCC. A205. Additionally, a 1976 UCIL report detailing the treatment and disposal of all plant wastes was "approved" by Couvaras. A2879; A2881.

[3] A712-719; A282-283; A346-349; A336; A352; A376-378 ("seriousness of the issue needs no elaboration"); A2675-2678.

c. UCC transferred its own proprietary manufacturing technology and approved all other technology at the plant.

The requirement that all design be provided or reviewed by UCC applied to manufacturing technology. UCC was involved in the design of all six of the facility's "units." Four made intermediary chemicals—CO, phosgene, MIC and napthol. Two others made the pesticides—Sevin and Temik. A112; A3361; A3489.

UCC provided the technology for the Temik, phosgene and MIC units.[4] Indeed, UCC sent four employees to oversee start-up of the phosgene and MIC units. A1618; A1647; A121; A3372. UCC assumed "responsibility for the safety and operability of the plant design" it provided. A3129. UCC also provided a laundry list of diagrams, specifications, criteria and assistance in conjunction with the process it designed. A3130-3135. UCC furnished "all" technical services UCIL required for the use of UCC's production techniques for the first five years of the plant's operation. A3062; A3489.[5]

UCC provided over 2000 pages of design for the Sevin unit. A112; A120; A3129; A3151-3167. UCIL "improved" the process, A1615, making Sevin in

[4] A112; A114; A120; A1616 (1977 CBP: "Phosgene and MIC units are commercially operated by UCC"); A3128-3129.

[5] UCC also provided safety manuals for the Phosgene, MIC, CO and Sevin units, A3259; A3263; A3168; A3172, and a host of other documents relating to, *inter alia*, plant safety and operations. A3094-3108.

"batch[es]" rather than "continuous[ly]," which saved costs. A1615; A1645. UCC would have reviewed and approved those changes. *See supra* pp.12-19.

The 1973 CPB envisioned that UCIL would provide the CO and 1-Napthol units. A112; A114; A175. However, UCIL ultimately obtained the CO process in a "purchase thru UCC." A1616. The contract was between Stauffer and UCC. A3140-3150.

UCIL's 1-Napthol process was never successfully implemented.[6] In any event, UCC provided the technology for napthol refining, and provided process consultation and reviewed design done in India for the napthol unit. A120; A3129. Evidence shows joint decision-making, if not UCC control, over deferring start-up. A2813-2816 (UCIL official: "I need your clearance"; UCC official: "I endorse your proposed course of action").

UCC created a "comprehensive plan" for training UCIL employees, involving training in the U.S., including in "Environmental Pollution/Control." A234-235; A120-121; A1618; A1647; A3372.

Toxins were generated, at least in part, by the MIC, Phosgene, Temik and napthol refining units, which came from UCC.[7] For example, the hydrochloric acid wastes that posed the plant's major disposal problem and necessitated the acid

[6] A3361-3362; *see also* A2814-2815; A2842-2844; A2848-2855; A271. UCIL sought UCC's assistance to solve the problems. A3362.

[7] A2713 (UCC to provide "summary" of "wastes produced by the U.S.-designed process units"); A123; A160; A2759; A2722; A2724.

neutralization pits and SEPs, A2759; A346 (pits); A115; A123 (SEPs), were generated by UCC's MIC unit. A157; A123; A2759. By contrast, UCIL's 1-Napthol process was barely used, and its predicted acid waste stream eliminated. A1645. UCIL's improvement to the Sevin unit resulted in *less* waste than the UCC process upon which it was based. A1615; A1645.

3. UCC Knew The Manufacturing Technology It Transferred Presented A "Major Disposal Problem."

UCC knew from the beginning that the technology it provided to UCIL posed water pollution risks. Yet, UCC approved "the proposed plant location," A114, which was near neighborhoods whose drinking water could be contaminated. A966; A2695. Indeed, a UCC engineer recognized that, if UCC engineers failed to act to prevent pollution from the MIC unit's hydrochloric acid waste stream, they would not "be held blameless." A2695-2696.[8]

UCC's 1972 waste disposal design noted that the acidic wastes "are clearly the major disposal problem for the proposed unit." A157. The 1973 CBP described "toxic and acidic" waste streams as "of major concern." A115; A122. As noted above, while it was originally thought that both UCC's MIC unit and UCIL's 1-

[8] A May 1972 UCC memo states:

> . . . Mr. Munos [sic] would probably prefer that we not concern ourselves here further with the [hydrochloric acid] disposal problem, leaving that to personnel at the site. However, … I cannot believe that we at the Tech Center would be held blameless if we recognize potential problems here and did not speak up – especially if these problems later materialized and created major difficulties.

A2695.

napthol process would produce acidic wastes, only UCC's MIC unit ultimately did so.

The technology UCC transferred, including the MIC unit, was the same as that at UCC's Institute plant. A114. However, the Institute plant discharged "significant" pollution into a large river. A152. UCC knew that Bhopal "presents an unusual challenge in that there is no nearby waterway." A156. A UCC Environmental Impact Assessment (EIA) noted that "[a]ll wastewater streams . . . will discharge into solar evaporation ponds." A152.

The SEPs were considered the "most economical solution" to prevent drinking water pollution from the MIC unit's wastes. A230.[9] The EIA stated that "[p]lans are to construct the ponds . . . with impermeable linings to prevent contamination of groundwater." A152.[10] Yet as a UCC engineer noted: "a question can be raised as to whether the soil conditions at the site lend themselves to constructing ponds economically with completely impervious bottoms that would prevent seepage of the chloride into the ground waters and therefore into the community water supply." A2695. Regardless, UCC's EIA and 1972 memo confirm that UCC had concerns

[9] The CPB noted the goal of "minimum capital . . . expenditures." A116.

[10] The 1972 plan also stated: "To avoid danger of polluting subsurface water supplies in the Bhopal area, this pond should be lined with clay suitable for rendering the pond bottom and dikes impervious to water." A158.

about the "major disposal problem" posed by its technology, A157, knew of the pollution risk, and was intimately involved in pollution planning.

In violation of local regulations, the plant began operating before the SEPs, causing off-site pollution and killing livestock.[11] UCC's Couvaras was informed of these complaints by UCIL's works manager, who requested of Couvaras that the "Project group" expedite SEP start-up. A2795.

Subsequently, toxins from UCC's MIC process were stored in Pond 2. A2759; A230. In March 1982, Pond 2 leaked, and Pond 3 showed "signs of leakage"; by April, continued leakage was "causing great concern." A240-241; A344. After the plant closed, the ponds "may have developed leaks resulting into permeation of the effluent in the soil." A288.

4. UCC Participated in The Failed Rehabilitation That Created A Toxic Landfill in The SEPs.

For at least ten years after the plant shut down in 1984, UCC participated in the inadequate "clean-up."

UCC's participation, if not approval, was required for the disposal of tons of chlorosulfonic acid sludge. Indeed, to "finalize" a proposed action plan, UCIL found it necessary to seek from UCC "an on-site joint review." A263.

UCC and UCIL also jointly designed the Bhopal Site Rehabilitation & Asset Recovery Project (Project), which was supposed to remediate the SEPs, main plant

[11] A2794-2795. Couvaras noted that commissioning a pond was essential to meeting local regulations. A2791.

site, waste pits, and landfill areas. A282-283; A288-290; A300; A312-316. The Project failed to prevent water pollution. *See* A2675-2678.

The Project was addressed in depth at a "meeting at South Charleston," home of UCC Engineering. A270-300. The meeting considered, *inter alia*, a "Proposed Plan for Landfill Areas" and a preliminary SEP reclamation report. A288; A300. At a later meeting at UCC, Project responsibilities were assigned to UCC. A310-311. For example, UCC developed its own "position on clean up standards." A310-312.[12]

UCIL's director was called to UCC headquarters for a Project review. A384. UCC also took on further Project responsibilities. UCC officials reviewed Project proposals. A301 (initialed by UCC's Gaines). UCC assisted in designing a water pollution study at the plant, A358; A362, advised UCIL on pollution testing techniques and clean-up guidelines, A398-400, and undertook to, among other things, provide procedures for the burning of tars and to review soil and groundwater tests and recommend next steps. A427-429. UCC also participated in the UCIL-ADL relationship, including in the decision to use ADL, A583 (UCC's "Board will want" ADL involvement), A542, and communicating with ADL about compensation and project issues. A428; A387; A503.

[12] *See also* A310-311 (UCC to develop strategy responding to NEERI proposal); A321-324; A325 (UCC provided guidance to Project consultant Arthur D. Little, Inc. (ADL)); A341-349 (UC Asia Pacific's Buckingham participated in "final review " regarding proposed scope of NEERI work, and informed UCC's Gaines).

Indeed, a "technical review" was conducted in the U.S. in early April 1992 to address, *inter alia*, "clean-up criteria," at which UCC's Technical Center was a "principal part[y]." A427; A431. Based on this meeting, UCC produced a draft rehabilitation strategy. A498-501.

UCIL's manager later traveled to the U.S. for remediation training, arranged by UCC, and to review the Project's status with UCC. *Id.*; A428; A550-552; A561-574.

The Project received recommendations from India's National Environmental Engineering Research Institute (NEERI), but did not blindly follow them. UCC's 1989 draft position on clean-up standards for the plant, on "Union Carbide" letterhead, suggested pumping Ponds 2 and 3 into Pond 1, "washing" the soil in Ponds 2 and 3, A312; A314-316, and covering Pond 1. A3577. NEERI's 1990 proposal—burying all three ponds' solids in a landfill in Pond 3—was entirely different, and rejected soil washing. A992; A1010-1012; A1166-1169. UCC's pumping and washing plan was implemented, *after* the 1990 NEERI report, A394-395; A3577; A409; A498; A402, even though NEERI "did not find it practical." A409.

Indeed, NEERI issued a 1992 report *because* UCC's plan had been implemented. A3569; A3577. That report again suggested a Pond 3 landfill and pumping the liquid now consolidated in Pond 1 to that landfill. A3647-3649. Ultimately, Pond 1 was pumped into a Pond 3 landfill, A573; A579, even though UC

Asia Pacific had warned UCC's Environment Director that "I do not favour this approach" because hydraulic pressure "may lead to splitting of the liner." A542.

The "original" liner of Pond 3 was used for the landfill, A542, even though UCC knew that it had become brittle and leaked. A313; A288. This too contradicted NEERI's advice. A 1991 UCIL memo, commented on by UCC's Gaines, had noted NEERI's recommendation that the old liner "should be removed" and a new one used in the landfill. A2692-2694.

The contaminated soil at the plant-site was not remediated, though the lease from the State required it. A942-943; A498.

5. UCC Exercised Control Over UCIL's Pesticide Business Through "WAPT".

UCC coordinated its agricultural products business as an integrated worldwide business under its control. UCIL's plant thus had to be integrated into the worldwide plan. This was done by the World Agricultural Products Team ("WAPT"). A3512 at ¶¶11-36 (citing, *e.g.*, A2806; A2808; A2842-2844; A2809-2810; A2797-2800; A2803-2804; A2869-72; A2811; A2813; A2847; A2857-2858; A2762). The WAPT noted that "UCIL is our only basic investment abroad that is completely integrated in terms of product development, R&D, engineering and production." A2803-2804.

WAPT conceived the Bhopal Task Force to "coordinate our worldwide plan," A2803-2804, and salvage the Bhopal plant's profitability. A2805; A2842-2844. Task

Force proposals required WAPT "endorsement," A2843, and were limited to those compatible with UCC's profitability and interests. A2809; A2803-2804.

WAPT retained veto power over UCIL decisions and ensured UCIL acted in UCC's interests even at the expense of UCIL's. A2803-2804. For example, when UCIL wanted to export Sevin to Asia, UCC rejected that idea through WAPT because it would have deprived UCC of profits and was incompatible with the worldwide plan. A2845-2847; A2845; A2858; A2810. Instead, the Task Force recommended that UCIL make other UCC pesticides compatible with that plan. UCIL obtained permission from India to do so. A2762.

VI. SUMMARY OF THE ARGUMENT

The toxins in Plaintiffs' drinking water came from the now-abandoned plant at which UCC's subsidiary manufactured UCC's patented pesticide. Defendants played a pivotal role at the plant from design and technology transfer through plant start-up to the failed remediation after closure. The district court's conclusion that no jury could reasonably find that UCC participated in creating the large-scale nuisance that continues to harm Plaintiffs, and that no evidence supports any other liability theory, was based on a number of legal and factual errors.

First, the district court essentially repeated the error for which this Court vacated the prior dismissal on the same motion: depriving Plaintiffs of a full opportunity to respond and present evidence. This time, the district court did so by

dismissing based on arguments UCC's motion did not raise, and by barring basic discovery and then holding that Plaintiffs lacked evidence on the same issues.

For example, the district court dismissed agency liability, even though UCC's motion did not challenge it. The court dismissed veil-piercing liability on grounds that UCC did not dominate UCIL, after prohibiting discovery into that very question specifically because UCC only contested veil-piercing on a different basis. Indeed, the court precluded all depositions, including of Defendants. It even denied a 30(b)(6) deposition of UCC to confirm information from the plant's former works manager, who contradicted virtually every assertion the court later found was uncontroverted.

Second, the district court applied erroneous liability standards. Although it ostensibly recognized that participation in a nuisance is sufficient for liability, it required Plaintiffs to show that UCC controlled the design or operation of the plant, which New York law does not require. With regard to concerted action liability, it did not even purport to apply the standard for aiding and abetting, instead requiring "an agreement to pollute." The court erroneously held that agency requires actual control, as opposed to a right of control, and that ratification cannot create an agency relationship.

Third, the court failed to view the facts in the light most favorable to Plaintiffs, repeatedly minimizing UCC's involvement. Although the court suggested otherwise, UCC's involvement was a far cry from mere "parental" oversight. UCC supplied the

concept and basic design for both the production units and waste disposal systems. UCC licensed its proprietary technology, without which UCIL could not produce UCC's patented pesticides – *all* plant design required UCC approval. UCC also provided technical expertise, without which UCIL could not build or operate the plant. Indeed, UCIL so depended on UCC that UCC sent its employee, L.J. Couvaras, to oversee construction and start-up, and he specifically approved the waste disposal system.

In particular, the district court failed to properly consider the central factual showings:

The court did not even mention the fact that the primary source of the wastes, the MIC unit, was UCC's technology. It was simply mistaken in finding that Plaintiffs lacked evidence that UCC approved all plant design.

The court seriously understated UCC's involvement in designing the plant's failed waste disposal systems. Among other things, UCC created the initial waste disposal plan, which included neutralization pits and solar evaporation ponds to address the hydrochloric acid wastes from UCC's MIC unit. Toxins found in the pits and ponds match those in the groundwater.

The district court failed to credit the evidence showing that UCC was a "principal party" to the failed rehabilitation efforts that left the plant site and the toxic landfill in the SEPs a continuing source of water pollution.

UCC's extensive participation is easily sufficient to permit a jury to find UCC liable for nuisance. Indeed, Anderson's admissions that UCC retained absolute control over UCIL and that the plant was built under UCC's design criteria, standing alone, should have been sufficient to deny summary judgment.

Fourth, the court erred in dismissing Plaintiffs' negligence claims for lack of a special relationship between UCC and Plaintiffs or UCIL. There is no such requirement where, as here, liability is based on defendant's own affirmative acts. UCC knew that using the same MIC technology as UCC's Institute plant posed a water pollution risk, because Bhopal lacked a large river like that Institute used for waste disposal. UCC also knew that UCIL lacked experience handling MIC. A jury could hold UCC liable for transferring its polluting technology anyway, and for planning and approving the use of ponds as a substitute for a river, despite doubts that safe ponds could be built economically.

Fifth, the court wrongly dismissed Plaintiffs' equitable relief claims. UCC argued only that decisions in the prior *Bano* action preclude relief. However, the court dismissed claims for remediation of the Plaintiffs' *own* property, even though this Court in *Bano* allowed those claims to proceed. Although Defendants did not challenge the individual Plaintiffs' medical monitoring claims or the well-established New York remedy of monetary relief in lieu of injunction, the court dismissed

without considering these remedies. Additionally, although Defendants raised only a legal challenge to class-wide relief, the court dismissed based on factual arguments.

Finally, the court should not have even heard this motion; it abused its discretion in denying Plaintiffs' motion for reassignment. Reassignment is warranted to avoid the appearance of prejudgment where a court has expressed strongly-held views but must reconsider the same issue on remand. Before issuing the decision at bar, the district court had previously reached firm conclusions based on an incomplete record about the same issues three separate times. No judge could be expected to put aside such firmly held views in considering—for a fourth time—the *same motion* on an expanded record. Particularly in a case so closely watched around the world, this requires vacatur. Regardless, if the Court reverses on other grounds, it should reassign on remand.

VII. ARGUMENT

A. Standard Of Review

Summary judgment is reviewed *de novo*, "drawing all factual inferences in favor of the non-moving party." *Paneccasio v. Unisource Worldwide, Inc.*, 532 F.3d 101, 107 (2d Cir. 2008). Affirmance is proper only if no rational jury could find for the non-movant. *D'Amico v. City of New York*, 132 F.3d 145, 149 (2d Cir. 1998).

The Court reviews for an abuse of discretion discovery decisions, *Hollander v. Am. Cyanamid Co.*, 895 F.2d 80, 84 (2d Cir. 1990), denial of injunctive relief, *eBay*

Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006), and refusal to reassign. *United States v. Urben-Potratz*, 470 F.3d 740, 744-45 (8th Cir. 2006). An error of law or a decision outside the permissible range is an abuse of discretion. *Heerwagen v. Clear Channel Commc'ns*, 435 F.3d 219, 225 (2d. Cir. 2006).

B. The District Court Erred in Granting Summary Judgment on Grounds UCC Did Not Raise.

This Court previously reversed because the district court's *sua sponte* conversion to summary judgment denied Plaintiffs the opportunity to present evidence and focused argument. *Sahu*, 548 F.3d at 70. For the same reason, a court cannot grant summary judgment on a liability theory that defendant did not challenge, *Clarendon, Ltd. v. State Bank of Saurashtra*, 77 F.3d 631, 635-36 (2d Cir. 1996), nor based on arguments newly raised on reply, *Meadowbrook-Richman, Inc. v. Assoc. Fin. Corp.*, 253 F. Supp. 2d 666, 680 (S.D.N.Y. 2003), without providing an opportunity to respond. Fed. R. Civ. P. 56(f).

UCC completely rewrote its motion on reply, injecting new arguments unresponsive to Plaintiffs' opposition. Plaintiffs objected. A3716-3721. The district court ruled that it would only consider arguments that "fairly respond" to Plaintiffs' and disregard those submitted "improperly." SPA66. Yet, the court repeatedly adopted grounds never raised at all – or advanced for the first time on reply – without analyzing whether it was proper to do so.

1. The District Court Dismissed Agency Liability Even Though Defendants Did Not Contest It.

Although Plaintiffs separately alleged agency and alter-ego liability,[13] Defendants did not contest agency, assuming it is the same as alter-ego. A1261. The district court, however, recognized that "'[s]uing a parent corporation on an agency theory is quite different from attempting to pierce the corporate veil'" and that agency liability arises where the subsidiary was acting "'on the parent's behalf.'" SPA79 (quoting *Royal Indus. v. Kraft Foods*, 926 F. Supp. 407, 412 (S.D.N.Y. 1996)).

Nonetheless, the court erroneously concluded that Defendants contested agency by challenging "Plaintiffs' direct and concerted action claims." *Id*. Agency liability is vicarious, not a direct or concerted action theory; it does not depend on the parent's involvement in the tort. Rather, it arises where a parent uses a subsidiary to transact the parent's business, *Port Chester Electrical Constr. Corp. v. Atlas*, 40 N.Y.2d 652, 656-57 (1976), or through the ratification of another's unauthorized act after the fact. Restatement (Third) of Agency, §4.01(1) (2006); *see* A14-66 at ¶¶2, 60, 87, 93, 95, 107, 152.

2. The District Court Dismissed Alter Ego Liability Based on Arguments Defendants Did Not Raise.

UCC challenged veil-piercing based on a "single ground": that there is no equitable need to pierce because EIIL, UCIL's successor, is purportedly able to pay a

[13] *See* A1466 at ¶¶2, 60, 75, 81, 87, 93.

judgment. SPA31; A1242; A1259; A1262. The court denied discovery into the UCC-UCIL relationship as "unnecessary" to rebut UCC's only argument. SPA31; SPA9-10; SPA59. Moreover, the court rejected that argument, holding that EIIL's viability "is not important for the purpose of looking into the future to see if EIIL can pay a specific dollar amount of damages." SPA81. Summary judgment should have been denied at that point. Instead, the court dismissed based on the finding that Plaintiffs failed to present evidence that UCC dominated UCIL; the exact argument for which it denied discovery because it was not raised by UCC. SPA81-84. *See infra* p.38.[14]

3. In Dismissing Direct Liability and Equitable Relief, The District Court Erroneously Relied on New Arguments.

UCC's direct liability argument was narrow; it contested specific factual allegations and raised no legal argument. The district court, however, adopted a series of erroneous legal and factual arguments UCC's motion never made.

For example, the court held that UCC's approval of back-integration could not constitute participation as a matter of law. SPA71-72; SPA78. It concluded that Plaintiffs presented "no evidence" that UCC reviewed or approved design. It held that Plaintiffs had not shown that UCC's training or technical assistance to UCIL contributed to pollution. SPA75. It found UCC's involvement in the design of the SEPs to be insufficient, SPA72-74, even though UCC's motion argued only that the

[14] The court also held that its findings on direct liability preclude veil-piercing, SPA82, another argument Defendants did not raise. That holding must be reversed for the same reasons as the dismissal of direct liability. *See Sahu*, 548 F.3d at 70.

SEPs were to be built with "impermeable linings." A1249-1250. It adopted UCC's reply argument that Plaintiffs asserted narrower arguments against Anderson than against UCC. A3695, at n.5; SPA83.

The court also dismissed negligence liability because it required a "special relationship", a legal argument raised on reply. A3707; SPA76. Moreover, as detailed in Section VII.G, the court adopted equitable relief arguments that UCC's motion did not put forward.

These arguments are refuted below, but the court erred in even considering them without affording Plaintiffs an opportunity to respond.

C. The District Court Erred in Granting Summary Judgment on Issues for Which It Barred Discovery.

In the prior appeal, this Court reversed because the district court failed to give Plaintiffs an opportunity to present all pertinent material. *Sahu*, 548 F.3d at 67. On remand, the district court repeated that error, denying Plaintiffs basic discovery into critical issues and then deciding those issues against the Plaintiffs.

Summary judgment should be vacated where, as here, discovery restrictions "unduly limited" a plaintiff's ability to prove his case. *Hollander*, 895 F.2d at 84; *Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 303-07 (2d Cir. 2003).

1. The District Court Abused Its Discretion in Barring All Depositions.

Depositions are "widely thought to be the most important step of the formal discovery process." SUBRIN, *et al.*, *Civil Procedure: Doctrine, Practice, and Content* 350 (2000). Accordingly, this Court has vacated summary judgment where depositions were denied. *E.g.*, *Miller*, 321 F.3d at 303-07; *Meloff v. N.Y. Life Ins. Co.*, 51 F.3d 372, 375 (2d Cir. 1995).

The district court denied all depositions—including Anderson, and three times denied a Rule 30(b)(6) deposition of UCC—finding that even a single deposition would unduly burden UCC. *E.g.*, SPA34. However, this Court has rejected the district court's argument that documents are an alternative to depositions. *In re Dana Corp.*, 574 F.3d 129, 149-50 (2d Cir. 2009) (finding court abused its discretion in denying Rule 56(f) depositions where plaintiffs had taken "only three depositions" of defendant). The district court cited this Court's observation that the remand likely only required "relatively limited further proceedings." SPA34 (quoting *Sahu*, 548 F.3d at 70). However, a deposition is limited. *See Dana*, 574 F.3d at 149-50. Nowhere did this Court suggest that the district court should deny basic discovery.[15]

Specifically, for example, the court denied a 30(b)(6) deposition to examine, among other things, "UCC's review of any technology developed outside of UCC

[15] The court also speculated that no witness could accurately recall events. SPA34. However, a witness's memory can only be explored at deposition.

and used at UCIL," A1448-1449, but it then held that Plaintiffs did not produce evidence such review occurred. SPA76.

The court even denied a 30(b)(6) deposition to corroborate information received from Ranjit Dutta, UCIL's former works manager. In an interview with Plaintiffs' counsel, Dutta confirmed most of Plaintiffs' contentions, including that:

- the basic processes were from UCC; UCC made final design decisions, UCIL "had no say"; UCC had to approve changes to UCC technology; UCC had "total responsibility of process", A3447-3450; A3454; A3456-3457; A3463-3465;
- the MIC processes at Bhopal and the U.S. facilities were identical, A3449-3450; A3454;
- UCIL's Sevin process was essentially the same as UCC's, with some improvement; idea that UCIL scrapped UCC process is "nonsense", A347; A3450-3451;
- some detail design was done by UCC; UCC had to approve all detail design, A3452-3453; A3460-3462;
- a UCC employee was responsible for the decision to use solar evaporation ponds, A3456-3457;
- a UCC Project Manager, John Couvaras, oversaw the Bhopal project, and was responsible for getting UCC approval for design changes, A3461-3462;
- UCIL depended on UCC's expertise, A3465;
- UCC annually reviewed UCIL's environmental practices, A3481-3482.

Thus, Plaintiffs possessed potentially dispositive information, but were denied means to confirm it.

The district court also refused Plaintiffs' request to depose Anderson, a defendant, UCC's former CEO and a member of the Management Committee that

approved the 1973 CBP. *See* SPA34. Anderson's public statements show knowledge of UCC's involvement in Bhopal plant design and control of UCIL. *See supra* pp.12-13.

In addition, whereas UCC consulted with "people who wrote documents," Plaintiffs were denied that opportunity. A2330. This refusal alone warrants remand.

2. The District Court Denied Documents Central to the Issues it Decided Against Plaintiffs.

The court denied discovery regarding UCC's control of UCIL with respect to Plaintiffs' veil piercing theory, including into the factors listed in *Wm. Passalacqua Builders, Inc. v. Resnick Developers S., Inc.*, 933 F.2d 131, 139 (2d Cir. 1991), finding it irrelevant to Defendants' only argument, EIIL's viability. *See supra* pp.6-7. Yet, the court dismissed alter-ego liability finding a lack of control, including Plaintiffs' alleged failure to meet the *Passalacqua* factors. SPA80-82.

The court permitted some control discovery regarding Plaintiffs' non-veil piercing theories, SPA 31, but denied supplemental discovery. SPA62-63. It held that WAPT approval of a strategic plan would not show that UCC controlled every step UCIL took to implement the strategy. *Id.* However, these documents were relevant to showing that UCIL was conducting UCC's business and generally acting as UCC's agent. Nonetheless, the court dismissed agency liability for lack of a showing of control. SPA82.

The district court also denied discovery into UCC's training of UCIL personnel and provision of technical services related to plant start-up, finding this irrelevant. SPA58. However, it then found no evidence that UCC's training or technical assistance was performed negligently or contributed to pollution. SPA78.

Likewise, the court denied third party discovery from Arthur D. Little, Inc., a consultant on the rehabilitation project, SPA34, but then assumed that UCC had no involvement with ADL. SPA77-78.

It was error to deny discovery and then find that Plaintiffs lacked sufficient evidence on these issues.

D. The District Court Applied Incorrect Legal Standards.

1. Nuisance

The district court quoted the right nuisance standard—that "everyone who… participates in the creation or maintenance of a nuisance are liable jointly and severally," SPA70, quoting *State v. Schenectady Chems., Inc.*, 459 N.Y.S.2d 971, 976 (N.Y. Sup.Ct. 1983), *aff'd as modified*, 479 N.Y.S.2d 1010 (N.Y. App. Div. 1984).[16] Yet, the court consistently required more.

For example, although Anderson admitted that the plant was built under UCC's criteria, the court required not that UCC participate in plant design and operations, but that they be subject to "UCC's micromanagement or control." SPA82. Similarly,

[16] Fault is not required, since Plaintiffs assert both public nuisance and an unreasonably dangerous activity. *Schenectady Chems.*, 459 N.Y.S.2d at 976, 979.

the court required Plaintiffs to show that UCC "designed," "dictated the design," or had "primary responsibility" for the design of the waste disposal system, SPA72-74, and that UCC "directed" or "approved" the rehabilitation Project. SPA77-78. While Plaintiffs presented evidence of UCC's control and approval of plant design, there is no question that UCC participated. *See State v. Fermenta ASC Corp.*, 166 Misc. 2d 524, 532, 630 N.Y.S.2d 884, 891 (N.Y. Sup. Ct. 1995) (finding control not required).

2. Concerted Action

The court held that concerted action liability requires an agreement to engage in polluting activity. SPA78. It failed to consider aiding-and-abetting, which requires only that UCC knowingly gave substantial assistance or encouragement. *Lindsay v. Lockwood*, 163 Misc. 2d 228, 232-33, 625 N.Y.S.2d 393, 397 (N.Y. Sup. Ct. 1994). Even if the court was correct in its narrow interpretation of "participation" in the creation of a nuisance, it cited no law suggesting "assistance" is equally narrow, and made no finding that UCC's acts do not constitute assistance.

3. Agency

The district court erred in requiring evidence that UCC controlled UCIL for agency liability. SPA79. Agency requires only a *right* of control; the principal need not exercise that right. Restatement (Third) of Agency, §1.01, comment c. Regardless, although agency looks to whether UCIL transacted UCC's business, the court did not allow full discovery into that question. *See* Section VII.C.

The district court erred in holding that ratification presupposes an existing agency relationship. SPA79. It does not. *In re Nig. Charter Flights Contract Litig.*, 520 F. Supp. 2d 447, 463 n.12 (E.D.N.Y. 2007); Restatement (Third) of Agency, §4.01, comment b.[17]

The record shows that UCIL acted on UCC's behalf, under UCC's control, including that UCC vetoed UCIL decisions to ensure UCIL acted in UCC's best interests, even at the expense of UCIL's. *See supra* pp.10-27.

E. The District Court Committed Additional Legal and Factual Errors in Dismissing Plaintiffs' Nuisance Claim.

In addition to applying the wrong legal standard, the court, based on a series of legal and factual errors, ignored or minimized the central facts supporting UCC's liability: the final decision to back-integrate the plant was entirely UCC's; all manufacturing and waste disposal design was either provided or approved by UCC; the plant's major disposal problem was posed by UCC's MIC technology; and UCC was a "principal part[y]" in the failed site rehabilitation effort.

Moreover, while each of UCC's various forms of participation is sufficient standing alone, the court failed to consider the record as a whole, which shows UCC's continuous involvement from the planning stages until a decade after the plant

[17] *Phelan v. Local 305 of United Ass'n of Journeymen*, 973 F.2d 1050, 1062 (2d Cir. 1992) and *Monarch Ins. Co. of Ohio v. Ins. Corp. of Ireland Ltd.*, 835 F.2d 32, 36 (2d Cir. 1987) do not address this question.

closed. *See Dana*, 574 F.3d at 152 (holding district court may not consider record piecemeal, giving credence to innocent explanations for individual strands).

1. Defendants Approved The Decision to Back-Integrate The Plant.

The district court erred in finding that UCC's approval of back-integration could not support nuisance liability "as a matter of law." SPA72. According to the court, UCC could only be liable if it "directly participated" in polluting activity. SPA72. That is incorrect. Liability arises when one sets in motion the chain of events leading to a nuisance. *City of Rochester v. Premises Located at 10-12 S. Washington St.*, 180 Misc. 2d 17, 22, 687 N.Y.S.2d 523, 527 (N.Y. Sup. Ct. 1998).

The project could not proceed without UCC's approval. Indeed, that approval covered UCC licensing its technology to UCIL and basic plant design, which UCC began before it approved the CPB. It also covered UCC's assistance, which UCIL required to build and start-up the plant. *See supra* pp.10-21. Contrary to the court's suggestion, SPA72, UCC's approval involved far more than mere parental oversight and budgetary approval.

But even if UCC's approval were an ordinary parental function, SPA72, such that it would not support veil-piercing, UCC would still be liable "for its own actions." SPA71 (quoting *United States v. Bestfoods*, 524 U.S. 51, 64-65 (1998)). The

inability to pierce a veil provides no immunity for participation in a nuisance. *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1052-53 (2d Cir. 1985).[18]

Whether UCIL proposed back-integration is irrelevant. SPA71-72. The final decision was UCC's.

2. The District Court Failed to Assess Anderson's Statements in The Light Most Favorable to Plaintiffs.

Anderson admitted that the Bhopal plant was built under UCC's design criteria with UCC safety standards, and suggested that UCC would not operate where it lacked "absolute control." *See supra* p.11. These are UCC admissions. Fed. R. Evid. 801(d)(2)(C)&(D). The court impermissibly drew inferences in Defendants' favor. It hypothesized that Anderson's admission about design criteria only referred to gas leak prevention. SPA82. And, it held that Anderson's statements only "confirm that UCC sold design packages to UCIL," SPA82, when they actually confirm that UCIL *used* UCC's technology and safety standards. Anderson's statement regarding control alone is sufficient to raise a jury question about UCC's control of UCIL.

3. Defendants Participated in Designing The Waste Disposal System.

In addition to erroneously requiring that UCC itself designed the waste disposal system, *supra* p.28, the court consistently minimized UCC's role. UCC

[18] The district court cited *Fletcher v. Atex, Inc.*, 861 F. Supp. 242, 245 (S.D.N.Y. 1994), SPA71-72, but there the only relationship between the parent and the tort was the parent's ownership of the subsidiary. *Id.* at 246-47.

provided the over-all summary diagram of waste disposal requirements. A2713; *supra* p.15. In 1972, UCC provided preliminary design for the system that included the SEPs and acid neutralization pits, and contemplated dumping wastes in landfill. *See supra* pp.17-18. Indeed, UCC planned the SEPs and pits *after* Munoz proposed leaving the hydrochloric acid problem to UCIL. A2695. UCC designed the MIC and Sevin units' wastewater collection system, *supra* p.17, and waste system design from UCIL required UCC approval. *See supra* p.18. That is participation.

The court assumed that only UCIL's design mattered, even though it implemented UCC's. For example, the court discounted UCC's 1972 design because it was preliminary, and concluded that two 1973 UCC memos show UCC's "limited role." SPA72-74.[19] UCIL's 1973 diagrams were explicitly based on UCC's 1972 design. A2737-2750, *especially* A2737; A2743 and A2749. Thus, UCC assured local authorities that proposed waste disposal methods "are accepted standards incorporating latest designs. . . and are in use at [UCC]." A2754.

Moreover, UCC's technology was particularly "exacting" with respect to handling toxins, UCC had to participate in and approve ongoing design. *See supra* p.18. Thus, UCIL represented to local authorities that waste treatment system design would be done under UCC's "guidance." SPA72-73, citing A2752. As the cover

[19] *See* A3136 (stating that "UCIL will have the primary responsibilities for designing and providing the . . . [waste disposal] facilities"); A2713 (noting that after transmitting comments on UCIL's "proposals", a particular UCC engineer had no obligation to provide general waste disposal information.

letter to the 1973 CBP noted—*after* UCC's 1973 memos—"any… design developed outside UCC" required UCC review. A97; *supra* p.12. Indeed, one of those memos was precisely the kind of UCC review of UCIL design that the court denied ever occurred. A2713 - A2750.

Indeed, by approving the 1973 CBP, UCC specifically approved using SEPs, A123, and UCIL's design was approved by UCC. *See supra* pp.10-12. UCC sent Couvaras—a UCC employee—to Bhopal to oversee design and construction. *See supra* pp.14. A UCIL report describing all of the plant's proposed waste disposal facilities, emphasized by the court, SPA74, was approved by Couvaras. A2879.[20]

Applying the wrong standard, the court held that UCIL's representations to local authorities do not show that UCC *designed* the system. SPA72-74. However, they certainly confirm that the disposal methods came from UCC, and that UCC would have ongoing involvement in design.

The court found that UCC's wastewater collection system report did not actually contain design, SPA73-74, but it did, and specifically noted "area[s] of high potential for pollution." A188; A219-224.

Although UCC planned the solar evaporation ponds in 1972, *supra* pp.15-16, the district court noted that a later UCIL memo indicated a different vision for the

[20] The district court cited the 1973 CBP's cover letter stating that all possible work would be done in India, while ignoring the next sentence, which states that UCC will review all such design. SPA73, citing A97.

SEPs' operation. SPA73; *supra* p.16. The district court completely ignored the fact that UCC's 1973 review reiterated UCC's vision, A2715, and the 1973 CPB subsequently reflected *UCC*'s plan, not UCIL's. *See supra* pp.16-17.[21]

Contrary to the record, the district court assumed, without evidence, that Couvaras was a UCIL employee. SPA74. This was doubly impermissible. Although Dutta confirmed that Couvaras was a UCC employee and that he was responsible for obtaining UCC approval for design changes—in which case it makes no difference who employed him—the court denied discovery. *See supra* pp.35-39.

UCIL stated that it would accept "certain Seepage/effluent from the Pond" as long as "there is corresponding reduction in the cost." A3508-3510. Thus, the ponds were lined with polyurethane, not clay. *Id.* According to the court, this shows that the ponds were UCIL's design, because UCC's 1972 plan included a clay lining. SPA74. However, all changes had to be approved by UCC. *See supra* p.18. Moreover, a UCC "Steering Committee" was responsible for resolving major problems affecting the quality or cost of project work, A3128, and the "seepage" memo was sent to Couvaras (LJC). A3510. A jury can conclude UCC approved this change.[22]

[21] Although Dutta stated that a UCC employee made the decision to use SEPs, the court denied discovery.

[22] Even if UCC did not approve the change, that would not erase UCC's prior participation.

4. The Court Erred in Holding That UCC Cannot Be Held Liable for Transferring or Approving Plant Technology.

Plaintiffs presented abundant evidence that UCC provided the basic plant design and that *all* of the plant technology either came from UCC or had to be approved by UCC. *See supra* pp.18-19. Anderson admitted that the plant was built "under [UCC's] design criteria." A2967-2969. A jury could easily conclude that this is participation in a nuisance.

UCC provided technology for the Phosgene, Temik and MIC units, and these processes generated wastes. *See supra* p.19. The MIC unit in particular generated the hydrochloric acid wastes that posed the major disposal problem, and that necessitated the neutralization pits and the SEPs. *See supra* pp.19-21. The court failed to even consider the evidence that UCC's MIC and other units were polluting. *See* SPA74-76.

The court suggested that Plaintiffs alleged only that "unproven" technology was polluting, and found that all "unproven" technology came from UCIL. SPA74-75, SPA78. However, the Complaint alleges—in at least four places—that UCC's technology was polluting and/or inappropriate for Bhopal, regardless of whether it was "unproven." A14-66 at ¶¶2, 74, 84-85, 140. Regardless, the court should have "deem[ed] the complaint amended to conform with the proof" that UCC's technology was polluting. *Clomon v. Jackson*, 988 F.2d 1314, 1323 (2d Cir. 1993); A3718, at

n.3.[23]

The court further erred in holding that pollution must be attributed to waste disposal, and that there could be no liability unless UCC's technology "caused pollution, in and of itself." SPA75. UCC assumed responsibility for providing safe technology. *See supra* pp.12-13, 18. Moreover, a defendant may be held liable even if another party's mishandling of wastes ultimately caused groundwater pollution. SPA70, citing *Schenectady Chems.*, 459 N.Y.S.2d at 976; *see also City of Rochester*, 180 Misc. 2d at 22 (liability arises when one sets in motion forces which eventually result in harm). UCC's technology generated waste that the disposal system failed to address. UCC participated in the creation of the nuisance.

UCC also participated by approving all plant design. *See supra* p.18-19. The cover letter to the 1973 CBP made clear that UCC "will review any technology and design developed outside UCC." A97. The court's conclusion that there is no evidence such approval occurred, SPA76, is wrong. For example, the record specifically shows that UCC reviewed napthol unit design. *See supra* p.20. It

[23] As to the units it considered, notably the Sevin unit, SPA75-76, the court understated UCC's role. UCIL "improved" UCC's process, it did not reject all of the 2000 pages of design UCC provided, nor did it have the expertise to design the unit from scratch. *See supra* p.20. The district court denied discovery to confirm Dutta's statement that UCIL's process was largely the same as UCC's. *See supra* p.37; *see also* SPA57-58 (denying documents). Any toxins from the SEVIN unit can be attributed to UCC because UCIL's improvement resulted in *less* waste than UCC's original process, *supra* p.21, and because UCC would have approved the change. *See supra* p.19.

provided the Project Manager who approved design in India. *See supra* p.14. UCC also adopted other procedures to ensure that it reviewed all design. *See supra* pp.14-15. Regardless, UCC repeatedly said that its approval was required, and a jury may find UCC did what it said. Holding otherwise was all the more impermissible since the court forbade basic discovery into this exact question.[24]

The court's suggestion that UCC's approval did not contribute to the creation of the nuisance misses the mark. SPA76. If UCIL's technology as opposed to UCC's caused pollution, UCC's approval is "participation"; without it, the technology would not have been used. *City of Rochester*, 180 Misc. 2d at 22; *Penn Cent. Transp. Co. v. Singer Warehouse & Trucking Corp.*, 447 N.Y.S.2d 265, 266-67 (App. Div. 1982) (finding triable issue of fact where defendant authorized act that caused nuisance).

Regardless, a jury could conclude that the large majority of the toxins in Plaintiffs' water came from UCC's technology. UCIL's napthol process was barely used, and its predicted acid waste stream eliminated. UCIL reduced the SEVIN unit's projected waste stream. Nothing suggests that the CO process caused pollution. The remaining units came from UCC.

[24] While all design required UCC review, UCC further required its "participation. . . in *initiating* major changes." A3138 (emphasis added). Although somewhat unclear, if the court meant to suggest that UCC and UCIL only contemplated that UCC would approve "major" changes, SPA76, that is belied by the CBP cover letter and the document the court cited. A3134-3135 (UCC "will...[r]eview and approve all changes").

5. UCC's Involvement as a "Principal Party" in The Failed Rehabilitation Supports Liability.

UCC's involvement in "remediation" was critical and extensive. *See supra* pp.23-26. The district court ignored or misinterpreted the evidence.

For example, UCIL sent UCC a "proposal" for disposing of acid sludge, and requested "an on-site joint review . . . to finalize the action plan." A263. This suggests that UCIL required UCC's input, if not approval. The court, however, discounted it, finding no evidence that the review occurred, which is both an inference in Defendants' favor and irrelevant.

In considering UCC's involvement in the Site Rehabilitation Project, the district court again misapplied the standard, in two respects. It dismissed because it found UCIL "directed" the Project, and that UCC did not "approve" the SEP landfill, even though neither is required. SPA77-78. Moreover, although the court recognized that UCIL and UCC held joint meetings about remediation, it erroneously concluded that this was not participation, without citing any authority. SPA77-78.

The record shows UCC participated in the relationship with ADL, evaluated clean-up strategies, and even produced its own position on clean-up standards and a rehabilitation strategy. *See supra* pp.23-25. Thus, it is not surprising that a UCAP memo to UCC refers to "our" ability to demolish the plant on "our" schedule. A545.

Although UCC was involved in the Project's efforts with respect to the main plant site as well as the SEPs, *e.g.* A3163; A500, the district court failed to address the Project's failure to remediate the site.

The court found that UCIL followed NEERI's recommendations regarding the SEPs and that UCC's only role was to discuss ongoing plans with UCIL. SPA77-78. UCC's role was far greater. For example, in 1989, UCC proposed a pumping and soil-washing plan for the ponds. *See supra* p.25. Later, in the 1990 report the court emphasized, NEERI suggested creating a landfill in Pond 3. SPA77; *supra* p.25. Nonetheless, UCC's plan was implemented, even though NEERI found it impractical. *See supra* pp.25-26.

The court failed to acknowledge that the plan was UCC's. The court's findings that the soil-washing was conducted by UCIL and did not produce harms miss the point. SPA78. When UCC's plan differed from NEERI's, the Project implemented UCC's.

Indeed, NEERI produced a 1992 report, (which again suggested a landfill), specifically because it was asked to suggest remedial measures in light of the new, post-soil washing circumstances. A3569; A3577.

UCC knew that the liner in Pond 3 was brittle and had leaked, and that NEERI recommended the old liner not be used. *See supra* p.26; A2692-2694. The Project implemented the landfill—without replacing the liner—even though UCC was

specifically warned that it could split. *See supra* pp.25-26. A jury could conclude that this warning was not idle chatter, but rather was issued to UCC because it played a role in Project decisions.

Likewise, the district court ignored evidence that UCC took on project responsibilities, including developing positions on clean-up standards and a rehabilitation strategy. *See supra* pp.24-25. Moreover, key meetings were held at UCC; UCC was a "principal part[y]." A427. Indeed, UCC summoned UCIL's director to UCC headquarters "to review th[e] project." A384; *see also supra* p.24 (UCC headquarters conducting later review with UCIL official). This permits a reasonable jury to find that UCC did not merely "discuss" the Project, but oversaw it.

It is irrelevant whether NEERI recommended the landfill, State authorities approved it or UCIL performed the work. *See* SPA77-78. The question is whether UCC participated.[25] Contrary to the court's findings, UCC was no mere bystander, but rather played a substantial role in deciding the course of rehabilitation.

[25] Compliance with safety standards is no defense. *Schenectady Chems.*, 117 Misc. 2d at 970. Nor is the claim that the conduct is otherwise lawful. *State v. Waterloo Stock Car Raceway, Inc.*, 96 Misc. 2d 350, 357-58, 409 N.Y.S.2d 40, 44 (N.Y. Sup. Ct. 1978). Governmental approval or oversight does not absolve UCC of liability for its own conduct. Indeed, even a government's agent that the government has agreed to indemnify is liable for its own torts. *Group Health Inc. v. Blue Cross Ass'n*, 625 F. Supp. 69, 75-76 (S.D.N.Y. 1985).

6. Anderson's Participation Is Sufficient to Hold Him Liable.

It was improper for the district court to consider Anderson's liability after barring Plaintiffs from deposing him. Regardless, Anderson was UCC's then-CEO and a member of the Management Committee that approved the decision to back-integrate with UCC technology. *See supra* pp.10-12. Without that approval, the project could not proceed. *Id.* Moreover, Anderson's statement regarding UCC's control over UCIL raises a genuine issue of fact as to his authority. *See supra* pp.10-12. Indeed, in *Bano*, this Court found "at least some evidence" that Anderson "exercised significant direct control" over the plant, including safety procedures. *Bano*, 273 F.3d at 133. Defendants' motion did not address Anderson's liability separately from UCC's. Dismissal was based on the same errors as the dismissal of UCC, SPA82-83, and must be reversed for the same reasons.

The district court held that no evidence suggests that, when UCC approved back-integration, the plant was in a residential neighborhood, or that UCC management knew that it was. SPA82-83. However, prior to approval, UCC engineers expressed concerns that MIC unit wastes might leak from the SEPs into "the community water supply." A2695; *see also* A966 (in 1977, plant was in "crowded" neighborhood). Although nuisance does not require fault, UCC management surely knew people lived there.

The court found that UCIL asked Madhya Pradesh to allot land, and thus it chose the site for UCIL. SPA82-83. However, the plant was back-integrated into the existing plant. Regardless, even if the State determined where the plant *could* be built, no one forced UCC to approve it. A defendant need not have any control over the site of a nuisance.

F. UCC Can Be Held Liable for Negligence.

A jury can find UCC negligent for transferring technology—especially the MIC process—that it knew produced "toxic and acidic" waste streams that risked polluting local drinking water. *See supra* pp.21-23. UCC used this same technology at its Institute plant, which discharged wastes into a large river. *See supra* p.21. Yet using it at Bhopal "present[ed] an unusual challenge," because Bhopal had no river. *See supra* p.22.

The court erroneously assumed that all polluting technology came from UCIL and that UCC's only alleged failure was not controlling UCIL. SPA76. The court overlooked the central fact: it was *UCC's* technology that risked groundwater pollution. *See supra* pp.21-23, 47-49.

Thus, the court erred in holding that Defendants owed no duty of care to Plaintiffs absent a "special relationship." SPA76. Anyone who does an affirmative act owes a duty to exercise reasonable care to protect others against harm arising out of the act. Restatement (Second) of Torts §302, comment a. No special relationship is

required where, as here, liability is based on a defendant's own act. *Id.*; *Weirum v. RKO General, Inc.*, 15 Cal. 3d 40, 48-49 (1975).

This duty applies even where the harm is ultimately caused by the foreseeable acts of another. *Stagl v. Delta Airlines, Inc.*, 52 F.3d 463, 465, 473 (2d Cir. 1995); *Weirum*, 15 Cal. 3d at 47; *see also* Restatement (Second) of Torts §§302(b), 302A, 449. A jury can find that UCC owed a duty to the Plaintiffs not to transfer technology it knew posed a pollution risk.[26]

Indeed, a defendant owes a duty to third-parties where the defendant, performing a contract, "launche[s] a force or instrument of harm," *Stiver v. Good & Fair Carting & Moving, Inc.*, 9 N.Y.3d 253, 257 (2007). Despite the risk, UCC licensed its technology to UCIL and provided the technical services necessary to operate it. In performing these contracts, UCC knowingly created an unreasonable risk of harm to Plaintiffs.

A UCC engineer recognized from the outset that UCC bore responsibility. After noting that the hydrochloric acid waste stream—from UCC's MIC unit—could pollute "the community water supply," and Munoz's preference that personnel in Bhopal address the issue, he concluded that the Tech Center would not be "held

[26] The court cited *Fletcher* and *Quinn v. Thomas H. Lee Co.*, SPA76, but they are inapposite because the defendants did not commit any negligent act. *Fletcher*, 861 F. Supp. at 246 (finding "no evidence that Kodak actually participated in the design or manufacture of the Atex keyboards"); *Quinn*, 61 F. Supp. 2d 13, 20 (S.D.N.Y. 1999).

blameless" if they "did not speak up." A2695. According to the court, UCC is immune because it "did speak up" and therefore UCIL knew it needed an appropriate waste disposal system. SPA76-77. However, UCIL lacked experience dealing with MIC, one of UCC's most sophisticated processes, particularly with regard to handling highly toxic materials. A3127. A jury can find UCC liable for alerting UCIL that UCC's technology is dangerous yet expecting UCIL to solve the problem.

Regardless, UCIL did not design the waste disposal system alone; UCC was intimately involved. *See supra* pp.15-18. A defendant is liable for providing negligent advice about how to avoid harm to third persons, if, as here, the advisee at least partially relied on it.[27] UCC's 1972 waste disposal plan included SEPs to prevent water pollution, and in approving the CBP, UCC approved the use of SEPs. *See supra* pp.16-18. However, UCC knew that "a question can be raised" as to whether it was possible to build safe ponds economically. A2695. That concern proved justified; construction was deemed too costly, and UCIL changed the ponds' liner, "accept[ing]" seepage to save money. *See supra* p.17. Moreover, UCC would have

[27] *E.g. Canipe v. Nat'l Loss Control Serv. Corp.*, 736 F.2d 1055, 1058-59, 1062-63 (5th Cir. 1984) (applying Restatement (Second) of Torts §324A (1965)); *Johnson v. Abbe Eng'g Co.*, 749 F.2d 1131, 1134 (5th Cir. 1984) (§ 324A applies to subsidiaries' reliance on parent's safety expertise); *Miller v. Rivard*, 585 N.Y.S. 2d. 523, 527 (App. Div. 1992) (New York applies §324A); *Smith v. Atl. Richfield Co.*, 814 F.2d 1481, 1488-89 (10th Cir. 1987) (parent can be liable for negligent safety advice to subsidiary that was not its alter-ego).

approved the changes. *See supra* pp.45-47. A jury could find UCC was negligent in suggesting and approving the use of SEPs.

UCC participated in the failed plant remediation, including the creation of a landfill, despite knowing the liner might split. *See supra* pp.50-52. This too was negligent.

G. *Bano* Does Not Preclude Equitable Relief.

UCC's *only* challenge to equitable relief was that this Court's dismissal of equitable relief in *Bano*, 361 F.3d at 703, precludes such relief here as a matter of law, because the claims are the "same." A1263-1264. Here again, the court erred in deciding issues Defendants did not raise.

UCC conceded that this Court *allowed* claims for remediation of the plaintiff's own property. *Bano*, 361 F.3d at 702, 713. The district court dismissed those claims anyway. SPA83-84. It cited *Bano v. Union Carbide Corp.*, 198 Fed. Appx. 32 (2d Cir. 2006), but this Court was clear that it was not addressing remediation of individual properties. *Id*. at 34-35.[28]

The court also erred in dismissing the individual Plaintiffs' medical monitoring claims. *Bano* did not address, and thus UCC did not challenge, these claims. The

[28] The district court also suggested that it cannot supervise remediation in India. SPA83-84. However, courts may order remediation abroad. *Bano*, 361 F.3d at 716-17. The court's assumption without evidence that a remedy concerning foreign land is impracticable was "wild speculation." *Arellano v. Weinberger*, 745 F.2d 1500, 1531-32 (D.C. Cir. 1984) (en banc), *vacated on other grounds*, 471 U.S. 1113 (1985).

district court in *Bano* addressed only *class-wide* medical monitoring, *Bano v. Union Carbide Corp*., No. 99 Civ. 11329, 2003 U.S. Dist. LEXIS 4097 at *26 (S.D.N.Y. Mar. 18, 2003); this Court did not consider medical monitoring at all. *Bano*, 361 F.3d at 716. Discussing only class-wide monitoring, the district court here provided no basis to dismiss individual relief. *Sahu*, 548 F.3d at 63. This requires remand. *Martens v. Thomann*, 273 F.3d 159, 172-73 (2d Cir. 2001).

More generally, the district court erred in considering the fact question of whether equitable relief and medical monitoring are feasible. UCC's legal argument was not predicated on any facts, and UCC provided no Rule 56.1 support. Moreover, *Bano* is not preclusive because these Plaintiffs were not parties. *Blonder-Tongue Lab., Inc. v. Univ. of Ill. Found*., 402 U.S. 313, 329 (1971). The court did not accept that *Bano* was legally preclusive, but applied *Bano*'s "reasoning" to the facts here without giving notice that facts were at issue, and despite UCC's utter failure to carry its burden to show that the facts preclude equitable relief. SPA83. Because Plaintiffs essentially had no opportunity to present all of their evidence, this requires reversal. *Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 646 (2d Cir. 1998).[29]

[29] As to class-wide remediation, the lack of notice also denied India the opportunity to weigh in, to clarify whether it demanded control over clean-up of the plant or acquifer and to present evidence or a proposed plan that would allow the court to consider feasibility on a full factual record. *See Bano*,198 Fed. Appx. at 35.

Moreover, *Bano* denied medical monitoring given the difficulty of locating class members who resided in Bhopal over "more than thirty years." *Bano*, 2003 U.S. Dist. LEXIS 4097 at *26. Here though, monitoring is sought only for persons *continuing* to reside in specific communities. A63; A54 at ¶129. Thus, Defendants presented no challenge tailored to this narrower class, and the "reasoning" of *Bano* is inapplicable. The court misread the Complaint in suggesting that Plaintiffs seek monitoring for "every current resident of the Bhopal area." SPA83. The specific communities at issue, A54 at ¶129, comprise only a small fraction of Bhopal.

Finally, even if remediation and medical monitoring were properly dismissed, the district court erred in barring a monetary remedy in lieu of injunction, without even mentioning it. That remedy "prevent[s] a failure of justice" where injunctive relief is impracticable.[30] *Bano* did not address and thus UCC did not contest this relief.

H. The District Court Abused Its Discretion in Refusing to Reassign This Action, and This Court Should Reassign on Remand.

Reassignment is warranted where a judge "could be expected to have difficulty putting aside his previously expressed views," *United States v. Campo*, 140 F.3d 415, 420 (2d Cir. 1998), or "to avoid the appearance of prejudgment." *Holley v. Lavine*, 553 F.2d 845, 851 (2d Cir. 1977).

[30] *Doyle v. Allstate Ins. Co.*, 136 N.E. 2d. 484, 486 (N.Y. 1956); *Fin. One Pub. Co. v. Lehman Bros. Special Fin., Inc.*, 414 F.3d 325, 344 (2d Cir. 2005); *Lusker v. Tannen*, 456 N.Y.S.2d 354 (App. Div. 1982) (collecting cases).

Reassignment does not imply criticism of the district court; it "avoid[s] any question, legitimate or not," about the eventual disposition. *Mackler Prods., Inc. v. Cohen*, 225 F.3d 136, 147 (2d Cir. 2000). This Court has repeatedly ordered reassignment even though the district court could consider the issues fairly on remand. *E.g. id.*; *Cullen v. United States*, 194 F.3d 401, 408 (2d Cir. 1999); *United States v. Leung*, 40 F.3d 577, 587 (2d Cir. 1994).

Plaintiffs' motion presented a paradigmatic case for reassignment. This case and *Bano* have involved multiple rounds of litigation, appeal, and remand. *Mackler*, 225 F.3d at 147. The court initially ruled on a limited record, but was required on remand to decide the same issues on an expanded record. *See Campo*, 140 F.3d at 419; *Cullen*, 194 F.3d at 401-02. Before it did so, the court had already reached firm conclusions that UCC was not liable, based on detailed factual findings, in its two previous summary judgment rulings, SPA4-8; SPA15-21, and then again on remand, "after renewed, independent consideration," prior to Rule 56 discovery. SPA30, at n.2.

Although the district court stated that it would consider the entire expanded record anew, SPA40; SPA68, no court could "be expected to erase [its] earlier impressions" in addressing the same motion for the *fourth* time. *United States v. Robin*, 553 F.2d 8, 10 (2d Cir. 1977). Indeed, UCC hammered the theme that "Plaintiffs have failed to show that this Court's [prior] grant of summary judgment

for defendants was erroneous." *E.g.* A3691. As in *Hispanics for Fair & Equitable Reapportionment v. Griffin*, which also involved remand because plaintiffs were not afforded an adequate opportunity to oppose summary judgment, the firmness of the court's already expressed views required reassignment. 958 F.2d 24, 25-26 (2d Cir. 1992).

Here the court had also gone out of its way, *sua sponte*, to opine that New York is not the proper forum, SPA3, and in the opinion at bar it repeatedly ruled on issues not presented. This exacerbated the risk to the appearance of justice.

Reassignment did not entail duplication disproportionate to the need to avoid that risk. *Mackler*, 225 F.3d at 147. Any judge would have had to review the entire expanded record. *Martens* is inapposite: the court had not expressed firm views, its task on remand was simply to explain its decision. 273 F.3d at 164, 173.

The district court's refusal to reassign requires vacatur. Regardless, reversal is warranted on other grounds, and the Court should reassign on remand, now that the district court has considered the record yet again.

VIII. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the judgment be reversed and remanded and the case reassigned.

Dated: November 6, 2011

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 13,985 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

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