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

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

RICHARD L. HERZ
EARTHRIGHTS INTERNATIONAL
1612 K Street, NW, Suite 401
Washington, DC 20006
(860) 233-4938

CURTIS VICTOR TRINKO
LAW OFFICES OF CURTIS V. TRINKO, LLP
16 West 46th Street, 7th Floor
New York, New York 10036
(212) 490-9550

H. RAJAN SHARMA
NEAL DEYOUNG
SHARMA & DEYOUNG LLP
555 Fifth Avenue, 17th Floor
New York, New York 10017
(212) 856-7236

THOMAS N. SAUNDERS
COHEN MILSTEIN SELLERS & TOLL PLLC
1100 New York Avenue, NW
Suite 500 West
Washington, DC 20005
(202) 408-4600

RICHARD S. LEWIS
REENA A. GAMBHIR
HAUSFELD LLP
1700 K Street, NW, Suite 650
Washington, DC 20006
(202) 540-7200

Attorneys for Plaintiffs-Appellants

MUNEE BI, on behalf of herself, her family, as guardian of her minor children, and all others similarly situated, QAMAR SULTAN, on behalf of herself, her family, as guardian of her minor children and all others similarly situated, FIRDAUS BI, on behalf of herself, her family, as guardian of her minor children, and all others similarly situated, NUSRAT JAHAN, on behalf of herself, her family and all others similarly situated, PAPPU SINGH, on behalf of himself, his family and all others similarly situated, JAMEELA BI, on behalf of herself, her family, as guardian of her minor children, and all others similarly situated, MEENU RAWAT, on behalf of herself, her family, as guardian of her minor children, and all others similarly situated, BANO BI, on behalf of herself and all others similarly situated, MAKSOOD AHMED, on behalf of himself, his family, as guardian of his minor children, and all others similarly situated, BABU LAL, on behalf of himself, his family, as guardian of his minor children and all others similarly situated, KAVAL RAM, on behalf of himself, his family, as guardian of his minor children, and all others similarly situated,

Plaintiffs-Appellants,

– v. –

UNION CARBIDE CORPORATION, WARREN ANDERSON,

Defendants-Appellees.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

INTRODUCTION AND SUMMARY OF THE ARGUMENT

UCC's brief overwhelmingly focuses on presenting a selective and erroneous account of the record. But as a threshold matter, UCC fails to refute Plaintiffs' showing that the district court applied incorrect legal standards. For example, while nuisance liability requires only participation in the creation of the nuisance, the district court required far more. And the district court failed to consider aiding-or-abetting at all; to suggest otherwise, UCC cites the district court's vacated decision—as it inexplicably does in a variety of contexts throughout its brief. Likewise, the district court improperly ruled against Plaintiffs on issues, like agency, that UCC did not even raise. These errors warrant reversal without need to address the facts.

Regardless, UCC comes nowhere close to overcoming Plaintiffs' showing that the district court resolved disputed material issues. Plaintiffs presented a wealth of evidence that UCC, acting through its own employees, played an independent and indispensible role in each of the acts that caused the contamination of the community drinking water.

Indeed, UCC's opening gambit attempts to avoid the record entirely. UCC does not contest that it provided the plant's MIC process—a primary source of the pesticide by-products tainting Plaintiffs' water. Instead, it seeks to excuse the district court's failure to even consider this fact by

mischaracterizing the allegations. This Court, however, held in the prior appeal that summary judgment based on the Complaint is impermissible because Plaintiffs must be allowed to present all of their evidence.

UCC predicates much of its argument on assertions that a jury need not accept. For example, it claims that the harm caused by the MIC process was too remote for liability. But that is typically a jury issue, and since the process was a "but for" cause of the harm, a reasonable jury could hold UCC responsible.

A jury may also conclude that, in providing the initial waste disposal plan—which, for example, included and led to the use of the waste ponds (SEPs)—UCC participated. And although UCC suggests in a footnote that Couvaras, who approved and oversaw UCIL's implementation of UCC's plan, was a UCIL employee, abundant evidence shows that he worked for UCC.

Back-integration of the plant required UCC's approval, without which UCIL could not have manufactured pesticides at Bhopal. A jury could permissibly find this too was participation.

The same holds true for UCC's extensive participation in developing the failed rehabilitation strategy for the plant-site and SEPs. For example, a

jury can conclude that, in summoning UCIL to UCC headquarters to discuss the status and progress of the project, UCC exercised oversight authority.

A jury can also find UCC liable for negligence and aiding-or-abetting. Plaintiffs have presented abundant evidence that UCC knew the risks of polluting the water every step of the way.

UCC asks this Court to conclude that a reasonable jury could only find that each of UCC's myriad forms of participation is simply not participation at all. And since liability can be based on UCC's involvement in *any* of the acts that resulted in the pollution, UCC must show—for every one of these points—that nothing in the record supports liability. While UCC fails for each phase of its participation, it certainly has not run the table.

In seeking to blame others, (UCIL, NEERI, the Madhya Pradesh ("MP") government), UCC consistently ignores the applicable standards. *All* who participate in a nuisance, including those who set in motion the events that lead to the harm, are liable, and similar principles apply to negligence and aiding-or-abetting.

UCC cannot refute Plaintiffs' showing that the district court's denial of discovery directly relevant to the issues the court decided against Plaintiffs constitutes reversible error.

Defendants likewise fail to address the deficiencies in the dismissal of equitable relief; they argue that the reasoning of *Bano* applies here, but had put no facts at issue that the district court could have permissibly considered.

Finally, UCC errs in claiming that the district court did not need to reassign because this Court did not overturn the district court's prior decisions on the merits. Under this Court's caselaw, the fact that the district court repeatedly expressed firm views based on an evidentiary record that this Court found inadequate was sufficient to require reassignment to preserve the appearance of justice.[1]

ARGUMENT

I. THE DISTRICT COURT APPLIED INCORRECT LEGAL STANDARDS.

A. Nuisance.

Although the district court correctly noted that anyone who participates in the creation of a nuisance is liable, it erroneously imposed additional requirements, such as "micromanagement or control." PB39-40,

[1] Because there is no dispute the MIC process came from UCC, its suggestion that this Court determined that UCC did not design the plant is irrelevant to that basis for liability. DB5-6, citing *In re Union Carbide Corp. Gas Plant Disaster*, 809 F.2d 195 (2d Cir. 1987). That opinion could have no bearing anyway, since this Court never considered liability; instead, it considered a different issue (the lower court's balancing of *forum non conveniens* factors), in a case about different pollution (the gas disaster), under a different, more limited standard (abuse of discretion), based on a different record, presented by different plaintiffs.

quoting SPA82.[2] UCC does not claim these additional requirements are actually elements of nuisance. Instead, like the district court, it attempts to minimize UCC's various forms of participation by disputing the facts and their importance. But that does not refute Plaintiffs' showing that the district court applied the wrong standard. UCC's factual assertions are for a jury to decide.

B. Aiding-or-Abetting.

UCC asserts that the district court analyzed aiding-or-abetting liability, but refers only to a decision this Court vacated, not the one on appeal. DB28-29. There is no question the district court failed to consider the evidence of UCC's assistance regarding back-integration, technology transfer, waste disposal design and site rehabilitation under aiding-or-abetting standards.

The argument UCC cites but the district court abandoned is wrong. Aiding-or-abetting a subsidiary does not require veil-piercing. These are separate liability theories. *See Bigio v. Coca-Cola Co.*, 675 F.3d 163, 171-72 (2d Cir. 2012) (considering parent's liability for abetting subsidiary after finding no basis to pierce the corporate veil); *Fletcher v. Atex, Inc.*, 68 F.3d

[2] Plaintiff-Appellants cite their opening brief as "PB" and Defendants-Appellees' brief as "DB."

1451, 1461, 1466 (2d Cir. 1995) (same). There is no special immunity for corporations that abet their subsidiary's torts.[3]

II. PLAINTIFFS HAVE SHOWN DISPUTED FACT ISSUES AND LEGAL ERRORS WARRANTING REVERSAL.

A. UCC's MIC Process Generated The Toxins In Plaintiffs' Water.

UCC's MIC process was "polluting." PB19-23. UCC does not dispute that local drinking water is contaminated by toxins from the plant. PB9. Nor does it claim that the CO, Napthol or Sevin processes were the primary source of those toxins. DB13. That leaves only UCC's processes.[4]

In particular, UCC's MIC process was the reason for the waste ponds. PB20-21. And toxins found under those ponds contaminated the water. PB9, 17. Summary judgment must be reversed because the district court failed to even consider this evidence that the MIC process was a primary source of the pollution. PB47.

UCC, however, claims that this failure was perfectly acceptable. DB14. It, like the district court, attempts to rewrite Plaintiffs' Complaint.

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[3] This Court has acknowledged aiding-or-abetting liability for nuisance claims. *People by Abrams v. Terry*, 45 F.3d 17, 19 (2d Cir. 1995); *see also*, Restatement (Second) of Torts § 876, cmt. d (advice to act in a way known to be tortious "has the same effect upon the liability of the adviser as participation or physical assistance").

[4] Regardless, which process produced the toxins is irrelevant, since UCC approved all plant technology. PB48-49.

The allegation that unproven technology was polluting was never the "centerpiece of plaintiffs' case," nor did Plaintiffs allege that *only* "unproven" technology was polluting. DB12-13; SPA75. UCC fails to mention Plaintiffs' numerous allegations that UCC's technology was polluting or inappropriate irrespective of whether it was "unproven." PB47. Indeed, Plaintiffs allege that UCC knew the pollution risk of transferring processes designed to discharge waste into a river, despite the absence of a river at Bhopal. A37-38, ¶¶84-85. That allegation refers to the MIC process. PB16, 54. Thus, the Complaint provides clear notice that UCC's transfer of MIC technology was a basis for liability.

UCC contravenes not only the allegations themselves, but also the principles that courts draw all reasonable inferences in plaintiffs' favor, *Bryant v. New York State Educ. Dep't*, 692 F.3d 202, 210 (2d Cir. 2012), and that the purpose of the Federal Rules is "to facilitate a proper decision *on the merits*." *Conley v. Gibson*, 355 U.S. 41, 48 (1957) (emphasis added) ("[P]leading is [not] a game of skill in which one misstep by counsel may be decisive to the outcome.").

Indeed, this Court has already rejected the notion that the district court may cite the Complaint as a reason to ignore the record. In vacating the district court's prior grant of summary judgment based on the Complaint,

this Court held that Plaintiffs were denied the "opportunity to oppose the motion with evidence and a focused argument." *Sahu v. Union Carbide Corp.*, 548 F.3d 59, 67-69 (2d Cir. 2008). By ignoring Plaintiffs' evidence and relying solely on the Complaint, the district court repeated that error.

UCC's claim that Plaintiffs never argued below that UCC is liable for transferring the MIC process is nonsense. Plaintiffs opposed summary judgment on grounds that UCC "does not deny that wastes were generated at least in part by the MIC . . . unit[], which came from UCC," A2633 and n.33; that UCC knew its technology posed water pollution risks and necessitated the SEPs, A2633-34 and n.33; that the SEPs leaked, A2636; and that toxins from the SEPs contaminated the groundwater. A2628-29.

Moreover, Plaintiffs argued that, in suggesting that the MIC process was not at issue, UCC misread the Complaint, A2633-34 and n.33; A3718, n.3, and that, if the district court agreed with Defendants' crabbed interpretation, it should permit Plaintiffs to amend to conform to the evidence. A3718, n.3; PB47. Plaintiffs' MIC argument is hardly new.

UCC's claim that MIC *itself* has not contaminated the groundwater, DB15, also fails. UCC improperly makes this argument—apparently without irony—despite failing to raise it in its motion below. A1246-48. Regardless, it is irrelevant. Toxins from UCC's *process* polluted Plaintiffs' water.

UCC now portrays the wastes that so worried UCC's engineers as just "salt." DB8, 15. While the "salt" was problematic, the MIC process's wastestream also included organic "residue" that was "discharged into the [SEPs]." A123; A275; A394; A1068; A1081 (finding ponds contaminated with organics); *see also* A115; A122 (wastestream was "toxic and acidic"). And organochlorine pesticides and benzenes (another organic) were later found in both the ponds and the drinking water. A2678; PB9.

Although fault is unnecessary for nuisance liability, Plaintiffs have shown, contrary to UCC's claim, DB15-16, that UCC knew the pollution risk posed by the technology it transferred. PB21-23; *see also* SPA76 (district court acknowledging that "UCC recognized potential waste disposal issues"). Indeed, UCC knew the wastes contained organic residues when it came up with the idea for the ponds in the first place. A160; A2722-23. UCC also knew from the outset that UCIL needed its help regarding "the handling of [the] highly toxic materials" involved in UCC's processes. PB13-15; A3127.

In its attempt to deny knowledge, UCC is forced to cite the district court's vacated 2005 decision, DB15-16, citing SPA5, which did not even consider this record. Regardless, in the documents to which the district court referred—UCC's 1972 waste disposal plan and Environmental Impact

Assessment—UCC envisioned SEPs with impermeable linings precisely because of the water pollution risk, A152, A158-160, despite concerns that the pollutants could still leak. PB22. A jury can therefore conclude that UCC was aware of the risk of transferring to Bhopal a process designed to dump wastes into a large river. PB54.

UCC's last-ditch argument, that it cannot be held liable no matter what technology it transferred, DB17, is also wrong. A jury may find that transferring the process that produced the toxins is participation. And since the district court did not even consider the evidence regarding MIC, it could not have properly applied the nuisance standard.

Defendants' reliance on *People v. Sturm, Ruger & Co.*, to suggest that the harms are too remote from UCC's conduct is misplaced. DB17, citing 761 N.Y.S.2d 192 (N.Y. App. Div. 2003). There, a gun manufacturer was sued in nuisance for others' "unlawful use of handguns." *Id.* at 194. The court, fearing that such previously unrecognized liability against gun manufacturers would open the door to similarly novel suits to address a host of societal problems, held that "liability…[is limited] only to those harms that have a reasonable connection to [the wrongdoer's] actions." *Id*. at 202. A similar specter is not present here. Liability for those who participate in causing pollution has long been at the heart of nuisance law.

Nothing in *Sturm, Ruger* suggests that the harms here lack a "reasonable connection" to UCC. Indeed, nuisance liability arises when one sets in motion forces that eventually result in harm, even if the act that ultimately causes the harm is committed by another. *City of Rochester v. Premises Located at 10-20 S. Wash. St.*, 180 Misc. 2d 17, 22 (N.Y.Sup.Ct. 1998). Thus in *State v. Schenectady Chems., Inc.*, a chemical company was held liable where the owner of a disposal site indiscriminately dumped the company's wastes. 459 N.Y.S.2d 971, 973 (N.Y. Sup.Ct. 1983), *aff'd as modified*, 479 N.Y.S.2d 1010 (N.Y. App. Div. 1984). Moreover, if there is reasonable doubt about the substantiality of participation, the question is for the trier of fact. *See* Restatement (Second) of Torts § 834 cmt. d.[5]

Defendants attempt to distinguish *Schenectady Chems.* on its facts, DB17, but the decision states the general principal that a non-landowner can be liable for taking part in the creation of a nuisance on another's property. 459 N.Y.S.2d at 977. Similarly, *Sturm, Ruger* cited approvingly *State v. Ole Olsen*, 38 A.D.2d 967 (2d Dept. 1972), which imposed liability on vendors who sold homes with sewage systems that later polluted local water, even

[5] *See also Stagl v. Delta Airlines, Inc.*, 52 F.3d 463, 474 (2d Cir. 1995) (holding in negligence context that since the foreseeability of another's act "may be the subject of varying inferences. . .these issues are generally for the fact finder") (internal quotation omitted).

though control had passed to the purchasers. *Sturm, Ruger*, 761 N.Y.S.2d at 198, n.2.

Thus, there is no support for UCC's suggestion that a defendant who transfers *wastes*—or as in *Ole Olsen*, polluting *infrastructure*—can be held liable, but that a jury is not even allowed to consider liability for one who transfers *polluting processes*. Each is participation. In each case, the pollution would not have happened but for the transfer. Indeed, pollution control is not just about disposal; it begins with the manufacturing process itself. Far from being "too remote," UCC's provision of the process that originated the toxins at issue was the *sine qua non* for the creation of the nuisance.[6]

B. UCC Participated In Designing The Waste Disposal System.

UCC's argument that UCIL "designed" the waste disposal system, DB18, repeats the district court's legal error. UCC need only have participated in designing the system. PB39-40. Plaintiffs have shown that UCC participated extensively, PB15-18; Defendants fail to show they did not participate at all. DB18-25.

[6] Moreover, in other contexts, mere trademark licensors are liable for injuries from their product, when they have the "capacity" to exercise control over design. *See Harrison v. ITT Corp.*, 603 N.Y.S.2d 826, 826 (N.Y. App. Div. 1993); *Auto. Ins. Co. of Hartford Conn. v. Murray, Inc.*, 571 F. Supp. 2d 408, 422-23 (W.D.N.Y. 2008). Surely UCC, the designer and seller of the polluting processes, has no special immunity.

Defendants assert that UCIL had primary responsibility for designing the waste disposal system and that UCC was not permitted to do so. DB18-19. But the division of labor was clear. UCC created the initial waste disposal plan, PB15, and then UCIL (or its contractor) drafted the design to implement it, *see* DB18, quoting A97, subject to UCC's approval. PB18.

Indeed, UCIL assured Bhopal's Public Health Engineer—in a passage UCC omits—that design would be done "under the guidance of" UCC. A2752. That implies direction, not mere advice "for UCIL's consideration." *Cf.* DB19 (citing SPA72).

UCC tries to minimize its involvement by noting its initial disposal plan was based on preliminary information. DB19; A156. But after receiving information from UCIL, UCC updated the plan. PB15. UCC was not merely "commenting on UCIL's waste disposal plans." DB20, quoting SPA73.

To be sure, UCC's revised plan was not the final design. DB19; A2881. But UCC and the district court cite no evidence that, contrary to what UCIL told the Public Health Engineer, UCIL was free to scrap UCC's plan, or that it actually did so. DB19; SPA72-73. Instead, UCIL's 1973 diagrams were explicitly based on UCC's plan. PB15. And although UCIL's vision for the ponds differed from UCC's, they were built according to UCC's concept. PB16 and n.2.

Other evidence confirms that UCC had final authority. The report UCC cites to argue UCIL designed the system describes "proposed" facilities, A2881; it was "approved" by Couvaras, A2879, the UCC employee sent to Bhopal to oversee design and construction. PB14, 18, 45.[7] Thus, a jury could conclude, contrary to UCC's claim, DB20, that UCIL did not deal on its own with the disposal problems created by UCC's technology.

Indeed, UCC never disputes that the idea of using SEPs, and how they would work, originated from UCC. Its argument that the concept of the SEPs was not inappropriate, DB22, is irrelevant to nuisance; fault is not required.

But it was inappropriate; indeed UCC was aware of the risk. PB21-23; *supra* Section II.A. UCIL's representation to Bhopal authorities that the waste disposal methods were based on accepted standards and used by UCC has nothing to do with the SEPs, DB22; SPA74; A2754, since ponds were *not* used at Institute. There, UCC dumped the wastes into the Kanahwa River. PB16.

[7] The record includes a UCIL General Manager's undisputed declaration that Couvaras was employed by UCC. A3372. UCC can only say Couvaras was "with UCIL"—whatever that means. DB21, n.9. They cite a UCC memo "addressed" to Couvaras at UCIL, which merely confirms that he was there and communicated with UCC Engineering. A2713.

Contrary to UCC's claim, DB22, the UCC engineer who expressed doubt about the ponds did not assume the bottom would be soil. A2695. He noted that, *given the soil conditions*, it might not be economically feasible to install lining that would protect the community's water supply. *Id.*

The ponds had only a thin plastic lining. A278; A230. UCC attempts to place all blame on UCIL for the decision to use that cheaper lining rather than clay, and thus to accept "certain Seepage/effluent from the Pond." DB23; PB17; A3508-3510. But UCC's Couvaras reviewed the memo. A3510; *see also* A3376 (UCIL Safety Superintendent affirming that any change in material at the plant had to be approved by UCC).[8]

All of that aside, a jury could reasonably find UCC liable for initiating the SEPs, because it was inappropriate to store an ever-increasing amount of pesticide by-products, for an indeterminate amount of time, in ponds above the community's drinking water.

Last, UCC argues that the ponds did not cause pollution as of 1992. DB24-25. UCC cites only NEERI studies, but NEERI lacked "any experience" with "[i]nvestigation and remediation of a closed chemical plant" and was "[f]ound to ignore standard sampling procedures." A557. It is

[8] Contrary to the above evidence, UCC cites a NEERI report suggesting the ponds were lined with both plastic and clay. DB24, n.11. Even if so, UCC still could not blame UCIL because then it did not alter UCC's plan.

undisputed the ponds leaked, and that toxins found under the ponds have polluted the groundwater. PB17, 23; DB24.

Regardless, the ponds were a nuisance that UCC helped create and that needed to be abated. *See* PB26 (lining had become brittle); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1051 (2d. Cir. 1985) (holding threat of release of toxins sufficient for liability). Thus, it makes no difference whether the toxins were released before, during or after the attempted remediation—in which UCC also heavily participated. PB23-26, 50-52.

C. UCC Is Liable For The Plant-Site Pollution.

In addition to the ponds, the plant-site itself was polluted with toxins that leached into the groundwater. PB17-18. UCC attempts to shift all blame for that pollution to UCIL, DB29-30, and for the failed remediation to the MP government. DB31-32. But UCC participated in the former and is therefore responsible for the latter.

UCC first insists that the Complaint does not allege a basis for holding UCC liable for waste handling at the plant-site. DB29-30. This focus on the Complaint repeats the error that led this Court to vacate the district court's previous decisions. *Supra* Section II.A. Regardless, Plaintiffs alleged UCC is liable because it audited UCIL's waste handling and found problems, but did

not take mitigating steps and ratified or acquiesced in UCIL's failure to act. A40-41, ¶¶92-93.

What actually matters—the record—supports liability. PB48. Even if UCC mishandled wastes, that would not absolve UCC for providing or approving the processes that generated the toxins, or for creating the initial disposal plan. *Id.* A defendant is liable for nuisance where it set in motion the chain of events causing the harm. PB48.[9] These are ordinarily jury issues. *Supra* Section II.A. A jury may find UCIL's improper handling resulted from the fact that UCC's plan inadequately addressed toxins from its processes.

Indeed, UCC now blames UCIL for measures UCC included in its own plan, DB30, most notably dumping wastes in a landfill. PB18. So UCC twists the Complaint's mention of "indiscriminate disposal," which refers to the use of 20% of the plant site as designated disposal areas, A40, ¶92, not, as UCC suggests, DB30, to arbitrary dumping. *See* A515 (finding contamination only in known waste disposal locations).

Regardless, UCC audited UCIL's waste handling, demonstrating UCC's oversight authority. PB18. One audit noted, among other things, the

[9] Similarly, one is liable for negligence where another's act is within the general category of foreseeable consequences. *Stagl*, 52 F.3d at 465, 473; PB55.

need to "[f]ind a better way of residue disposal/handling." A244. UCC asks this Court to disregard that audit, because, it claims, UCIL had "represented in response that it had developed an action plan." DB31, citing A244. But there is no indication that the "action plan steps" were promises from UCIL, not orders from UCC.

Defendants' claim that UCC had no duty to act is relevant only to negligence, and is wrong. DB31. UCC's duty arose not from the parent-subsidiary relationship, but from UCC's own acts of transferring polluting technology, inadequate disposal planning, and overseeing waste handling. *See* PB54-57.

Having participated in the creation of the plant-site nuisance, UCC is liable for its remediation—another process in which UCC was intimately involved. PB23-26. UCC seeks to blame MP, DB31-32, but any fault MP bears does not absolve UCC. All who participate in the creation of a nuisance are liable. PB39, 52 and n.25. It makes no difference, that UCC sold its shares in UCIL. DB33 (citing the district court's vacated ruling at SPA7). Liability does not require ownership even of the property itself. *Schenectady Chems.*, 459 N.Y.S.2d at 976-77.

In any event, the record does not support UCC's argument. UCC claims that the Madhya Pradesh Pollution Control Board ("MPPCB") failed

to provide an alternate site for toxins, and that UCIL performed the remediation that MPPCB authorized. DB32. But UCC does not argue there was no other possible site, and MPPCB specifically told UCIL that it had not carried out its obligation and was "totally responsible" for doing so. A942-43. India and MP urged the district court to hold UCC liable. A3384.

D. UCC May Be Held Strictly Liable For Approving The Back-Integration Of The Bhopal Plant.

UCC can be held liable for approving back-integration, regardless of who proposed the idea or whether Plaintiffs can pierce UCC's corporate veil. PB21, 42-43. Arguing otherwise, UCC again impermissibly focuses on the Complaint and relies on the district court's vacated decision. DB33-34.

Regardless, UCC cites the district court's holding that UCC's approval of back-integration with UCC's MIC technology was not "in and of itself, tortious" and "does not, as a matter of law, rise to the level of participation in the creation of pollution." DB34-35, quoting SPA72. First, in requiring UCC's approval to be "tortious," the district court failed to apply strict liability. Fault is required neither for public nuisance, PB39, n.16, nor for Plaintiffs' private nuisance claim, since UCC does not contest that the nuisance involved "an inherently dangerous activity." SPA70, quoting *Schenectady Chems.*, 459 N.Y.S.2d at 976; PB39, n.16. Second, the holding that UCC's approval was not "participation" ignores that liability

may be premised upon an act that sets in motion the events leading to the nuisance, PB42, and that this is a jury issue.

Last, UCC denies there were residential areas near the plant when UCC approved back-integration. DB35; PB21. How then does UCC explain its own engineer's concern, prior to approval, that wastes might seep "into the *community* water supply?" A2695 (emphasis added).[10]

E. UCC's Admissions Warrant Reversal.

Anderson admitted that UCC had complete control over UCIL and that the plant was built under UCC's design criteria and safety standards. *See* PB11-12. UCC suggests that the Court should find for the Defendants based on other evidence, and then ignore these party admissions. DB36. But these admissions alone create disputed issues as to UCC's control over UCIL and participation in the plant's design. *See* PB39-40, 43.

F. UCC May Be Held Liable For The Creation Of The Toxic Landfill.

UCC repeats the district court's error in assuming that UCC cannot be liable unless it "approved" the toxic landfill at the SEPs. DB27; PB49; SPA76. But it goes further, suggesting that it "played no role" in creating

[10] The pictures UCC cites are not properly in the record, DB35 n17, SPA69, and prove nothing; there is no claim they depict all of the land above the aquifer.

that landfill. DB26. The record, however, contains abundant evidence of UCC's extensive involvement. PB23-26.

For example, UCC provided the soil-washing plan, PB25, 51, developed clean-up standards and a rehabilitation strategy, PB24-25, and oversaw the project. PB52.

UCC attempts to place all blame on NEERI and the MP government. DB25-26. But no organization in India—not MP state, not NEERI, and not UCIL—had the expertise required to devise and implement the remediation. A303; A557. This is why UCC pushed for hiring Arthur D. Little, Inc. (ADL) as a consultant, PB24; A557, and was itself so heavily involved. MP and NEERI did not even participate in the key meetings at UCC. PB24-25; A310-311; A427; A270-300.

Despite its lack of experience, NEERI drafted a landfill plan, A3647-49, and MPPCB "asked [UCIL] to take up the work." A570. But the Board did not critically examine NEERI's recommendations. A558. Regardless, a jury can easily find that UCC retained the ability to act on its independent judgment; when its ideas conflicted with NEERI's on the soil washing plan, UCC's idea was implemented. PB25, 51.[11]

[11] Whether the soil washing itself caused harm is irrelevant. DB27-28. The soil washing plan demonstrates UCC's central role.

Here again, MP's involvement cannot absolve UCC of participating in nuisance, let alone in substandard work—for example, reusing a damaged liner—even if condoned by NEERI.

UCC participated in the creation of the landfill despite knowing that it posed water pollution risks. PB25-26. In fact, UCC had been warned that large-scale burial of toxic wastes in the SEPs could lead to "splitting of the liner." A542. UCC contends that it is "speculation" that the liner split "when" liquid was pumped in. DB28. But the concern was that pressure caused by subsequently covering the site would eventually split the liner. A542.

Moreover, Plaintiffs *did* argue below that UCIL reused the original liner of Pond 3. A2638-39; DB28. Even if there is conflicting evidence from NEERI on whether the liner needed replacing, *compare* A3647 (1992 NEERI report) *with* A2692-94 (NEERI recommendation to replace liner, commented on by UCC's Gaines), UCC had independent reason to know the liner was compromised, A313; A288, and not to rely on NEERI, given its lack of expertise. Regardless, conflicts within the record about the liner, like conflicts about UCC's involvement in the creation of the landfill in general, are for the jury.

III. THE DISTRICT COURT ERRED IN BARRING KEY DISCOVERY.

Defendants cannot rebut Plaintiffs' showing that the district court's denial of critical discovery, including all depositions, prejudiced Plaintiffs. PB35-39. Contrary to UCC's suggestion, DB37, Plaintiffs respectfully submit that when this Court remanded for "relatively limited further proceedings," *Sahu*, 548 F.3d at 70, it was not inviting the district court to deny ordinary discovery into the very issues the court went on to address. Indeed, the point of remand was that Plaintiffs had been denied the opportunity to present a full evidentiary record. *Id.* at 67.

Defendants do not challenge Plaintiffs' showing that the district court erred in denying document and third-party discovery into the extent to which UCIL generally acted as UCC's agent, UCC negligently trained UCIL personnel and provided technical services, and UCC was involved with ADL. PB38-39.

While the district court erred in finding no evidence of UCC's review and approval of the technology used at the Bhopal plant, PB47-49, it further erred in deciding this issue against Plaintiffs without allowing them to follow-up on the documents with a Rule 30(b)(6) deposition. UCC is wrong to assert that Plaintiffs have abandoned claims based on non-UCC technology. *See supra* Section II.A.; PB48-49.

Similarly, Plaintiffs were denied a 30(b)(6) deposition regarding information received from Ranjit Dutta—who confirmed Plaintiffs' position on most summary judgment issues. PB37. UCC notes that Plaintiffs submitted a transcript, not an affidavit. DB38. But the issue is not whether the transcript is admissible. Moreover, Dutta's comment that he has dementia was, as the context suggests, apparently made in jest, given his ability to remember a wealth of detail regarding a host of critical issues. PB36. And since most of the district court's opinion addressed these issues, UCC's claim that they are irrelevant is absurd. DB38. The transcript shows what a deponent in this case might say, and thus demonstrates a deposition's critical value. Dutta's affidavit—drafted with UCC's lawyers, A3439—is no substitute. DB38.

Defendants' effort to minimize the importance of deposing Mr. Anderson is not persuasive. DB38. He is a defendant, was a member of UCC's Management Committee that approved back-integration, and his public statements demonstrate relevant knowledge. PB37.

Plaintiffs have also been denied depositions of other UCC employees, including individuals that authored relevant documents. PB38. The fact that UCC conferred with such individuals, *id.*, in conjunction with Dutta's ability to recall details, refutes any claim that no witness can remember the events

at issue. DB39. Documents are not an "alternative" to depositions, DB39, quoting SPA34, in part because depositions may clarify documents. *In re Dana Corp.*, 574 F.3d 129, 149-50 (2d Cir. 2009).

A court has discretion to deny discovery. But a party facing summary judgment "must be afforded a reasonable opportunity to elicit information within the control of his adversaries." *Id.* at 149 (internal quotation omitted). The district court abused its discretion by forbidding any depositions whatsoever.

IV. THE DISTRICT COURT ERRED IN DISMISSING ALTER-EGO LIABILITY BASED ON ARGUMENTS DEFENDANTS DID NOT RAISE.

UCC's veil-piercing argument below was far narrower than it now claims. DB40. UCC moved on the *single* ground that EIIL, UCIL's successor, is a viable corporation, *capable of satisfying a judgment*. SPA9; A1242; A1259; A1262. But current inability to pay is not an element of the claim. What matters is the parent-subsidiary relationship *at the time of the tort*. *See, e.g., Lowendahl v. Baltimore & Ohio R.R.Co.*, 247 A.D. 144, 158 (N.Y.App.Div. 1936). Thus, while UCC needed to show that current viability is dispositive, it is actually irrelevant. As this was the only ground UCC raised, dismissal was improper.

UCC now relies on the two-prong test for veil-piercing. DB40-44. It argues that Plaintiffs failed to allege UCIL was a "shell" or "dummy", DB44—exactly the argument UCC *never* made in its motion.

To defend its attempt to raise new issues, UCC misstates Plaintiffs' burden. DB44-45. The non-moving party is *not* required to present evidence establishing elements of their case that the movant does not challenge. Where the movant fails to meet its initial burden to show the absence of a genuine issue of material fact, the motion must be denied, even if unopposed. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 160 (1970); *Amaker v. Foley*, 274 F.3d 677, 680-81 (2d Cir. 2001). The district court's application of the two-prong test was error. PB33-34.

The district court further erred in addressing the domination prong; the very issue about which it barred discovery. PB33-34. Although the district court noted that UCC's motion did not focus on the question of UCC's control, it dedicated nearly the entire alter-ego discussion to that issue; the second-prong is relegated to a conclusory paragraph. *See* SPA80-82. UCC's claim that the district court did not base its decision on the domination prong improperly relies in part on the district court's now-vacated opinion, DB45-6 (citing SPA18), and is entirely undercut by its

detailed discussion of the district court's conclusions on this exact issue. DB46-49.

V. UCC DID NOT CHALLENGE AGENCY LIABILITY AND PLAINTIFFS HAVE PRESENTED SUFFICIENT EVIDENCE TO PRECLUDE SUMMARY JUDGMENT.

UCC's motion below did not challenge agency or ratification liability. PB33. Since UCC did not meet its initial burden to show there are no disputed material facts, summary judgment must be denied. *Amaker*, 274 F.3d at 680-81. Neither the district court's finding that UCC moved generally against all theories of liability, DB50, nor the fact that this case was remanded, DB52, absolves UCC of its burden. Plaintiffs were not required to guess what issues UCC would later contest.

UCC's argument that Plaintiffs failed to allege agency with specificity, DB50-51, is wrong. Defendants assume that alleging that UCC controlled UCIL and is responsible for all of UCIL's liabilities implies only alter-ego. DB51. They ignore general agency. *See* Restatement (Second) Agency § 3.

Plaintiffs adequately alleged that UCIL was UCC's agent for the manufacture and sale of pesticides. The Complaint specifically alleges that UCC controlled UCIL as an integral part of UCC's agricultural products division. A31 ¶¶63-66. And documents providing details of UCC's control

through its World Agricultural Products Team ("WAPT") were later disclosed in discovery.

Even if UCC had challenged it below, Plaintiffs have proffered enough evidence of agency to preclude summary judgment. UCC ran its worldwide agricultural products business as a single enterprise through the WAPT. PB26-27. UCIL acted as UCC's agent for that worldwide business. *Id*. Indeed, UCC forced UCIL to act against its own interests to benefit UCC, *id.*, *i.e.* "on [its] parent's behalf." SPA79, quoting *Royal Indus. v. Kraft Foods, Inc.*, 926 F. Supp. 407, 412 (S.D.N.Y. 1996).

"[E]xercis[ing] [] control in a manner more direct than by voting a majority of the stock in the subsidiary or making appointments to the subsidiary's Board of Directors," as UCC did through WAPT, raises an inference of agency. *In re South African Apartheid Litig.*, 617 F. Supp. 2d 228, 272 (S.D.N.Y. 2009). The facts are sufficient to submit agency liability to a jury. *See Cabrera v. Jakabovitz*, 24 F.3d 372, 386 (2d Cir. 1994).

The record also shows that UCIL acted as UCC's agent for the site rehabilitation & asset recovery project. UCIL sought and received ample technical assistance from UCC throughout the project. *See In re Parmalat Sec. Litig.*, 375 F. Supp. 2d 278, 295 (S.D.N.Y. 2005) (seeking "direction

and help" from parent creates inference that parent was in control and thus of agency).

VI. THE DISTRICT COURT IMPROPERLY DISMISSED EQUITABLE RELIEF.

Defendants' argument that the reasoning of *Bano* applies here fails because the equitable relief Plaintiffs request was either specifically allowed by *Bano* or not considered in that case. Because Defendants' motion put no facts at issue, and made no legal argument other than that *Bano* applies, the district court erred in going beyond the particular issues and circumstances addressed in *Bano*. PB57-59. The fact that the district court made the same error prior to remand does not, as UCC suggests, DB55, mean that the vacated decision somehow amended Defendants' motion and absolved them of their initial burden. Moreover, like the district court, Defendants ignore Plaintiffs' request for damages in lieu of injunctive relief.

Defendants abandon the notion that the district court was legally bound to dismiss equitable relief based on the *Bano* rulings. DB54. But the relief requested here was different from that dismissed in *Bano*; in the absence of any argument about the specific relief requested here, it was error for the district court to rule based on that ground. Regarding remediation, the *Bano* plaintiffs' request sought only remediation of the aquifer and its flow through individual properties. But here, Plaintiffs seek actual remediation of

their own properties, which was specifically allowed by this court in *Bano*. PB57. Defendants' new argument that remediation of individual properties is the same as remediation of the aquifer is improperly raised for the first time on appeal; is factually wrong, because remediation of individual properties could be accomplished by filtering individual household water supplies; and is unsupported by the district court's ruling, which stated only that it would be unable to "effectively supervise remediation of [Plaintiffs'] private property," SPA83—an argument neither considered in *Bano* nor raised by Defendants, and that Plaintiffs never had a chance to address.

Defendants are similarly incorrect that the reasoning for rejecting medical monitoring in *Bano* applies here. Plaintiffs never had the opportunity to argue that the classwide monitoring regime they proposed, which was substantially narrower than that at issue in *Bano*, is feasible. Indeed the district court's argument for lack of feasibility is simply that the population potentially affected by Defendants' contamination is large; an argument that favors class certification, rather than suggesting Defendants should not be required to remedy their actions. *See, e.g.*, *Boggs v. Divested Atomic Corp.*, 141 F.R.D. 58, 62 (S.D. Ohio 1991) (certifying medical monitoring class potentially involving "tens of thousands of people"). And the district court failed to address Plaintiffs' request for individual medical

monitoring, which would be eminently feasible. *See Askey v. Occidental Chem. Co.*, 102 A.D.2d 130, 137 (4th Dept. 1984) (individual exposed to toxins may recover future cost of monitoring).

Instead of demonstrating that the district court properly relied upon arguments fairly presented, Defendants present *entirely new* arguments in this appeal—such as that monitoring is impractical because the diseases at issue are not identified. DB58. Decisions regarding the feasibility of medical monitoring should be made on a factual record. Summary judgment was improper where no facts were put at issue.

VII. THE DISTRICT COURT ABUSED ITS DISCRETION IN REFUSING TO REASSIGN, AND THIS COURT SHOULD REASSIGN ON REMAND.

It is unreasonable to believe that the district court—in considering the same issues the *fourth* time—could "put[]. . . out of [its] mind previously-expressed views." *Mackler Prod., Inc. v. Cohen*, 225 F.3d 136, 147 (2d Cir. 2000) quoting *United States v. Robin*, 553 F.2d 8, 10 (2d Cir. 1977) (en banc). Indeed, UCC made sure that the court could not forget its prior rulings, citing them over and over as a basis for rejecting Plaintiffs' arguments. A3688-3716.

UCC cannot seriously contest that reassignment was necessary to "preserve the appearance of justice." *Mackler*, 225 F.3d at 147 (2d Cir.

2000) quoting *Robin*, 553 F.2d at 10. Instead, Defendants insist that the first two *Robin* factors can never apply unless this Court has determined that any "views or findings" were "determined to be erroneous or based on evidence that must be rejected[.]" DB59-60 (quoting *Robin*). But this Circuit has repeatedly required reassignment where the district court expressed firm views based on an inadequate record, *even in the absence of a finding that the prior decision was wrong on the merits*. *See, e.g., United States v. Campo*, 140 F.3d 415, 418 (2d Cir. 1998); *Cullen v. United States*, 194 F.3d 401, 407 (2d Cir. 1999); *Hispanics for Fair & Equitable Reapportionment v. Griffin*, 958 F.2d 24, 26 (2d Cir. 1992).

Defendants speculate that the *Griffin* court reassigned because the district court committed "flagrant" procedural errors. DB60, citing SPA41. In fact, it did so "[b]ecause of the firmness of the district judge's already expressed views." *Griffin*, 958 F.2d at 26. Regardless, UCC's claim is odd indeed, since the procedural error—granting summary judgment without providing notice and a full opportunity to present evidence—is precisely the one the district court made here.

In addition to being wrong for all of the reasons noted above, Defendants' argument that reassignment was not warranted because the district court did not err on the merits puts the cart before the horse. DB59.

Since the appearance of justice is central, reassignment must be considered independent of, and indeed prior to, the merits. The district court should never have considered the merits, and there is thus no need for this Court to do so here.

Reassignment would not have entailed waste or duplication, as the district court on remand was required to consider all of the evidence holistically. *See In re Dana Corp.*, 574 F.3d at 152. Regardless, here, where the district court repeatedly expressed firm views based on an incomplete record, any duplication was not out of proportion to the need to preserve the appearance of justice. PB61.

CONCLUSION

For the foregoing reasons, the district court's order should be overruled in its entirety and the case reassigned on remand.

Dated: February 19, 2013 Respectfully submitted,

By: s/ Richard L. Herz
Richard L. Herz
EarthRights International
1612 K Street
Suite 401
Washington, DC 20006
(202) 466-5188

Thomas N. Saunders
Cohen Milstein Sellers & Toll PLLC
1100 New York Ave., N.W.

West Tower, Suite 500
Washington, DC 20005-3964
(202) 408-4600

Richard S. Lewis
Reena Gambhir
Hausfeld LLP
1700 K Street NW, Suite 650
Washington, DC 20006
(202) 540-7200

Himanshu Rajan Sharma
Neal DeYoung
Sharma & DeYoung LLP
555 Fifth Avenue, 17th Floor
New York, New York 10017
(212) 856-7236

Curtis Victor Trinko
Law Offices of Curtis V. Trinko, LLP
16 West 46th St., Seventh Floor
New York, NY 10036
(212) 490-9550

Counsel for Plaintiffs-Appellants

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 6,969 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

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Dated: February 19, 2013

Respectfully submitted,

By: s/ Richard L. Herz

Richard L. Herz
EarthRights International
1612 K Street
Suite 401
Washington, DC 20006
(202) 466-5188