UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SAHU, ET AL.,

PLAINTIFFS,

v.

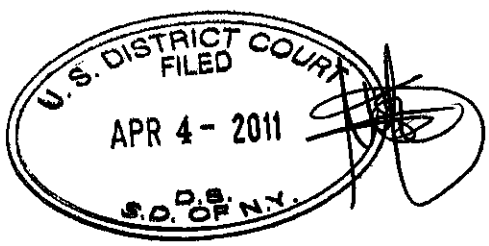
UNION CARBIDE CORP., ET AL.,

DEFENDANTS.

Civ. Action No. 04-cv-08825-JFK

#113

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS UNION CARBIDE CORPORATION'S AND WARREN ANDERSON'S MOTION TO DISMISS AND FOR SUMMARY JUDGMENT



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RULES

I. INTRODUCTION

Plaintiffs seek redress for the pollution of their drinking water by the former Union Carbide India Limited ("UCIL") plant in Bhopal. The plant remains "a continuous source of groundwater contamination" that has harmed Plaintiffs and threatens the health of thousands of local residents. Ex. A at 18.[1] The record is thick with evidence that Defendants Union Carbide Corporation and Warren M. Anderson (collectively "UCC") played a pivotal role in creating and/or contributing to this large-scale nuisance.

UCC's brief,[2] now converted to a summary judgment motion, fails to carry its burden because it does not deny that the record as a whole supports liability; it argues only that a subset of the record fails to support certain allegations. Since UCC does not (and cannot) challenge the core facts alleged that support liability, UCC's arguments fail to absolve it of liability even if accepted. UCC does not deny that it approved back-integration of the plant; it argues only that UCIL proposed it, which is immaterial to UCC's liability for its own participation. UCC does not dispute that it transferred its own technology to UCIL or that it approved any non-UCC technology. Nor does UCC deny that the technology that it designed or approved generated toxic wastes. Instead, UCC, by misconstruing the allegations, falsely contends that pollution was caused solely by UCIL's mishandling of wastes. But UCC is liable for transferring and approving waste-generating technology that contributed to the harm even if UCIL's mishandling of plant wastes released them into the environment.

UCC is also liable for negligence because it approved this technology despite knowing its inadequacy for the Bhopal site. UCC nowhere denies its prior knowledge of "a major disposal problem" posed by back-integration at the "Bhopal location." Instead, it claims only that solar evaporation ponds (SEPs) were built with "impermeable linings" to prevent pollution. But the

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[1] Unless otherwise noted, citations to lettered Exhibits such as "Ex. A" refer to exhibits attached to the Declaration of Matthew K. Handley (the "Handley Decl.") in Support of Plaintiffs' Opposition. Citations to numbered Exhibits such as "Ex. 1" refer to exhibits in Exhibit C of the Affidavit of William C. Heck (the "Heck Aff.") accompanying UCC's motion.

[2] Memorandum of Law of Defendants Union Carbide Corporation and Warren M. Anderson in Support of Their Motion to Dismiss and For Summary Judgment ("DB").

record shows UCC designed the SEPs, and UCC does not deny that the SEPs failed in a major leak in 1982. Moreover, UCC does not deny that the technology it approved or designed generated the wastes that posed the problem in the first place.

UCC does not contest the evidence of its extensive involvement in the rehabilitation project for the plant-site and SEPs. As to the plant, UCC argues only that the project was UCIL's, which is irrelevant because UCC contributed to the maintenance of a nuisance: *i.e.*, at least hundreds of tons of toxic waste, both above-ground and buried in disposal areas, which remain a source of groundwater pollution, a fact UCC does not deny. Nor does UCC deny that it was involved in the "remediation" of the SEPs and approved the creation of a toxic landfill without replacing the SEP's liner; it argues that UCIL did the work under supervision by local authorities -- which cannot absolve UCC of liability for approving this course of action.

Wholly apart from these acts, UCC is liable based on its design of the plant's failed waste disposal systems. UCC claims UCIL designed those systems, but UCC's plans are in the record.

Whether UCC's acts were intended to prevent pollution is immaterial; UCC may be held liable for acting negligently, or strictly liable for contributing to a nuisance, which do not require fault.

UCC may also be held liable because UCIL was its alter-ego. UCC does not deny Anderson's admission that UCC exercised "absolute control" over UCIL; it claims only that its former subsidiary is able to pay a judgment, which is utterly irrelevant under Indian and New York law. Agency liability cannot be dismissed because UCC does not challenge it at all.

Last, UCC's claim that *Bano v. Union Carbide Corp.*, 361 F.3d 696 (2d Cir. 2004) ("*Bano II*") precludes equitable relief is wrong; that decision *allowed* claims for off-site clean-up and did not address medical monitoring. *Id.* at 717. There also can be no preclusive effect since Plaintiffs were not parties in *Bano*. While UCC suggested in *Bano* that U.S. courts may not grant equitable relief, it has argued in Indian proceedings that Indian courts lack jurisdiction. Thus, UCC's position is that no court

anywhere may hold it responsible for the nuisance it has created in Bhopal.

II. SUMMARY JUDGMENT STANDARD

Plaintiffs need only "offer some hard evidence showing that [their] version of the events is not wholly fanciful." *Jeffreys v. City of New York*, 426 F.3d 549, 554 (2d Cir. 2005). The record must be considered as a whole, not in piecemeal fashion giving credence to innocent explanations for individual strands of evidence. *Howley v. Town of Stratford*, 217 F.3d 141, 151 (2d Cir. 2000). The Court cannot grant summary judgment on grounds UCC has not raised, without providing notice and an opportunity to respond. Fed. R. Civ. P. 56(f).[3] For its motion to succeed, UCC must defeat *every* liability theory. UCC's motion must be denied under the applicable standard, even accepting UCC's contentions, based on what UCC does not dispute. In any case, ample record evidence, as shown below, compels denial of summary judgment.

III. ARGUMENT

A. Summary Judgment Must Be Denied Because UCC Has Not Asserted That Any Material Direct Liability Facts Are Undisputed, and Has Not Challenged Evidence Supporting Plaintiffs

UCC has not identified any material undisputed facts related to direct liability, and therefore has not met its initial burden. "A fact is material when it might affect the outcome of the suit under governing law." *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 202 (2d Cir. 2007). UCC does not describe any direct liability standard and thus has not even tried to show that any particular fact is "material." And since it does not purport to apply any law to the facts, it does not show that Plaintiffs cannot meet any direct liability standard.

Moreover, UCC's Rule 56.1 Statement is irrelevant to direct liability; this alone "may constitute grounds for denial." Local Rule 56.1(a). UCC's brief does not fill the gap. UCC does not argue the *record* precludes liability; it argues "that the documents Plaintiffs cite in their complaint contradict their allegations." *Sahu v. Union Carbide Corp.*, 262 F.R.D. 308, 313 (S.D.N.Y. 2009). The Complaint referenced documents to

[3] Where the movant fails to meet its burden to show the absence of a genuine issue of material fact, the motion cannot be granted, 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). A court may not grant summary judgment on liability theories that are not challenged. *Clarendon, Ltd. v. State Bank*, 77 F.3d 631, 635-36 (2d Cir.1996).

"indicat[e] that evidence existed to support the complaint's assertions," "not . . . to counter a possible future motion for summary judgment." *Sahu v. Union Carbide Corp.*, 548 F.3d 59, 68 (2d Cir. 2008).[4] UCC must show, based on the *entire record*, that there is no genuine issue as to *liability*; not that a subset of the record fails to support *specific allegations*.[5] UCC does not even attempt to do this. Points I and II must be denied.

Notably, substantial evidence supporting Plaintiffs' claims was not referenced in the Complaint and is therefore uncontested by UCC. This is true of all of the evidence attached to the Handley Decl. denominated as lettered exhibits and submitted herewith. Thus, the most UCC could claim is that the record is conflicting, which is insufficient for summary judgment. *Sahu*, 262 F.R.D. at 313.

Further, unchallenged legal theories cannot be dismissed. UCC nowhere even purports to challenge strict or nuisance liability. Similarly, UCC erroneously assumes direct participation and joint tortfeasor theories apply only to the decision to back-integrate and UCC's technology transfer, DB at 3-10, and that only concerted action liability applies to UCC's other acts. DB at 10-18. Thus, UCC does not purport to challenge even these theories with respect to all of UCC's acts.

B. Relevant Standards for Plaintiffs' Direct Liability Claims for Nuisance, Strict Liability and Negligence

The release or threat of release of toxins into the environment creates a nuisance, and anyone who participates in creating or maintaining it, even on another's property, is jointly and severally liable without fault. *State v. Schenectady Chems., Inc.*, 117 Misc. 2d 960, 966 (1983), *aff'd as modified* 103 A.D.2d 33 (1984); *N.Y. v. Shore Realty Corp.*, 759 F.2d 1032, 1051-52 (2d. Cir. 1985). Third-party control of the instrumentality causing the nuisance does not defeat liability. *Schenectady Chems.*, 117 Misc. 2d at 966-67 (chemical

[4] The Complaint provides notice that Plaintiffs challenge the acts demonstrated herein. *E.g.* Compl. ¶¶69-75, 88 (UCC approved back-integration); ¶¶2, 60, 76, 83, 86 (UCC exercised control over design); ¶¶80, 84-85 (UCC knew its technology created pollution risk); ¶¶2, 60, 94-107, 113-116 (UCC participated in failed rehabilitation); ¶¶64-69 (UCC exercised control of UCIL).

[5] The Court must review the record as a whole, and summary judgment is improper if "there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party." *Howley*, 217 F.3d at 151. Thus, for example, Plaintiffs may defeat this motion through documents obtained in Rule 56(f) discovery. *Sahu*, 262 F.R.D. at 313; *Sahu*, 548 F.3d at 67 (parties must be given opportunity to present all relevant material).

company can be liable for dumping by contractor).[6] Moreover, strict liability applies to an abnormally dangerous activity, such as the dumping of chemicals, even if the defendant exercised the utmost care.[7]

A defendant can be held liable as a joint tortfeasor for its direct participation in a tort.[8] UCC can be held liable for negligently contributing to the pollution, by for example, transferring inadequate technology or negligent design for the waste disposal systems or participating in the plan to create a toxic landfill. UCC cannot blame UCIL; a defendant is liable for its negligence where another's act "is a normal consequence of the situation created by [that] negligence." *Billsborrow v. Dow Chem.*, 177 A.D.2d 7, 17 (N.Y. App. Div. 1992).

It is immaterial whether UCC has also attempted to prevent or remediate the pollution. That could not preclude liability for nuisance or strict liability, which do not require fault. "It makes no difference that [defendant] has begun a cleanup ... it is required to finish that cleanup." *Shore Realty*, 759 F.2d at 1051. Nor could it preclude negligence liability. UCC negligently provided improper technology and a failed waste disposal system; it makes no difference whether UCC or UCIL tried to remediate the resulting pollution. Likewise, a defendant is liable for providing negligent advice or expertise (including to its subsidiary), about how to avoid harm to third persons, regardless of intent, if, as here, the subsidiary at least partially relied on the defendant's undertaking.[9] Whatever its purpose, UCC participated in acts that caused pollution, which it failed to remediate. When the land was surrendered, it was badly polluted. Ex. 93 at UCC 2246-47.

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[6] *City of Rochester v. Premises Located at 10-12 S. Washington St.*, 180 Misc. 2d 17, 22 (N.Y. Sup. Ct. 1998) (nuisance liability arises when one sets in motion chain of events resulting in the harm).

[7] Restatement (Second) of Torts § 519; *Schenectady Chems.*, 117 Misc. 2d at 965, 970 (whether dumping of chemicals is abnormally dangerous activity is fact question); *Shore Realty*, 759 F.2d at 1051-52 (same). UCC does not contest that the dumping at issue was an abnormally dangerous activity.

[8] *E.g. Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 358 (2d Cir. 2000)(joint tortfeasors jointly and severally liable). UCC can also be held liable for acting in concert with another in causing the harm. Aiding and abetting requires only that the defendant have knowingly given substantial assistance or encouragement to the primary wrongdoer. *Lindsay v. Lockwood*, 163 Misc. 2d 228, 232-33 (N.Y. Sup. Ct. 1994).

[9] *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. Atlantic Richfield Co.*, 814 F.2d 1481, 1488-89 (10th Cir. 1987); *see also Melodee Lane Lingerie Co. v. Am. Dist. Tel. Co.*, 18 N.Y.2d 57, 64 (1966) ("one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully").

UCC's direct liability arguments are purely factual. It does not challenge any of these standards.[10]

C. The Evidence in the Record Supports Plaintiffs' Direct Liability Claims

UCC participated in every phase of the tort; it engaged in several types of conduct that each independently support liability. These include UCC's participating in if not controlling the design of the plant's waste treatment systems, designing or approving all manufacturing technology used at the plant as well as UCC's intimate involvement in the failed remediation.

1. UCC Was Directly Involved in the Acts and Decisions That Resulted in Pollution

a. Defendants Approved Back-integration of the Bhopal Plant

UCC does not dispute that it approved back-integrating the Bhopal plant from a formulation plant into one that produced UCC's "Sevin" pesticide.[11] UCC argues only that the 1973 Capital Budget Proposal (CBP) was UCIL's proposal, DB at 5; it does not contest that UCC made the ultimate decision to proceed.[12] The proposal was contingent on India permitting UCC to retain a majority stake in UCIL, by agreeing to reduce the amount to be invested in the project. Ex. 1 at UCC 4189-90; Ex. I. Retaining a majority of shares is necessarily a *UCC* objective; indeed it was UCC policy.[13] That objective was inextricably linked to UCC's approval of

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[10] UCC may be held directly liable for its own acts even if Plaintiffs cannot pierce the corporate veil. One need not pierce to hold a defendant liable for participating in a corporation's torts. *Jordan Inv. Co. v. Hunter Green Invs.*, No. 00 civ. 9214 (RWS), 2003 U.S. Dist. LEXIS 5182 at *21 (S.D.N.Y. June 2, 2003), *citing Shore Realty*, 759 F.2d at 1052-53, and collecting cases; *Path Instruments Int'l Corp. v. Asahi Optical Co.*, 312 F.Supp. 805, 811 (S.D.N.Y. 1970); *see also United States v. Bestfoods*, 524 U.S. 51, 64-65 (1998) (distinguishing piercing from where parent directly liable for participating in wrong); *Smith*, 814 F.2d at 1488-89 (parent can be liable for negligent safety advice to subsidiary that was not its alter-ego).

[11] In 1973, UCC endorsed the Capital Budget Proposal to back-integrate the Bhopal facility. Ex. 5 at UCC 4240; Ex. 1 at 4242. On December 2, 1973, the CBP was submitted to UCC's "Management Committee," including Anderson, under a cover letter from UCC subsidiary Union Carbide Eastern (UCE) stating: "[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." Ex. 1 at UCC 4186-87. The CBP shows joint decision-making: "UCIL finds the business risk in the proposed mode of operation acceptable ... UCC concurs." *Id.* at UCC 4206. The 1977 CBP regarding back-integration also was a "Proposal" requiring UCC approval. Ex. I at UCC 4684; 4694 (UCIL "recommends" completion of the original project).

[12] Moreover, the idea for back-integration was at least partially UCC's. By 1966, UCC was conducting its own study of the feasibility of establishing pesticide manufacturing facilities in India. Ex. TT ¶2.

[13] "Legal Control of a 50-50 Joint Venture Affiliate" and "Master Guidelines and Check List for Matters to be Considered in Organizing and Reorganizing Equity in an Affiliate." Ex. EE. As Anderson publicly stated, "[s]uppose we were a 40

back integration, including decisions about whether to back-integrate and at what cost.

b. Defendants Exercised Control over the Design and Operation of the Plant

(1) Anderson's Public Statements Demonstrate Control

Public statements Anderson made within the scope of his authority as President and CEO of UCC are admissions binding UCC and they demonstrate UCC's control over plant design and operation.[14] Contrary to UCC's suggestion that UCIL rejected UCC's technology, Anderson publicly stated that: "our safety standards in the US are identical to that in India or Brazil or some place else. . . . Same equipment, same design, same everything." Ex. SS. Anderson told the Hartford Courant:

> [T]he plant in India was built under our design criteria, and our design criteria for the Indian plant has every safety feature in it that we have over here . . . . If you look at it, it 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.

Ex. GG. These admissions alone create a genuine issue of fact regarding UCC's control over plant design.[15]

(2) UCC Participated in the Creation of a Nuisance by Designing the Plant's Failed Waste Disposal Systems

UCC's liability is shown by evidence that it designed the waste disposal system. UCC's claim that UCIL designed this system, and did so prior to the December, 1973 CBP, is plainly false. DB at 8.[16] UCC provided the "over-all summary diagram of waste disposal requirements." Ex. F at UCC 4544. In July, 1972, UCC Engineering created preliminary design for the "waste disposal for Indian SEVIN Unit", including solid, liquid and gaseous wastes. Ex. 3. That same year, UCIL told local officials that the work on "design of the effluent treatment unit" would be done by a consultant "under the guidance of our Principals' Engineering

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percent owned company . . . do we want to participate around the world where you have less than absolute control?" Ex. II at UCC 6723.

[14] Statements by persons with speaking authority and statements of an employee concerning a matter within the scope of employment made during that employment, are admissions of the employer. Fed. R. Evid. 801(d)(2)(C)&(D).

[15] Indeed, in *Bano*, the Second Circuit held that those Plaintiffs had submitted "at least some evidence" that Anderson "exercised significant direct control" over the plant, including safety procedures. *Bano v. Union Carbide Corp.*, 273 F.3d 120, 133 (2d Cir. 2001).

[16] The passage UCC quotes does not identify the system's designer. DB at 8, Ex. 1 at UCC 4212.

Department," Ex. J at UCC 4769, and that the proposed disposal methods "are in use at the plant of the Principals of [UCIL], in the United States." Ex. K at UCC 4778. UCIL's 1973 diagrams were explicitly based upon UCC's 1972 plans. Ex. G at UCC 4576-81, *especially* UCC 4580. UCC sent further designs in 1973. Ex. G at UCC 4545-67. Indeed, after UCC planned the SEPs in 1972, UCIL suggested a different vision for their operation, but the 1973 CPB later reflected *UCC*'s plan, not UCIL's.[17]

In 1973, UCC sent UCIL the "final" design of the wastewater collection system for the MIC and SEVIN carbamoylation units, which covered "all necessary functions of design, construction, and materials procurement." Ex. 6 at UCC 4246-49. Similarly, the acid neutralization pits, Ex. 23 at UCC 4099, were part of UCC's design, based on those at Institute, WV. Ex. 3 at UCC 4128-31.[18] As with process design described below, disposal system engineering done by UCIL required UCC approval.[19] UCC participated in and controlled waste disposal system design, and is liable for the failure of that system.

UCC does not dispute that the plant-site and SEPs are polluted and that toxins from the plant-site have contaminated Bhopal's water supply.[20] The toxins found at the plant and the SEPs "match[] the chemicals

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[17] In UCC's July 1972 SEP design, evaporation would balance inflow; a pond's life ended when it filled with solids. Ex. G at UCC 4546; Ex. 3 at UCC 4129. In January 1973, UCIL proposed that inflow would exceed evaporation, and the pond would store solution. Ex. G at UCC 4546. The December 1973 CBP followed UCC's concept, not UCIL's; a new pond would be needed when a SEP "filled with solids." Ex. 1 at UCC 4213; *see also* Ex. 2 at UCC 4295 (ponds to be built to allow evaporation of entire hydraulic load); *see generally* Ex. XX at 19-20 (UCC employee made decision to use SEPs).

[18] In addition, in 1974, UCC endorsed the idea of spraying pond liquid into the air to remove CO2, Ex. H at UCC 4594; which polluted nearby farms. Ex. 23 at UCC 4097. *See also* Ex. 4, at UCC 4175 (providing requirements for waste liquid incinerator); Ex. D at UCC 4528-29 (previously noting UCC and UCIL to "mutually decide" incineration method).

[19] UCC had "primary responsibility for establishing the design basis" for the wastewater systems in the MIC and Sevin units, and mandated that *all* design be provided or approved by UCC. Ex. 6 at UCC 4274; *accord* Ex. FF at UCC 4638 (waste disposal system report "approved" by Couvaras); *infra* Section III.C.1.(b)(3) (Couvaras was Project Manager sent by UCC who ensured design done in India was approved by UCC); Ex. UU ¶2 (UCC played the key decision-making role in almost all aspects of plant safety).

[20] *E.g.* Ex. 97. Over 20% of the plant-site was used as disposal areas for solid and liquid waste, and these were polluted. Ex. 87 at UCC 1096-1103; Ex. 19 at UCC 3802-03 (describing waste pits and landfills); Ex. 23 at UCC 4099-102 (same); Ex. 29 at UCC 1871; Ex. 31; Ex. A at 15-16, 18. For example, "solid wastes generated during the processing were put into open land-fill areas." Ex. 24 at UCC 1827; *accord* Ex. 25 at UCC 1607; *see also* Ex. 29 at UCC 1871 (pits' runoff of "great concern"). In 1989, samples showed the landfills and pits were contaminated, DB at 15 n.5; Ex. 31 at UCC 2268-70 ("seriousness of the issue needs no elaboration"), although UCIL omitted this in a letter to local authorities. Ex 27. A 1992 study found groundwater pollution in a test well, although it had not yet spread. Ex. 55 at UCC 2823. UCC claims

found in the groundwater sample in the colonies outside the factory premises. There is no other source of these chlorinated benzene compounds and pesticides then UCIL." Ex. A at 18. Although UCC cites a 1999 sampling to suggest that *SEP* toxins have not spread to the water, DB at 16, it does not deny that the same chemicals in the SEPs now also contaminate local water sources, and the record shows the SEPs were inadequate.[21] Regardless, UCC does not dispute that the SEPs pose a pollution threat, which is sufficient for nuisance.

UCC's claim that Plaintiffs concede pollution resulted solely from UCIL's "indiscriminate disposal of wastes", not any act of UCC, DB at 11-12, is based on UCC's misreading of an allegation in the Complaint.[22] A defendant is liable where, as here, it set in motion the chain of events causing the harm. *City of Rochester*, 180 Misc. 2d at 22; *Billsborrow*, 177 A.D.2d at 17 (negligence liability where another's act is normal consequence of the negligence). UCIL's improper handling resulted from the fact that the waste disposal system designed by UCC was inadequate to handle pollutants generated by technology designed or approved by UCC. UCC does not deny that this technology generated toxins that required waste disposal systems for both solid and liquid wastes. Section III.C.1.b.(3). UCC participated in the over-all design of those systems. Indeed, UCC was intimately involved in the specific practices it now seeks to attribute solely to UCIL; some were part of UCC's design.[23] UCC also oversaw UCIL's waste handling through audits

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this was not "groundwater," DB 15, but the well tested "ground water." *Id.*; Ex. 47 at UCC 3594. Regardless, as UCC does not dispute the water is now polluted with plant-site toxins, UCC's claim is irrelevant to whether the plant-site is a nuisance.

[21] The ponds leaked, Section III.C.2 *infra*, the soil under the liner of Ponds 1 and 2 have long been polluted, Ex. 81 at UCC 2999; *see also* Ex. 97 at 8-9, 17-18 (1997 test finding site of SEP 1 and 2 polluted), and the landfill was built with an inadequate liner. Section III.C.2 *infra*.

[22] UCC twists the Complaint's meaning by omitting the italicized words: "*Despite Union Carbide's knowledge of* the problems at UCIL . . . *Union Carbide did not take any mitigating steps. . . Even if* the failure to act on these problems may be attributed to UCIL, *Union Carbide ratified, approved and/or acquiesced in that failure to act subsequently.*" DB at 11-12 (*quoting* Cmplt ¶93). Regardless, ¶93 deals only with pollution occurring during UCIL's operation.

[23] The Complaint's reference to "indiscriminate disposal" explicitly referred to the use of 20% of the plant site for waste pits and landfill, and the drain under the Sevin plant. Compl. ¶92. UCC's plans contemplated both the acid neutralization

mandated by UCC policy.[24] Given UCC's central role in the failed waste disposal design and implementation, a fact-finder can hold UCC liable under strict liability, or for contributing to a nuisance or negligence, even if UCIL's mishandling of the wastes contributed to their release into the environment. *E.g. Schenectady Chems.*, 117 Misc. 2d at 966-67.

(3) UCC Participated in the Creation of a Nuisance by Transferring, Approving or Overseeing All of the Technology Used at the Plant

The facts UCC does not deny establish its liability: in particular, the facts that UCC transferred its own technology to UCIL for some units, and that *all* of the plant's manufacturing technology was either provided or approved by UCC. DB at 6-8. The record confirms Anderson's admissions regarding UCC's control.

The Bhopal plant's "basic process design" came from UCC. Ex. ZZ. Indeed, UCC provided to UCIL "comprehensive information" concerning manufacture and the installation of the required equipment. Ex. LL at UCC 12060. Moreover, as the cover letter to the 1973 CBP stated: "[t]o the extent feasible UCC will provide the necessary technology and process design *and will review any technology and design developed outside UCC.*" Ex. 1 at UCC 4187 (emphasis added).[25] Thus, UC Eastern represented that "[k]now-how for the project is being provided by Union Carbide Corporation." Ex. AAA; *accord* Ex. ZZ (UCC's "know-how,

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pit and dumping wastes from it and other wastes in landfill. Ex. 3 at UCC 4131. UCC also approved the burial of wastes. *See* Ex 7 at UCC 1704, 1707 (plant operating manual contemplated burying wastes; including certain trash Sevin); Ex. II at UCC 6692 (Anderson admitting it was UCC's procedure to make sure "all the manuals are proper"); Ex. HH at UCC 6651-2 (UCC gave procedures); Ex. 87 at UCC 1096 (off-spec products dumped in open areas at plant-site); *see also* Ex. 55 at UCC 2819, 2821 (noting spillages might have occurred, but finding contamination only in known waste disposal locations). Moreover, UCC designed the drain, Ex. 6 at UCC 4274, which was highly polluted, Ex. 97 at 3, 12-15, with toxins also found in the groundwater. *E.g.* Ex. A (Johnson Decl. ¶7-8).

[24] Ex. 11 (May, 1982 UCC "Operational Safety Survey" listing "Action Plan Steps": *e.g.* "Find a better way of residue disposal/handling"); Ex. 19 at UCC 3791 ("'OSS' of CO/Phosgene/MIC facilities completed by UCC team"); *see also* Ex. XX at 44-45 (UCC audited environment practices).

[25] *Accord* Ex. TT ¶¶7-8 (UCC Engineering had "primary responsibility" for plant engineering and created design report which contained all necessary information to base mechanical design, erection, start up and operation); Ex. UU ¶¶2-3 (key decisions about design were made by UCC; design was made or approved by UCC; any changes had to be approved by UCC); Ex. XX at 10-13, 17, 19-20, 26-28 (basic processes were from UCC; Bhopal processes same as U.S. facilities; UCC made final design decisions, had to approve changes to UCC technology, had "total responsibility of process").

technical support, and majority ownership of UCIL provide assurance of technical competence.")[26]

UCC does not dispute that it provided the technology for the Phosgene, MIC, and Temik units and napthol refining. *See* DB at 6-8.[27] UCC also provided technology for the Sevin unit.[28] UCC's claim that "UCIL, *not Union Carbide* provided the CO . . . process[]" is false. DB at 7, 8, n.1 (emphasis in original). The 1973 CPB envisioned that UCIL would provide the CO and 1-Napthol units. Ex. 1 at UCC 4202, 4204. But UCIL ultimately obtained the CO process in a "purchase thru UCC." Ex. I at UCC 4705. The contract was between Stauffer and UCC. Ex. NN at UCC 12356-66. Similarly, UCIL's 1-Napthol process was never successfully operationalized.[29] In any event, UCC provided process consultation and reviewed the design done in India for that unit. Ex. 1 at UCC 4210; Ex. MM at UCC 12134.

UCC explicitly assumed responsibility for providing safe technology. As UCC told UCIL: "[f]or those portions of the project for which UCC is furnishing the process design, the Engineering Dept. is charged with the basic responsibility for the safety and operability of the plant design." Ex. MM at UCC 12134. These

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[26] Based on these documents and Ex. I at UCC 4705, all obtained after Plaintiffs filed the Complaint, this Court noted that Plaintiffs presented "evidence which indicates that UCC transferred technology, know-how, and technical support to UCIL." Order Re: Motions for Reconsideration at 15 (Dkt. # 92, March 15, 2010); 262 F.R.D. at 313. That ruling is inconsistent with any claim that Plaintiffs' version of events is "wholly fanciful." *Jeffreys*, 426 F.3d at 554.

[27] The 1973 CBP that UCC approved provided for UCC's transfer of this technology. Ex. 1 at UCC 4202, 4204, 4210; Ex. I at UCC 4705 (1977 CBP: "Phosgene and MIC units are commercially operated by UCC"); Ex. MM at UCC 12134; Ex. 5 at UCC 4243 ("facilities and processes are based, where suitable, on those now in commercial use at UCC's Institute plant and in the case of CO and 1-Napthol on processes [from] UCIL." Indeed, UCC personnel were needed to "oversee" start-up of the phosgene and MIC units. Ex. I at UCC 4707, 4736; Ex. 1 at UCC 4211.

[28] Ex. 1 at UCC 4202, 4210; Ex. MM at UCC 12134. UCC sent UCIL over 2000 pages of design for the unit. *E.g.*, Ex. OO at UCC 17897-19695. UCC's suggestion that UCIL rejected all of it and developed, from scratch, its own process for making UCC's patented pesticide defies credulity. DB at 7. The Sevin process was "among the more sophisticated and exacting processes practiced by UCC"; accordingly "extra effort in providing the initial technology services and in maintaining particular thoroughness in communications between India and the U.S." was required. Ex. MM at UCC 12132; *see also* Ex. UU ¶3. In fact, UCIL's process was essentially the same as UCC's, with some improvement. Ex. XX at 11-14. UCC would have reviewed and approved the changes.

[29] Trials in 1977 were abandoned due to problems. Ex. RR at 228. The unit was started up in May 1982, but was shut down by December, 1982. Ex. RR at 227-28; *see also* Ex. U at UCC 5611-12; Ex. X at UCC 5667-69; Ex. Y at UCC 5759-66; Ex. 19 at UCC 3791; Pl. Rule 56.1 Statement ¶68. UCIL sought UCC's assistance to solve the problems Ex. RR at 228, and imported 1-napthol from UCC. Ex. W at UCC 5636. The evidence shows joint decision-making, if not UCC control, over plans about deferring start-up. Exs. T, U & V at UCC 5610-13 (UCIL official: "I need your clearance"; UCC official: "I endorse your proposed course of action"); Pl. Rule 56.1 Statement ¶69.

processes comprised the core technology used at Bhopal.

The 1973 CBP also provided for additional "UCC Technical Help" that was "Required." Ex. 1 at UCC 4210-11. With respect to "Engineering Design," this included the "assign[ing]" of a UCC employee "for whatever on-going liaison and assistance may be necessary through start-up." *Id.* at UCC 4210. Moreover, "[o]ne man has been loaned to UCIL to act as Project Manager" for "Detail Engineering and Construction." *Id.* at UCC 4211.[30] UCC also made specific provisions for reviewing any changes made to UCC design:

- "[F]or the proper discharge of the U.S. responsibility for the ultimate performance of the designs provided by the Engineering Department, an experienced process engineer will be kept available at the Technical Center to maintain active contact with the UCIL process engineers, to audit and review suggested changes in the design, and to provide assistance as needed. . . .[T]he U.S. process engineer will...**[r]eview and approve all changes that the UCIL engineers may propose to make in the Engineering Department portion of the process design**... [and will] [a]rrange for reviews as may become needed of final piping drawings for the Engineering Department's portion of the process....the sole purpose would be to detect major operational or safety problems that may have been introduced during detailed design." Ex. MM at UCC 12139-40 (emphasis added).

- "A U.S. engineer will be expected to provide a prompt response to each change notice, either indicating his approval or providing an alternative recommendation." Ex. MM at UCC 12143.[31]

UCC also provided other services that show that the plant was based upon UCC technology.[32]

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[30] *Accord* Ex. MM at UCC 12134; Ex. TT ¶10 (UCC employee was Project Manager to oversee design and construction; UCC employees from US monitored detailed engineering and construction). Thus, UCC's review of "design developed outside UCC," Ex. 1, UCC 4187, included detail design. Moreover, UCC provided at least some detail design after transmitting design packages. Ex. I at UCC 4726 (referencing "Equipment *incorporated by UCC later in design*, viz. GOI refrigeration unit and other equipment in the MIC unit." (emphasis added); *see also* Ex. XX at 15-16, 23-25 (some detail design done in the U.S. by UCC; UCC had to approve all detail design done by UCIL; UCC Project Manager John Couvaras ("Couvaras") was in charge of project and responsible for getting approval from the U.S. for design changes).

[31] Although the same document notes UCIL's "responsib[ility] for the over-all venture" – describing that responsibility as including the 1-napthol process that was never operationalized, the "contracting" of detail design and construction to third-parties and "project management," *id.* at UCC 12133 – these delineated "activities" are distinct from UCC's duties of providing design and approving any changes, described elsewhere in Ex. MM, for which UCC can be held liable.

[32] Ex. JJ at UCC12004 (UCC made "available to UCIL all such technical services as are generally connected with or specifically pertain to the production and use of the Products which may reasonably be required by UCIL for the most efficient use of the production techniques that Union Carbide has developed or may develop in the future..."). UCC "furnish[ed] technical services during the first five years of operation," Ex. ZZ; created a "comprehensive plan" for training engineers, supervisors and operators, that involved training in the U.S., including in "Environmental Pollution/Control," Ex. 8; *accord* Ex. 1 at UCC 4211; Ex. I at UCC 4707, 4736; Ex. TT ¶10; Pl. Rule 56.1 Statement ¶72-73; supplied the start-up team, Ex. TT ¶10; Ex. 1 at UCC 4211; and provided safety manuals for the Phosgene, MIC, CO and Sevin units,

UCC does not deny that wastes were generated at least in part by the MIC, Phosgene, Temik and/or napthol refining units, which came from UCC.[33] UCC also provided the basic plant design and reviewed all technology it did not provide. This establishes a genuine issue of fact as to strict liability and as to whether UCC participated in the creation of the nuisance. As noted above, UCC's claim that Plaintiffs concede that pollution resulted from UCIL's operations, not plant technology, is false, and UCC's participation in creating the nuisance is sufficient even if another party's mishandling of the wastes ultimately caused the release of toxins from the plant. Regardless, as also noted above, UCC is liable for participating in waste system design and overseeing waste handling practices.

2. UCC's Knowledge of the "Major Disposal Problem" is Sufficient for Liability

UCC is liable for negligence in transferring its technology because it was on notice that the technology posed water pollution risks. Indeed, UCC engineers recognized at the outset that they would not "be held blameless" if they failed to act to prevent pollution. Ex. C at UCC 4516-17.[34]

Ex. QQ at UCC 21450, 21454; Ex. PP at UCC 19435, 19439, as well as a host of other documents relating to *inter alia* plant safety and operations. Ex. KK at UCC 12036-50.

[33] Ex. F at UCC 4544 (UCC to provide "summary" of "wastes produced by the U.S.-designed process units"); Ex. 1 at UCC 4213; Ex. 3 at UCC 4131; Ex. L at UCC 5102; Ex. G at UCC 4553, 4555. For example, acidic waste streams that, as detailed below, posed a major disposal problem, came from the MIC unit. Ex. 1, UCC 4213; Ex. L at UCC 5102. Thus, the SEPs were needed because "the Institute process systems" discharged waste into the Kanawha River. Ex. 2 at UCC 4295. Moreover, UCIL's 1-Napthol process was used for only a short time, and its predicted acid waste stream was eliminated. Ex. I at UCC 4734. Toxins from the Sevin unit can be attributed to UCC because UCIL's alteration resulted in *less* waste than the UCC process upon which it was based. *Id.* UCC implies that Plaintiffs allege only that the CO and 1-Napthol processes were improper. DB at 8, fn 1. They are wrong. Cmpl., ¶¶2, 74, 140 (UCC liable for its "transfer of inadequate, highly polluting and inappropriate technology"); ¶¶84-5 (design of UCIL plant based on that of Institute, even though latter discharged waste into a river). Regardless, the argument is irrelevant to claims that do not require fault.

[34] These concerns are reflected in a May 1972 memo regarding a conversation between Ted McConnell and Edward Munoz, Ex. C at UCC 4516, who were UCC personnel charged with responsibility for the Bhopal plant. *Id.*; Ex. TT ¶¶1-3. The memo states:

> The impression came through from Ted's recounting of the conversation that Mr. Munos [sic] would probably prefer that we not concern ourselves here further with the HCL disposal problem, leaving that to personnel at the site. However, this leaves me with an uneasy feeling, because 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. For example, 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. . . . Questions can also be raised as to

UCC's 1972 designs for the waste disposal unit noted "the acid-bearing process wastes which are clearly the major disposal problem for the proposed unit." Ex. 3 at UCC 4128. The 1973 CBP described "toxic and acidic" waste streams as "of major concern." Ex. 1 at UCC 4205; 4212.

The technology UCC transferred was the same as that at UCC's Institute plant. *Id.* at UCC 4204.[35] But the Institute plant was able to discharge wastes into a large river; and the pollution from these discharges was rated as "significant." Ex. 2 at UCC 4295. In contrast, UCC knew from 1972 that Bhopal "presents an unusual challenge in that there is no nearby waterway into which treated effluent can be discharged." Ex. 3 at UCC 4127. A UCC Environmental Impact Assessment (EIA) noted that "[a]ll wastewater streams from the Pesticide Unit at Bhopal will discharge into solar evaporation ponds." Ex. 2 at UCC 4295.[36]

The SEPs were seen as the "most economical solution" to prevent the spread of wastes that were known to be "drinking water pollution hazards." Ex. 7 at UCC 1705. The EIA stated that "[p]lans are to construct the ponds . . . with impermeable linings to prevent contamination of groundwater." Ex. 2 at UCC 4295.[37] But as a UCC engineer had 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." Ex. C at UCC 4516. Regardless, the EIA and 1972 memo confirm that UCC had concerns about the "major disposal problem," Ex. 3 at UCC 4128, knew of the pollution risk, and was intimately involved in pollution planning.

> the applicability of solar evaporation to calcium chloride. . . . [T]he essence of Mr. Munos [sic] proposed solution lies in the less advanced environmental conscienceness [sic] in India.

Ex. C at UCC 4516. As detailed below, UCC, not personnel in India, designed the waste systems.

[35] Anderson's admission that UCIL had the "same design" refers to Institute.

[36] The 1973 CBP also describes the "Technology Risk[]" that "while similar waste streams have been handled elsewhere, this particular combination of materials *to be disposed of* is new and, accordingly, affords *further chance for difficulty*." Ex. 1 at UCC 4206 (emphasis added). Given the goal of "minimum capital . . . expenditure[]," UCIL found the risk "acceptable" and "UCC concur[red]." *Id.* This was a "business risk," because it might require further investment, DB at 6-7, *i.e.*, UCC and UCIL did not address the problem up-front because of the cost. That does not suggest theses difficulties posed no environmental threat. Regardless, other evidence shows that UCC knew of the pollution risk.

[37] The 1972 engineers' memo 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." Ex. 3 at UCC 4129.

A jury can find that UCC should not have transferred systems designed for discharge into a river to Bhopal, where there was no such river, and they knew that the use of SEPs could lead to toxic contamination.

UCC does not deny that it at least helped design the SEPs. DB at 9-10, n.2. UCC engineers initially proposed a "22-acre" SEP as the "minimum size" and warned that: "if the proposed pond geometry is selected, new ponds will have to be constructed at one to two-year intervals." Ex. 3 at UCC 4129. In May 1973, experiments designed by UCC made clear that the "pond size required will be even larger than originally visualized." Ex. E at UCC 4533. In June, 1973, UCC engineers noted that "[t]o properly size the pond... the smallest pond area is 35 acres." Ex. G at UCC 4546. But they also stated that "[u]ndersizing the pond" has "a few advantages," including "lower initial capital cost." *Id.* Ultimately, UCC allowed the system to proceed with two functioning ponds totaling 22 acres, along with an emergency pond (#3) to be used during repairs to the others. Ex. 7 at UCC 1705; Ex. 23 at UCC 4100. Contrary to the UCC engineers' warning, the SEPs were planned to be used over "an estimated life of 4 years," Ex. 7 at UCC 1705, and were actually used for six years, from 1978-84, not the 1-2 years recommended. Ex. 19 at UCC 3791.[38]

Worse, the SEPs were made even more hazardous to save money on construction. In 1977, UCIL "emphasized" to its consultants "the need for reduction for cost of the Pond as much as possible" and "that *certain Seepage/effluent from the Pond can be accepted by* [UCIL] *provided there is corresponding reduction in the cost.*" Ex. HHH at UCC 4922-24 (emphasis added). UCC was involved; this memo was sent to, among others, Couvaras (LJC), the UCC employee who was the project manager at the site and who was responsible for approving or getting approval from the U.S. for design changes. *Id.* at UCC 4924; *supra* n.30.

In violation of local regulations, the plant began operating without any SEPs on-line, causing off-site

[38] UCC suggests that the UCC engineers' determination of the ponds' life can be ignored because UCIL planned to dredge away the solids. DB at 10, n.2. But there is no evidence this was ever done. UCIL followed UCC's plan. As to the size of the SEPs, UCC ignores the engineers' determination that 35 acres was the minimum, and it misleadingly notes that the three ponds covered 35 acres without noting that 13 of those acres were for an emergency pond. *Id.*

pollution.[39] Subsequently, toxic wastes from UCC's MIC process were stored in Pond 2. Ex. L at UCC 5102; Ex. 7 at UCC 1705 (noting this waste was drinking water hazard). In March 1982, Pond 2 leaked, and Pond 3 showed "signs of leakage"; by April 10, 1982, "[c]ontinued leakage" was "causing great concern." Ex. 10 at UCC 1736-37; Ex. 23 at UCC 4097.[40] It makes no difference if UCIL was planning repairs. DB at 12. The leak was the culmination of decisions UCC made or in which it participated about using Institute technology and using ponds to hold the toxins it produced. Moreover, after the plant closed, the ponds "may have developed leaks resulting into permeation of the effluent in the soil." Ex. 19 at UCC 3808.

In sum, UCC had design responsibility and knowingly transferred and approved polluting technology to a site without a river for waste discharge. UCC had reason to know this posed a water pollution risk. UCC also approved "the proposed plant location," Ex. 1 at UCC 4202, which was near neighborhoods whose drinking water could be contaminated. Ex. 97 at 5; Ex. C at UCC 4516. This raises a genuine issue regarding UCC's joint tortfeasor liability for negligence. UCC need not, however, have known of the risk for nuisance or strict liability, which do not require fault.

3. UCC's Intimate Participation in the Failed Rehabilitation Sufficiently Supports Liability

UCC does not deny that, after the plant closed in 1984, it was involved in all aspects of the inadequate "clean-up" until at least 1994. Instead, UCC asserts that the Bhopal Site Rehabilitation & Asset Recovery Project ("Project") "was UCIL's." DB at 12. UCC may be held liable for its own participation or negligence in the maintaining or creating of this nuisance.

UCC involvement in "remediation" was critical and extensive. Its participation, if not approval, was

[39] By July 1978, local authorities complained to UCIL about "discharge of industrial effluent from your factory into nearby fields, resulting in death of cattle and losses to agricultural crops." Ex. O at UCC 5282-83 (this "is fourth in the series of Govt./public complaints"). The government's consent required that waste be disposed in SEPs. *Id.* A UCIL manager noted to UCC's Couvaras these complaints regarding "our failure in proper disposal of chemical waste," and requested the "Project group" to expedite start-up of the SEPs. *Id.* A memo notes that the need to commission a pond is essential to meet local regulations. Ex. N at UCC 5279.

[40] Both telexes in Ex. 10 are signed by "Correa," (presumably the "Correa" on UCC's "Bhopal Working Committee," Ex. 9 at UCC 1617), and addressed to "H. Ayers," a UCE official.

required for disposal of tons of acid "sludge."[41] In 1988, UCC provided UCIL with "guidelines" for disposal of Sevin and Napthol tars. Ex. 18. UCC does not dispute that these tars remain on site.

Beginning in 1989, UCC and UCIL jointly designed the Project, which included remediation of the SEPs, main site, waste pits, and landfill areas. Ex. 19 at UCC 3802-03, 3808-10, 3820; Ex. 21 at UCC 1813-17. The Project failed to prevent water pollution, *see* Ex. A at 15-18, and left the plant site and SEPs a nuisance.

The Project was addressed in depth at a June 1989 "meeting at South Charleston," home of UCC's Engineering Department, Ex. 19 at UCC 3790-820, which considered *inter alia* a "Proposed Plan for Landfill Areas." *Id.* at UCC 3820. At an October 1989 meeting at UCC, Project responsibilities were assigned to UCC employees. Ex. 21 at UCC 1811-12. For example, UCC was to develop its own "position on cleanup standards (See attached review draft)." Ex. 21 at UCC 1811.[42] Subsequently, UCC participated in other key planning meetings and took on further responsibilities.[43] Indeed, a "technical review" was to be conducted in the U.S. in early April 1992 to discuss, *inter alia*, "clean-up criteria," at which the "South Charleston Technical Center" was a "principal part[y]." Ex. 47 at UCC 3594; Ex. 48 (early April 1992 UCC meeting to develop recommendations for UCIL). Based on this meeting, UCC produced a draft rehabilitation strategy on UCC letterhead. Ex. 52. The record shows joint UCC-UCIL decision-making on the Project.

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[41] Ex. 17 at UCC 1728 (UCIL seeking from UCC "an on-site joint review . . . to finalize the action plan for the disposal of [chlorosulfonic acid] sludge"); Exs. 14-15 (UCC advising UCIL on disposal of "approx. 15 tons of [CSA] sludge.").

[42] *See also* Ex. 21 at UCC 1811-12 (UCC to pose questions on pond report including methods and whether to analyze "well water off site" and develop strategy to respond to NEERI proposal); Ex. 22 at UCC 1821-24, 1836 (UCC provided guidance to Arthur D. Little, Inc. ("ADL") a Project consultant); Ex. 24 (UC Asia Pacific's Buckingham participated in "final review meeting" regarding proposed scope of NEERI work, and informed UCC's Gaines).

[43] In August 1990, UCIL's director was called to Danbury to discuss the Project. Ex. 34 at UCC 1858. UCC officials reviewed Project proposals. Ex. 19 at UCC 3660 (initialed by UCC's Gaines). UCC assisted in designing a study of water and soil pollution at the plant. Ex. 26 at UCC 2378; Ex. 28 at UCC 3627. UCC advised UCIL on testing techniques and clean-up guidelines. Ex. 38. In February, 1992, UCC and UCIL officials met in Singapore. Ex. 47. UCC was to review test results and recommend next steps, and set up a training in the U.S. for UCIL's manager on remediation. *Id.* In 1993, Hayaran traveled to the U.S. for this training, and conducted a status review of the project with UCC. Ex. 62 at UCC 2387, 2389; Ex. 64. UCC also participated in the UCIL-ADL relationship, including in the decision to use ADL, Ex. 67 (UCC's "Board will want" ADL involvement), negotiating contracts, Ex. 60 at UCC 2011, and communicating with ADL about compensation and project issues, Ex. 47 at UCC 3595; Ex. 35 at UCC 1834; Ex. 53.

UCC played a central role in pond "remediation" efforts. Its suggestion that the Project simply followed the recommendations of the National Environmental Engineering Research Institute ("NEERI") is false. DB at 15-16. UCC's draft position on clean-up standards, on "Union Carbide" letterhead, suggested a "strategy for clean up" of the SEPs. This involved pumping Ponds 2 and 3 into Pond 1, "washing" the soil in Ponds 2 and 3, Ex. 21 at UCC 1813, 1815-17, and covering Pond 1. *See* Ex. 49 at UCC 3352. NEERI's 1990 proposal was entirely different -- burying all three ponds' solids in a landfill in Pond 3 -- and it rejected soil washing. Heck Aff. Ex. D at UCC 109, 127-29, 283-86. Yet, the pumping and washing parts of *UCC*'s plan were implemented, *after* the 1990 NEERI report, Ex. 37 at UCC2541-42; Ex. 49 at UCC 3352; Ex. 41 at UCC3669; Ex. 52 at UCC 3506; Ex 39, even though NEERI "did not find it practical." Ex. 41 at UCC 3669.

UCC cites NEERI's 1992 report, DB at 16, made *because* UCC's plan had been implemented, Ex. 49 at UCC 3352, which again suggested a landfill in Pond 3 and pumping the liquid now consolidated in Pond 1 to that landfill. *Id.* at UCC 3422-24. The Project ultimately created a landfill something like what NEERI's 1992 report suggested. UCC does not dispute that it approved the burial of toxins in the Pond 3 landfill; it contends only that the work was "performed by UCIL" based on NEERI's advice. DB at 16. But UCC can be held liable for the landfill's failure given its approval of the creation of the nuisance, as well as its design of the plant that created the disposal problem, the waste systems that failed to resolve the problem, and the plan to consolidate liquids in Pond 1, all of which contributed to the creation of the landfill nuisance.

Moreover, in creating the landfill, UCC and its Project co-participants were negligent. Pond 1 was pumped to the Pond 3 landfill in November 1993, Ex. 64 at UCC 1951; Ex. 66 at UCC 2703, even though, in August, UC Asia Pacific's Buckingham had warned UCC's Environment Director that "I do not favour this approach as the hydraulic pressure developed as the site is subsequently covered over may lead to splitting of the liner." Ex. 60 at UCC 2011.[44] The Project also used the "original" liner of Pond 3, Ex. 60 at UCC 2011,

[44] The fact that the Buckingham noted an "alternate option" to pumping Pond 1 to the landfill further shows that the Project did not blindly follow NEERI's suggestions. *See id.*

again contrary to NEERI's recommendation, even though UCC knew by 1989 that the ponds' lining "may have developed leaks."[45]

UCC's attempt to absolve itself from liability by blaming others, without citing any legal authority, is unavailing. It is irrelevant whether the landfill was recommended by NEERI, the work was performed by UCIL, or M.P. State authorities supervised or approved Project efforts. DB at 13. Anyone who participates in the creation of nuisance is liable without fault; compliance with safety standards is no defense. *Schenectady Chems.*, 117 Misc. 2d at 970.[46] Likewise, UCC can be held liable for providing negligent advice. For the same reasons, UCC's claim that the Project did not try to conceal pollution cannot bar liability. DB at 12-13.

While the participation of NEERI, M.P. or UCIL might make them joint-tortfeasors, it does not immunize UCC.[47] UCC argues that UCIL continued remediation after UCC sold its shares, citing references to the SEP landfill. DB at 16-17, *citing e.g.* Ex. 91 at UCC 2739. But UCC approved, and participated in all conduct leading to the negligent creation of this nuisance. Moreover, UCC does not claim that UCIL did something other than what UCC approved. It makes no difference when the landfill was finished. Regardless, the soil at the plant-site was not remediated, even though the lease required it. Ex. 93 at UCC 2246-47; Ex. 52 at UCC 3506. Since nuisance does not require possession, *Schenectady*, 117 Misc. 2d at 966, UCC's observation that the lease was terminated and its claim that Indian authorities agreed to remediate are irrelevant. DB at 17-18. The latter is also unsupported and false. India currently seeks to hold UCC liable for the cleanup,

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[45] Ex. 19 at UCC 3808; *accord* Ex. 21, UCC 1814 ("some embrittlement has occurred. Also at least one case of pond leakage has been noted."). 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, and that additional liners should separate the wastes from each SEP. Ex. B at UCC 3623-25. NEERI's recommendation was not followed.

[46] *See also State v. Waterloo Stock Car Raceway, Inc.*, 96 Misc. 2d 350, 357-58 (N.Y. Sup. Ct. 1978) (that conduct is otherwise lawful is no defense to public nuisance liability).

[47] *Bassett*, 204 F.3d at 358 (plaintiff may sue one joint tortfeasor even where another has sovereign immunity). Governmental approval or oversight does not absolve UCC of its liability for its own tortious conduct. Indeed, even a government's agent that the government has agreed to indemnity 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).

although UCC claims that Indian courts lack jurisdiction over it. Ex. YY.[48]

Thus, even assuming the Project was UCIL's, UCC may be held liable for, *inter alia*, participating in the creation of a nuisance, strict liability, and for its own negligence in its participation or providing expertise.

4. UCC Exercised Control of UCIL Through WAPT

The above noted evidence of UCC's direct involvement must be viewed in light of the fact that UCC coordinated its agricultural products business on a worldwide basis and exercised control over the Bhopal plant; this was done by the World Agricultural Products Team ("WAPT"), comprising UCC, UCE, APC and UCIL. Pl. Rule 56.1 Statement ¶¶11-36. In the 1980s, the Bhopal Task Force was conceived at a WAPT meeting to "coordinate our worldwide plan," Ex. R at UCC 5548-49, and to salvage the profitability of UCIL's Agricultural Products Division, *i.e.* the Bhopal plant. Ex. R at UCC 5550; Ex. X at UCC 5667-69. The Task Force's proposals needed WAPT "endorsement," Ex. X at UCC 5668, and were limited to those compatible with UCC's profitability, technology and interests in coordinating an integrated worldwide agricultural products business. Ex. S at UCC 5590, Ex. R at UCC 5548-49. Thus, in addition to the direct evidence of UCC's involvement in every relevant decision regarding the plant, WAPT had veto power over UCIL decisions, and ensured UCIL acted in the UCC's best interests even at the expense of UCIL's.[49]

D. EIIL's Alleged Ability to Pay a Judgment Cannot Preclude Veil Piercing

UCC does not deny that it exercised absolute control over UCIL, as Anderson admitted. Section III.C.1.(b)(1), *supra*. As this Court noted, UCC challenges veil-piercing on "a single ground": that there is no

[48] India and Madhya Pradesh have made clear to this Court their position that UCC is liable for remediation. Ex. VV. M.P. specifically denied that it became liable upon the lease's surrender. Ex. 93 at UCC 2246-47. UCC cites only inadmissible hearsay: an EIIL letter that purports to quote the alleged statements upon which UCC relies. DB at 17-18; *quoting* Ex. 94 at UCC 2239-40. Moreover, the press release purportedly refers to only some of the relevant toxins. UCC's claim that M.P. agreed to provide a dump for plant waste cites hearsay in a purported observer's notes. DB at 17; Ex. 93 at UCC 2248.

[49] For example, UCIL sought to export Sevin to Asia, but UCC rejected that plan through WAPT because it would deprive UCC of profits and was incompatible with the worldwide agricultural products plan. Exs. Y, BB, and S at UCC 5734, 5771, 5591. Instead, the Task Force recommended that UCIL make other UCC pesticides selected on the basis of their compatibility with UCC's interests, profits and technology as well as UCC's worldwide business plan. UCIL sought and obtained permission from the Indian government to manufacture those same pesticides at Bhopal in 1981. Ex. M at UCC 5220.

equitable basis to pierce because Eveready Industries India Ltd. ("EIIL"), UCIL's successor, is purportedly a viable corporation capable of responding to plaintiffs' claims. *Sahu*, 262 F.R.D. at 314; DB at 2, 19, 22; Def. Rule 56.1 Statement.[50] UCC's proposed new rule that the ability to satisfy a judgment precludes piercing conflicts with both Indian and New York law and provides no basis for summary judgment.

Since UCIL was incorporated in India, Indian law governs veil-piercing.[51] Corporate groups involved in a "hazardous or inherently dangerous industry" are treated as a single enterprise for tort liability. *M.C. Mehta v. Shriram Food & Fertilizer Indus.*, A.I.R. 1987 S.C. 1086 (India 1986), Ex. GGG. EIIL's ability to satisfy a judgment is irrelevant to the analysis. Since UCC does not dispute that it was part of such a corporate group, it makes no argument that could preclude liability.[52]

New York law compels the same result. Veil-piercing examines the parent-subsidiary relationship "at the time the acts complained of took place." *Lowendahl v. Baltimore & Ohio R.R. Co.*, 247 A.D. 144, 158 (1st Dep't 1936), *aff'd*, 272 N.Y. 360 (1936).[53] UCC's former subsidiary's ability to pay a judgment is irrelevant to whether UCIL was UCC's alter-ego at that time.[54] UCC cites no case adopting its proposed "requirement," even though it would need to be met in every piercing case. DB at 22.

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[50] Thus, the Court denied discovery it found "unnecessary to withstand Defendants' narrow summary judgment argument," *Sahu*, 262 F.R.D. at 314, including into UCC's relationship with or general control over UCIL. *Sahu v. Union Carbide*, No. 04 Civ. 8825, 2006 U.S. Dist. LEXIS 714 *3-5 (S.D.N.Y. Jan. 9, 2006); 9/30/10 Order at 17 (Dkt. # 100).

[51] New York choice-of-law rules apply. *Fieger v. Pitney Bowes Credit Corp.*, 251 F.3d 386, 393 (2d Cir. 2001). Thus, the place of incorporation's law governs veil-piercing. *Kalb, Voorhis & Co. v. Am. Fin. Corp.*, 8 F.3d 130, 132 (2d Cir. 1993). This does not mean India law governs all issues; the analysis is issue-by-issue. *See Fieger*, 251 F.3d at 397, n.1.

[52] Plaintiffs sufficiently allege that UCC and UCIL were part of a single enterprise engaged in a hazardous industry. Compl. ¶¶60-69; *see also* Section III.C.4, *supra*.

[53] UCC could not transfer its alter-ego liability by selling its UCIL shares. *See Jota v. Texaco*, 157 F.3d 153, 156, 162 (2d Cir. 1998) (equitable relief permissible for pollution caused by subsidiary defendant had sold); *Schumacher v. Richards Shear Co.*, 59 N.Y.2d 239, 244-45 (1983) (selling assets does not absolve tort liability).

[54] Moreover, since a parent and its alter-ego are treated as one, *Lowendahl*, 247 A.D. at 156; *Fisser v. Int'l Bank*, 282 F.2d 231, 234 (2d Cir. 1960), the subsidiary's torts are the parent's; it cannot avoid liability by claiming the subsidiary might be liable. Similarly, piercing is fact-specific and "may not be reduced to definitive rules." *Morris v. State Dep't of Taxation & Fin.*, 82 N.Y.2d 135, 141 (1993); *accord Wm. Passalacqua Builders v. Resnick Dev.*, 933 F.2d 131, 139 (2d Cir. 1991) ("infinite variety of situations" might warrant piercing); *D. Klein & Son v. Good Decision, Inc.*, No. 04-1994, 2004 U.S. Dist. LEXIS 27321, at *25-26 (S.D.N.Y. Mar. 5, 2004) (Keenan, J.), *aff'd*, 147 Fed. Appx. 195 (2d Cir. 2005) ("no one factor is mandatory").

As UCC concedes, two distinct tests permit piercing. DB at 20-22. "Justice" is not a separate element of either, and neither requires insolvency. Courts pierce under the identity rule where the corporations' independence "had in effect ceased or had never begun." *Mull v. Colt, Co.*, 31 F.R.D. 154 (S.D.N.Y. 1962).[55] Contrary to UCC's claim, lack of independence itself shows that failure to pierce would be unjust.[56] UCC does not dispute that UCC and UCIL were not independent, and relevant discovery was denied. UCC's motion fails.

Alternatively, even if the corporations are generally independent, courts pierce where the parent dominated the subsidiary in respect to the conduct at issue, and "such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury." *Morris v. N.Y. State Dep't of Taxation and Fin.*, 82 N.Y.2d 135, 141 (1993). No additional element exists. *Lowendahl*, 247 A.D. at 157.[57] UCC does not challenge UCC's domination or how such domination was used.

UCC suggests without support that the "wrong" cannot be the tort at issue, and claims that Plaintiffs therefore do not allege any violation of a positive legal duty or unjust conduct affecting them. DB at 21-22. They are mistaken.[58] Regardless, Plaintiffs further allege that UCC sold its UCIL shares to wrongfully insulate

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[55] In such circumstances, "an adherence to the fiction of separate identity would serve only to defeat justice and equity by permitting the economic entity to escape liability arising out of an operation conducted by one corporation for the benefit of the whole enterprise." *Mull v. Colt, Co.*, 31 F.R.D. 154, 163 (S.D.N.Y. 1962). UCC misquotes "**an** adherence . . ." as "**and** adherence," falsely suggesting that there is a separate justice test. DB at 22 (bold added). UCC's suggestion that UCIL is the "economic entity" turns *Mull* on its head. DB at 22. The term referred to the subsidiary's owners and sister corporations. *Mull*, 31 F.R.D. at 157, 163 (plaintiff seeks to pierce to "hold[] the entire economic entity liable." *i.e.* "the entire taxicab operation garaged at one location as a single economic entity.").

[56] Since UCC no longer owns UCIL, adherence to the fiction of UCIL's separateness at the time of the wrongdoing would permit UCC to escape liability. Under *Mull*, that is unjust.

[57] Courts pierce "where excessive control *alone* causes the complained of loss," *Wm. Passalacqua Builders*, 933 F.2d at 141 (emphasis added), even if the subsidiary is an ongoing business. *Dist. Council No. 9 v. APC Painting, Inc.*, 272 F. Supp. 2d 229, 231, 241 (S.D.N.Y. 2003); *JSC Foreign Econ. Ass'n Technostroyexport v. Int'l Dev. & Trade Svcs.*, 386 F. Supp. 2d 461, 472 (S.D.N.Y. 2005) (unnecessary to show subsidiary did no legitimate business); *Berkey v. Third Ave. Railway Co.*, 244 N.Y. 84, 87-88 (1926) (subsidiary viable; considering if "other circumstances" justify piercing); *TNS Holdings, Inc. v. MKI Securities Corp.* 92 N.Y.2d 335, 339-40 (1998) (same); *Bridgestone/Firestone v. Recovery Credit Servs.*, 98 F.3d 13, 18 (2d Cir. 1996) (insolvency at time of act is among many relevant factors).

[58] *Bedford Affiliates v. Sills*, 156 F.3d 416, 431 (2d Cir. 1998) (pollution case holding that second *Morris* prong requires only that parent's control led to contamination); *Wm. Passalacqua Builders*, 933 F.2d at 141 (piercing if control causes "the complained of loss"); Compl. ¶¶53-69.

UCIL and itself from liability. Compl. ¶¶117-23.[59]

Even if it were relevant, UCC makes no argument that EIIL can *currently* pay a judgment. Instead, it argues EIIL could pay a judgment in 2005. But EIIL has since lost approximately one-third of its value. Pl. Rule 56.1 Statement ¶2.[60] Moreover, UCC does not assert that EIIL can pay class damages, or respond to any equitable relief claims. DB at 19. Since UCC does not challenge piercing regarding to these forms of relief, they cannot be dismissed.[61]

E. UCC Makes No Argument That Could Preclude Agency Liability

UCC's motion must be denied because UCC does not contest liability on any agency theory. Section I, *supra*. UCC acknowledges that Plaintiffs allege that UCC is liable because UCIL was its "general or specific agent," in addition to its "alter ego." DB at 2, *quoting* Compl. ¶60. Rather than challenging such liability, UCC assumes it is the same as piercing. DB at 21. Agency law, however, allows a parent to be held liable for the acts of a subsidiary that is not its alter-ego,[62] and this Court has differentiated between the two. Dkt. # 100 at 7-8. Even if Part III could somehow be read to challenge agency, UCC has provided no basis to dismiss. Agency is a legal, not equitable, doctrine. It does not require a plaintiff to meet any "justice" requirement. *See Royal*

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[59] *D. Klein & Son*, 98 Civ. 4083 (JFK), 2004 U.S. Dist. LEXIS 27321, at *25-26 (S.D.N.Y. March 5, 2004) (piercing where Defendant's "actions show an intent to impair [Plaintiffs'] ability to seek relief for [Defendants'] breach"). UCC does not contest this purpose, *see Bano I*, 273 F.3d at 132 (India's courts held UCC's sale of UCIL shares was fraud to avoid criminal liability), and discovery into the sale was denied. *Sahu*, 2006 U.S. Dist. LEXIS 714 at *4. EIIL is a flashlight and battery company. Its ability to remediate is lessened by the absence of UCC, the pesticides' inventor. Moreover, discovery was denied into, *inter alia*, the UCC/UCIL relationship, UCIL's finances and whether UCC insurance covered UCIL, all of which is relevant to whether the sale diminished EIIL's ability to respond.

[60] Regardless, UCC's argument is based on market capitalization, which does not establish capacity to pay. Ex. WW. UCC does not suggest EIIL could pay *after a trial*, which could take years. *Baltimore & Ohio Chicago Terminal R.R. v. Wisconsin Cent.*, No. 97-3484, 1997 US Dist LEXIS 13253 at *21 (N.D. Ill. Aug. 28, 1997).

[61] EIIL's current market capitalization of only $79 million, Pl. Rule 56.1 Statement ¶2 is below the historical costs of environmental remediation. Ex. FFF.

[62] Under New York law, "[s]uing a parent corporation on an agency theory is quite different from attempting to pierce the corporate veil." *Royal Indus. v. Kraft Foods*, 926 F. Supp. 407, 412 (S.D.N.Y. 1996); *see also* Restatement (Second) of Agency §14M & Appendix, Reporter's Notes at 68 (1958). A principal cannot escape liability just because it owns stock in the agent. *Royal Indus.*, 926 F.Supp. at 413. Agency liability affirms the separate existence of the subsidiary, whereas piercing treats the parent and subsidiary as one. *Lowendahl*, 247 A.D. at 157.

Indus., 926 F.Supp. at 413. Since that is UCC's only piercing argument, its motion must be denied.[63]

UCC also has not challenged agency liability based on UCC's ratification of UCIL's acts after the fact, even though the Complaint puts defendants on notice of this theory.[64]

F. *Bano II* Does Not Preclude Equitable Relief

UCC's *only* challenge to equitable relief is its assertion, without argument, that Plaintiffs' injunctive relief and medical monitoring claims are the "same" as claims in *Bano*, and are barred because *Bano II* affirmed dismissal of those claims. DB at 23-24, *citing* 361 F.3d at 703. But even if *Bano* could have preclusive effect, UCC concedes that *Bano II allowed* claims for remediation of the plaintiff's own property. DB at 24; 361 F.3d at 702, 713. Plaintiffs seek such relief as a remedy for their health problems, and UCC presents no argument that it is precluded.

Bano II has no preclusive effect because the Plaintiffs here were not parties.[65] In any event, *Bano II* did not consider medical monitoring. 361 F.3d at 716. And the issues are not the same.[66] Since UCC provides no

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[63] Plaintiffs separately allege agency and alter-ego, Compl. ¶¶2, 60, 75, 81, 87, 93. Agency arises when the subsidiary acts on the parent's behalf or at its direction. *Royal Indus.*, 926 F.Supp. at 412; *C.R. Bard Inc. v. Guidant Corp.*, 997 F.Supp. 556, 560 (D. Del. 1998); *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386, 2002 U.S. Dist. LEXIS 3293 at *41 n.14 (S.D.N.Y. Feb. 28, 2002); *see e.g.* Compl. ¶¶61, 63-64, 70 (alleging UCIL acted on UCC's behalf); Compl. ¶¶62, 64-65, 68-69, 88-89, 95-107, 112, 114 (alleging UCIL acted at UCC's direction); *see also* Sections III.C.1.b.(1), III.C.4.

[64] *E.g.* Compl. ¶60. Subsequent ratification does not require control; it is the express or implied adoption of another's unauthorized acts. *Orix Credit Alliance v. Phillips-Mahnen, Inc.*, No. 89 Civ. 8376, 1993 U.S. Dist. LEXIS 7071 at *13 (S.D.N.Y. May 26, 1993), *citing Prisco v. State of New York*, 804 F. Supp. 518, 523 (S.D.N.Y. 1992). It includes, for example, the knowing acceptance of the benefits of the act, *Cathay Pac. Airways v. Fly and See Travel*, 3 F.Supp. 2d 443, 455 (S.D.N.Y. 1998), *see* Compl. ¶¶2, 95, 107, 152; and conduct from which an intent to adopt the act may be inferred. *Bowoto v. Chevron Texaco Corp.*, 312 F.Supp. 2d 1229, 1247-48 (N.D. Cal. 2004), *see* Compl. ¶¶2, 60, 87, 93. These principles apply between parents and subsidiaries, even if plaintiff cannot pierce the veil or show the subsidiary acted with the parent's authorization. *Id.* Indeed, while piercing examines the parent-subsidiary relationship at the time of the tort, ratification occurs afterwards.

[65] *Res judicata* only "bars a second suit between the same parties," *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 718 (2d Cir. 1993), and collateral estoppel requires that the issues and parties be the same. *Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 644 (2d Cir. 1998). Due process prohibits barring claims of parties who never appeared in a prior action, even if "adjudications of the identical issue [] stand squarely against their position." *Blonder-Tongue Lab. v. Univ. Found.*, 402 U.S. 313, 329 (1971). No class was certified in *Bano*. That case cannot preclude Plaintiffs' claims.

[66] In *Bano*, this Court held monitoring would require locating "thousands of people who have resided" near the plant over "more than thirty years." *Bano v. Union Carbide*, No. 99 Civ. 11329, 2003 U.S. Dist. LEXIS 4097 at *26 (S.D.N.Y. Mar. 18, 2003). That is inapplicable to Plaintiffs' *individual* monitoring claims. And, unlike in *Bano*, monitoring is sought only by persons who continue to reside in affected communities and to be exposed. ¶162; *Bano*, 99 Civ. 11329, Am. Cplt ¶42.

Rule 56.1 support or factual argument, UCC has not met its Rule 56 burden regarding whether relief is practicable, and the Court may not consider the issue.[67]

Finally, even if *Bano* were preclusive as to any type of injunctive relief, it did not address a monetary remedy in lieu of injunction, which "prevent[s] a failure of justice" where injunctive relief is impracticable.[68] Since UCC does not contest this remedy, it cannot be dismissed.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that Defendants' motion for summary judgment be denied in its entirety.

[67] Courts may order remediation in a foreign country under appropriate circumstances. *Bano II*, 361 F.3d at 716-17. Thus, there can be no dismissal as a matter of law. Since UCC does not contest that those circumstances exist, there can be no dismissal on the facts.

[68] *Doyle v. Allstate Insurance 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).

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