14-3087-cv

United States Court of Appeals

for the

Second Circuit

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OHMWATI BAI, on behalf of themselves and all others similarly situated,
MOHAN LAL SEN, on behalf of themselves and all others similarly situated,
QAMAR SULTAN, on behalf of themselves and all others similarly situated,
MEENU RAWAT, on behalf of themselves and all others similarly situated,
MAKSOOD AHMED, on behalf of themselves and all others similarly situated,
KRISHNA BAI, on behalf of themselves and all others similarly situated,

(For Continuation of Caption See Inside Cover)

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

BRIEF AND SPECIAL APPENDIX FOR PLAINTIFFS-APPELLANTS

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Plaintiffs-Appellants,

– v. –

UNION CARBIDE CORPORATION, MADHYA PRADESH STATE,

Defendants-Appellees,

WARREN ANDERSON,

Defendant.

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INTRODUCTION

The Plaintiffs-Appellants in this water pollution case have had their land contaminated and drinking water wells ruined by toxic pesticides and chlorinated benzenes. Defendant Union Carbide Corporation ("UCC") caused this pollution emanating from its then-subsidiary Union Carbide India Limited's ("UCIL") Bhopal, India, facility by designing, approving, and overseeing the construction of an inadequate waste management system. The Government of India has requested the U.S. courts – the only available forum – to order UCC to pay for a clean-up.[1]

The design of a chemical plant's waste management system has three components: the manufacturing process, which determines the amount and type of waste and thus the efficacy of waste management; the overall waste disposal strategy; and the detail design that implements both. A reasonable jury could find UCC was a "substantial factor" in the harms to Plaintiffs based on its responsibility for any one of these components. Here, Plaintiffs produced evidence – including

[1] Plaintiffs' injuries are unrelated to the 1984 Gas Disaster at the same plant.

evidence not previously introduced in prior Bhopal-related cases – that UCC was responsible for all three.

Nonetheless, the district court held that no rational jury could find UCC was a cause of the harm and granted it summary judgment. SPA35-40. As a threshold matter, the district court did properly recognize that summary judgment could not be granted based on prior decisions in a similar personal injury action, *Sahu v. Union Carbide Corp.*, ("*Sahu I*"), including this Court's decision. *See* Heck B, A149-158, 528 F. App'x 96 (2d Cir. 2013). Since *these* Plaintiffs submitted evidence not at issue in *Sahu I*, the court needed to "start[] fresh," and evaluate this record as a whole.

The district court, however, inappropriately discounted Plaintiffs' evidence and usurped the role of the jury. Plaintiffs presented new evidence that UCC exercised final approval authority over every detail of the Bhopal plant's design. For example, in a newly-submitted declaration, Lucas John Couvaras – the Project Manager who approved all of the detail design for the Bhopal plant – stated that he was working for UCC. But the court chose to disregard it.

Similarly, two pollution control experts independently testified that UCC provided both a manufacturing process that was inappropriate for the site because adequate waste disposal options were not available and a "high risk" disposal strategy to store the wastes from that process in ponds above Bhopal's aquifer. They further concluded that UCC's process and strategy were the primary causes of the contamination of the local drinking water. But the district court second-guessed the experts and found that these were not causes of the harm.

The district court also applied an erroneous legal standard. It held that only the entity that controlled the detail design of the waste disposal system could be liable. But under traditional New York tort standards applied by this Court, no such control is required. And the district court's standard would make little sense; even the district court found it "self-evident" that "detail design necessarily follows general process design," SPA28, which UCC provided.

The new evidence here – most notably the declarations of Couvaras and the experts – fills the gaps identified in *Sahu I*. A rational jury could credit Couvaras's declaration that he was a UCC

employee, and agree with Plaintiffs' experts that UCC's manufacturing process and waste disposal strategy were causes of the pollution. Summary judgment must be reversed.

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. § 1332; there is complete diversity and the amount in controversy exceeds $75,000. This Court has jurisdiction under 28 U.S.C. §1292(a)(1).

ISSUES PRESENTED

1. Project Manager L.J. Couvaras, who oversaw and approved the detail design work done in India for the Bhopal plant, testified, along with two other witnesses, that Couvaras was a *UCC* employee. Did the district court improperly resolve disputed factual issues when it concluded Couvaras was a *UCIL* employee?

2. UCC designed both the manufacturing process whose wastes have polluted Plaintiffs' property and the over-all strategy for disposing of those wastes. Two leading experts concluded that UCC's process was part of the waste management system, that UCC's process and strategy were mandatory, that they were inappropriate for the site, and that they were causes of the harm. Did the district court improperly resolve

disputed factual issues when it concluded that no rational jury could agree with these experts?

3. In *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 725 F.3d 65, 121 (2d Cir. 2013) ("*MTBE*"), this Court held that a defendant can be liable for water pollution even if it did not control how the toxins were handled. Did the district court apply an erroneous legal standard in requiring that UCC dictate a mandatory waste disposal design?

4. The leading case of *Texaco v. Borda*, 383 F.2d 607 (3d Cir. 1967), held that the lower court abused its discretion when it refused to allow a preservation deposition of a key witness who was 71. Couvaras is in his late eighties. Did the district court abuse its discretion when it barred Plaintiffs from preserving Couvaras's testimony?

PROCEDURAL HISTORY

Plaintiffs are landowners living in working-class neighborhoods near the Bhopal site, whose land and wells have been polluted by toxins from the plant. They filed this property damage action in March, 2007, alleging negligence, public and private nuisance, strict liability and

trespass. *Sahu v. Union Carbide Corp.* ("*Sahu II*"), 07 Civ. 2156 (S.D.N.Y.).

Plaintiffs filed this case after a similar property damage class action was dismissed on grounds that the named plaintiff did not own the land at issue. *Bano v. Union Carbide Corp.*, 198 F. App'x 32 (2d Cir. 2006). In *Bano*, the Government of India formally urged the district court to order plant remediation, paid for by UCC. *Id.* at 35.

At the time this case was filed, *Sahu I*, the personal injury action, was pending on appeal. Accordingly, this action was stayed a few weeks after it was filed. *Sahu v. Union Carbide Corp.*, No. 07 Civ. 2156 (JFK), 2014 WL 3765556, at *2 (S.D.N.Y. July 30, 2014).

In *Sahu I*, the district court originally *sua sponte* converted Defendants' motion to dismiss and granted summary judgment. *Sahu v. Union Carbide Corp.*, 418 F. Supp. 2d 407 (S.D.N.Y. 2005). This Court vacated, holding that conversion denied plaintiffs an opportunity to present all pertinent evidence. *Sahu v. Union Carbide Corp.*, 548 F.3d 59, 66-70 (2d Cir. 2008).

On remand, the district court again granted summary judgment. This Court, by summary order, held, based on the record before it, that

plaintiffs had not produced sufficient evidence of UCC's participation in the harm to assert direct liability. In particular, this Court found that the record showed "that UCIL, and not UCC, designed and built the actual waste disposal system." A155. The decision suggested that summary judgment would be improper if plaintiffs had presented evidence that the "idea to use evaporation ponds as a means to dispose of wastewater was a cause of the hazardous conditions." *Id*.

The stay was subsequently lifted in this action on October 7, 2013. Plaintiffs amended their complaint to allege, among other things, that the plant's methyl isocyanate (MIC) process, provided by UCC, was the primary source of the toxins in their water. The amended complaint also asserted claims on behalf of newly-named Plaintiffs who were not parties in *Sahu I*.

UCC moved for summary judgment, claiming only that the "allegations, legal theories, and relevant evidence" in this action were the same as in *Sahu I*. SPA5. UCC made no collateral estoppel or *res judicata* arguments.

In opposition, Plaintiffs submitted new evidence not before the court in *Sahu I*. This included, but was not limited to, evidence that

UCC oversaw the detail design and construction of the plant, including the waste disposal system, and expert evidence that UCC's manufacturing design and "high risk" waste management strategy were causes of the harm. *E.g.* Declarations of Lucas John Couvaras, ¶1, A3298; T.R. Chauhan ¶¶2, 5, A3335; Dr. Ian von Lindern, ¶66, A3325; Dr. Jurgen H. Exner, ¶11, A3301-3302.

Plaintiffs concurrently sought to depose Couvaras, both to provide additional evidence to oppose summary judgment pursuant to Federal Rule of Civil Procedure 56(d), and to preserve his testimony under Rules 26 and 30, since Couvaras is in his late eighties.

The district court rejected UCC's argument for summary judgment based on *Sahu I*, noting that *Sahu I* does not preclude the claims of new Plaintiffs. SPA8. More importantly, the court recognized that Plaintiffs here submitted new evidence that they argued fill the gaps in the *Sahu I* record; accordingly, it found the proper course was to "start[] fresh." *Id.* at 8-9.

The district court granted summary judgment and denied Plaintiffs' motions to depose Couvaras. Plaintiffs timely appealed. Plaintiffs also filed, and this Court denied, a petition for a writ of

mandamus to order a preservation deposition of Couvaras pending appeal. Dkt. 70.

STATEMENT OF FACTS

I. Plaintiffs' property and wells have been polluted by toxins from the plant.

Plaintiffs own real property and wells near the Bhopal plant. Heck D, ¶¶4-20, A39-43. Plaintiffs' drinking water, and that of their neighbors, is polluted with chlorinated benzenes and pesticides. A2227; Heck D ¶¶7, 10-20, A40-43. Toxins found at the plant-site and associated evaporation ponds "match[] the chemicals found in the groundwater [] in the [neighborhoods] outside the factory premises. There is no other source. . . ." *Id.* These pollutants continue to leach into the groundwater, contaminating wells up to three kilometers away at levels averaging twelve, and ranging up to fifty-nine, times the legal limit. *Id.*, A2226-2227. Those toxins are known to cause a host of health problems. *Id.*, A2214-2218. Local authorities have declared over 100 wells unfit for human consumption. *Id.*, A2214.

II. UCC's acts were primary causes of the pollution.

A. Defendants approved the manufacture of pesticides at the plant.

The Bhopal plant was built to produce "Sevin," UCC's patented

pesticide. A389. Initially, it mixed imported components. *Id.* UCIL hoped to "back-integrate" the plant to manufacture these components, including the highly dangerous MIC. UCIL needed UCC's approval to do so, A380, which it sought through a Capital Budget Proposal (CBP) submitted to UCC's "Management Committee." *Id.*, 371-425. The project was "reviewed by . . . [UCC's] Environmental Affairs Department[]." *Id.*, A371-372. In December, 1973, UCC's management endorsed the proposal. *Id.*, A447-449.

UCC's approval was contingent on India allowing reduced investment in the project so that UCC could retain majority control, *id.* A374-375; *see also* A1922-1923, as was UCC policy. A2425-2430. As UCC's CEO stated, "[s]uppose we were a 40 percent owned company . . . do we want to participate around the world where you have less than absolute control?" A2592.

B. UCC had final authority over the plant's design.

UCC had "complete primary or review authority" over the design of the Bhopal plant. von Lindern ¶48, A3320, *accord* ¶¶22, 30, 47, A3314, A3316, A3319. All design either originated from or was approved by UCC. The CBP stated: "To the extent feasible UCC will

provide the necessary technology and process design and will review any technology and design developed outside UCC." A372.

UCC Engineering had "primary responsibility" for plant engineering, performed the conceptual design work and prepared the design containing all information needed for detail design, construction and operation. A2898; A2660. UCIL's Safety Superintendent, Kamal Pareek, confirmed that "key decisions regarding design . . . and safety" were made by UCC, the basic design was drafted or approved by UCC, and that any design changes had to be approved by UCC. A2902-2903; *accord* Chauhan ¶¶2-3, 5-6, A3335 (declaration of employee who operated plant's MIC unit).

Thus, a UCC subsidiary told the U.S. government that "[k]now-how" and "basic process design" came from UCC, and that UCC's "know-how, technical support, and majority ownership of UCIL provide assurance of technical competence." A2962-2965.

UCC did not provide all design work. "By Government requirement all possible work in engineering and construction w[as to] be done in India with UCIL assuming an overall responsibility for

implementation of the project." A372 (emphasis added).[2] Thus, UCIL was only responsible for detail design that was "based on" and implemented UCC's basic process design. Couvaras ¶¶1-3, A3298; Chauhan ¶¶2-3, A3335; Herz D, A3369; A2962; A2676; A396. UCIL's activities were "complementary" to UCC's, so "that the U.S. technology may be translated into a soundly designed plant." A2674, A2677-2682 UCIL was required to "maintain[] the technical integrity" of UCC's designs. A2684.

This division of labor made UCC's oversight critical. UCC transferred some of its "more sophisticated and exacting processes . . . especially with regard to corrosivity and the handling of highly toxic materials." *Id.*, A2674. This necessitated "extra effort in providing the initial technology services and in maintaining particular thoroughness in communications between India and the U.S." *Id.*

UCC did not allow UCIL to perform the detailed engineering without UCC oversight; UCC ensured that it would approve all design. von Lindern ¶¶22, 30, 47-48, A3314, A3316, A3319-3320. First, UCC

[2] A memo stated that UCIL "is responsible for the overall venture. This includes responsibility for the plant design and construction," which included specific "activities," notably "contracting" detailed design and field construction, and the project management. A2675. These were distinct from UCC's duties. *Id.*, A2674, A2677-2682.

sent a Project Manager, Lucas John Couvaras, to Bhopal to oversee the detail design and construction. Couvaras ¶¶1, 3, A3298; Chauhan ¶¶2, 5, A3335; A2897; A396; A2676. Couvaras, who was at all relevant times employed by UCC, *see* Couvaras ¶1, A3298; Chauhan ¶2, A3335; A2897, approved detail design reports drafted in India, including for the waste disposal system. *E.g.*, A2431; *see also* Herz E, A3373.

Second, changes to UCC's design required the "participation and approval" of UCC engineers in the United States. A2681, A2684-2685; von Lindern ¶¶22, 30, 47-48, A3314, A3316, A3319-3320. A UCC engineer would maintain "active contact" with UCIL to ensure that no major safety problems were introduced during detail design. *Id.*, A2681-2682. UCC engineers needed to "participat[e]. . . in initiating major changes" and to "[r]eview and approve all changes" UCIL "may *propose*" to UCC design. *Id.*, A2681; A2685 (emphasis added); *accord* Chauhan ¶2, 5, A3335; von Lindern ¶¶22, 30, 47-48, A3314, A3316, A3319-3320; A2897; A2902-2912.

In sum, the manufacture of UCC's pesticide was complicated and dangerous, and UCIL lacked experience dealing with MIC. von Lindern, ¶44, A3319; Herz D, A3369; A2674; A395. Accordingly, UCC imposed

"strict limitations" on UCIL regarding changes to UCC design that left final authority with UCC. von Lindern ¶¶47-48, a3319-3320.

C. UCC chose the plant's failed waste management system.

Both the manufacturing process, (the source of the wastes), and the methods of disposal were central to the plant's waste management. Exner ¶7, a3301; von Lindern ¶¶10-16, 48, 56-57, 65, A3311-3313, A3320, A3321-3322, A3324. UCC had "lead design responsibility" for processes producing most wastes requiring treatment. von Lindern ¶¶22, 45-46, 48, 53, A3314, A3319-3321. And UCC determined the waste management strategy and the method of waste disposal. Exner ¶¶3, 4, 9, 11, A3300-3301; von Lindern ¶¶17, 20-21, 28-29, A3313-3316; Herz A, A3348. Plaintiffs' experts concluded that UCC's process and disposal strategy were inappropriate for the site and were causes of the pollution. von Lindern ¶¶9(ii), 15, 21, 27-29, 42, 54, 64-66, A3311-3316, A3318, A3321, A3324-3325; Exner ¶10, A3301.

1. UCC's proprietary MIC manufacturing process was the primary source of toxins at the plant.

UCC provided the technology for a number of the plant's units,

most notably the MIC unit.[3] These units generated toxins. A2265; A398, A435; A2311, A2274, A2276. In particular, UCC's MIC process produced "substantial quantities of [hydrochloric acid] . . . contaminated with organics." Herz A. These "toxic and acidic" wastes were "clearly the major disposal problem for the proposed unit," and were "of major concern." A389, A397, A432. The MIC process wastes necessitated the use of acid neutralization pits and solar evaporation ponds. A2311; A656 (pits); A390, A398 (ponds); A432; Chauhan ¶4, A3335 (MIC unit generated most of the waste stream).[4]

UCC assumed "responsibility for the safety and operability of [its] plant design." A2676.

2. UCC provided the over-all waste disposal strategy.

As part of its process design, UCC mandated the plant's waste treatment strategy. von Lindern ¶¶10, 21, 28-29, A3311, A3313-3315; Exner ¶¶3-5, 7, 9, 11, A3300-3302. UCC wrote the "over-all summary" of waste disposal requirements and a Definition of Scope report. A2265.

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[3] A387, A389, A395; A1933; A2675-2682.

[4] Although UCIL's 1-napthol process was to produce acid wastes, that waste stream was eliminated, A1962, and the process was never successfully implemented. A2894-2895.

In July 1972, UCC Engineering created a preliminary "waste disposal" design, A430-437, which it later revised. A2248, A2274-2277. Detail design implementing UCC's plan was left to UCIL. von Lindern ¶¶18, 30., A3313-3316 A mid-1973 UCC memo stated that "UCIL will have the primary responsibilities for designing and providing [waste disposal] facilities." A2683. But, as UCIL told local officials, even that design work would be done by a consultant "under the guidance of [UCC's] Engineering Department," A2304, and the proposed disposal methods "are in use at [UCC's] plant . . . in the United States." *Id.*, A2306. UCIL's 1973 diagrams were explicitly based upon UCC's 1972 design. *Id.*, A2289-2302, *especially* A2289, A2295 and A2301.

UCC also reviewed plans sent by UCIL. A2266. UCC provided the design criteria and specifications for the ponds; UCIL did the on-site design, but UCC retained final review and approval authority. von Lindern ¶¶18, 30, A3313, A3316; Chauhan ¶¶2, 5, A3335; A2902-2903. The waste disposal system ultimately reflected what UCC specified. Exner ¶9, A3301.

a. Solar evaporation ponds.

UCC's MIC technology produced acid wastes, but the Bhopal plant

lacked a river for the disposal of these wastes; this posed a "major disposal problem." *See infra* Statement of Facts (SOF) § III. UCC's 1972 waste disposal plan specified solar evaporation ponds to hold contaminated wastewater. von Lindern ¶¶39, 42, A3317-3318; A433. Such ponds were built. Exner ¶9, A3301; A505; A657. And they ultimately failed. SOF § III.

b. Pits and landfill.

UCC's design included acid neutralization pits based upon those at UCC's Institute, West Virginia plant. A432-435. UCC sent the design for the pits, A2278-2288, which treated wastes from UCC's MIC process. A504. UCC's strategy contemplated dumping some pit and other wastes into a landfill. *Id.*, A435. Over 20% of the plant site was used for dumping waste, the landfill (and pits) were polluted,[5] and runoff was of "great concern." A675. Pursuant to UCC's "comprehensive control system" for environmental practices, UCC oversaw UCIL's waste handling through mandatory audits. A518, A546; Chauhan ¶¶7-9, A3335; Herz B, Policy 2.30, p.1, 7, Policy 2.32, p.4, A3350, A3356, A3362.

[5] A1025-1032; A557-558; A646, A656-659, A662, A686-688 ("seriousness of the issue needs no elaboration"); A2224-2227.

c. UCC approval was required.

All UCIL design required UCC review. A372. Waste disposal engineering not done by UCC thus required UCC's approval. von Lindern ¶¶30, 47-48, A3316, A3319-3320. For example, after UCC came up with the plan to use ponds, UCIL suggested a "different concept" for the ponds' operation. A2267.[6] But UCC reiterated its vision, *id.*, and UCC's vision was implemented. von Lindern ¶¶30, 48-51, A3316, A3319-3321; A398; A427.

UCC's requirement that its U.S.-based engineers approve all changes to UCC design also applied to "[m]aterials of construction." A2685; *accord* Pareek, A2904. UCC approved the sizing of and materials for the ponds, including the liner. Chauhan ¶6, A3335.

A 1976 UCIL report detailing the treatment and disposal of all plant wastes was "approved" by Couvaras, A2431, A2433, the UCC Project Manager.

III. UCC knew that its MIC process presented a serious disposal problem at Bhopal.

UCC knew from the beginning that the MIC process it provided

[6] In UCC's design, ponds would fill with solids. A2267; A433. UCIL proposed that ponds would store solution. A2267.

produced hydrochloric acid wastes laced with toxins and risked polluting the "community water supply." A2244. Indeed, a UCC engineer recognized that, if UCC engineers failed to act to prevent such pollution, they would not "be held blameless." A2244-2245.

UCC's MIC process was essentially the same as that UCC used at its Institute plant. A389. A1933 (UCC "commercially operated" MIC unit); Chauhan ¶3, A3335. However, as part of its waste disposal strategy, the Institute plant discharged "significant" pollution into a large nearby river. *Id.*, A427. Indeed, UCC repeatedly exceeded the discharge limits in its permit. von Lindern ¶¶26, 60-62, A3315. A3323-3324. UCC knew that disposal via acid neutralization "would constitute a major problem at Bhopal because of the lack of a receiving stream." Herz A, A3348; von Lindern ¶¶21, 27-28, 42, 64, A3313-3315, A3318, A3324; A431. This problem called into question the viability of the Bhopal site. Herz A, A3348.

A UCC Environmental Impact Assessment (EIA) stated that "[p]lans are to construct the ponds . . . with impermeable linings to

prevent contamination of groundwater." *Id.*, A427.[7] Yet, as a UCC engineer noted: "a question can be raised as to whether the soil conditions at the site lend themselves to constructing ponds economically with completely impervious bottoms that would prevent seepage of the chloride into the ground waters." A2244.

Despite these concerns, UCC approved "the proposed plant location," A389, and UCC's waste disposal plan included acid neutralization with discharge into evaporation ponds. von Lindern ¶¶39-41, A3317-3318. Although the waste disposal system for similar waste streams at Institute was inadequate, UCC's disposal strategy for Bhopal lacked key components of, and had "substantially less" ability to treat wastes than, Institute's insufficient system. *Id.* ¶¶25-28, 31, 62-64, A3314-3316, A3323-3324. Consistent with the CBP goal of "minimum capital . . . expenditures," A391, the ponds were the "most economical solution." *Id.*, A505.

Toxins from UCC's MIC manufacturing process at Bhopal were stored in the ponds. *E.g.* A505. The ponds' lining ultimately failed. In March 1982, one pond leaked, and another showed "signs of leakage";

[7] The 1972 plan also stated: "To avoid danger of polluting subsurface water supplies in the Bhopal area, this pond should be lined with clay." A433.

by the next month, leakage was "causing great concern." *Id.*, A515-516; A654. After the plant closed, the ponds "may have developed leaks resulting into permeation of the effluent in the soil." A563. The soil under the ponds has long been polluted, A984; *see also* A1285-1286, A1294-1295, with the same toxins found in the adjacent neighborhoods' drinking water. A2224-2227. The aquifer "is contaminated from leakage of the evaporation ponds." Exner ¶11, A3301-3302.

UCC's manufacturing process and disposal strategy for Bhopal involved "high risk." von Lindern ¶¶64-66, A3324-3325. "Aspects of the process design, including the type of plant and its wastewater disposal pit, contributed to the contamination of the . . . groundwater." Exner ¶10, A3301; *accord* von Lindern ¶¶27-29, 54, 64-66, A3315-3316, A3321, A3324-3325.

SUMMARY OF THE ARGUMENT

To find UCC liable, a jury need only conclude that UCC was a substantial factor in causing Plaintiffs' harms. Plaintiffs' evidence that UCC provided and approved a manufacturing process and waste disposal strategy that it knew posed risks to the community water supply, and that polluted the groundwater, easily meets that standard. While this Court's decision in *Sahu I* – which found insufficient

evidence that UCC was responsible for the failure of the waste disposal system – is not binding here, Plaintiffs have presented evidence not before the Court in *Sahu I* that cures any prior deficiency.

First, Plaintiffs presented new declarations that the Bhopal Project Manager, Lucas John Couvaras, was a *UCC* employee, including from Couvaras himself. Because it was undisputed that Couvaras approved the detail design work for the waste management system, this alone would allow a jury to find UCC liable; indeed, the district court did not dispute that if Couvaras worked for UCC, liability would be warranted.

On summary judgment, the district court was required to credit Plaintiffs' evidence. But the court disregarded these declarations, impermissibly weighing them against evidence submitted by UCC. Ultimately, the court held that there was no genuine dispute that Couvaras worked for UCIL, despite Couvaras's own declaration that he worked for UCC.

Even if Couvaras worked for UCIL, new testimony and expert evidence, as well as UCC's own documents, show that *all* design work done in India had to be approved by UCC, and that any changes to UCC

design had to be approved by UCC engineers in the United States. The district court erred in finding that the only reasonable reading of this record is that UCIL could do whatever it wished.

Second, even if UCC did not have approval authority over the detail design, the basic process design UCC provided to UCIL was a substantial factor in the waste management system's failure. There is no dispute that detail design merely implements basic process design. New declarations submitted by two eminent experts in pollution control and chemical process engineering concluded that UCC provided both the manufacturing process that produced the toxins fouling Plaintiffs' wells, as well as the disposal strategy to deal with its process's wastes. They also concluded that the manufacturing process and waste disposal strategy were unfit for Bhopal, and were leading causes of the pollution. The district court impermissibly failed to credit Plaintiffs' expert evidence.

The district court held that the "mere showing" that UCC provided the MIC process is insufficient for finding liability, even though Plaintiffs had actually presented evidence of far more. The court rejected the experts' conclusions that UCC's MIC manufacturing

process was a key component of the plant's waste management system, that the process was inappropriate for the site, and that the process was a cause of the pollution.

Plaintiffs' experts also concluded that UCC's waste disposal strategy – including the idea to use ponds as a substitute for the river at Institute – was badly flawed and led directly to the release of toxins into the groundwater. The district court rejected this evidence, again substituting its conclusions for the experts'.

In holding that UCC could be held liable only if it controlled design of the waste disposal system, the district court misconstrued the applicable law. In *MTBE*, this Court recently held that a defendant may be liable as a substantial factor in causing water pollution without *any* involvement in, let alone control over, how the toxins were handled. And the law is equally clear that a defendant is liable for providing negligent advice about how to avoid harm to third persons, if, as here, the advisee at least partially relied on that advice. There is no requirement that the advice be mandatory. The district court could not say, as a matter of law, that UCC cannot be liable even though manufacturing process design and waste disposal strategy were

inappropriate and failed to protect Plaintiffs from a known risk.

Regardless, UCC's strategy *was* mandatory; any changes had to be approved by UCC, including approval by UCC engineers in the United States. The court held that the ponds that were built differed from those UCC envisioned. But there is evidence that no such design changes were made. In any event, any changes would not suggest UCIL was free to scrap UCC's ponds strategy; the court ignored the fact that changes to UCC's design required its approval.

In short, given the new evidence that Couvaras worked for UCC and that UCC had final authority over all detail design work done in India, and the new evidence that UCC's manufacturing process and waste disposal strategy caused the pollution, a jury would be entitled to conclude that UCC's actions were a substantial factor in the pollution of Plaintiffs' property.

Last, although Couvaras is in his late eighties, the district court barred Plaintiffs from deposing him to preserve his testimony in a form admissible at trial. Although the law is clear that parties are entitled to preserve key testimony from an elderly witness, the court did not even consider Couvaras's advanced age. Since Plaintiffs would be highly

prejudiced if his testimony is lost, Plaintiffs should be permitted to preserve his testimony.

STANDARDS OF REVIEW

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

The Court reviews the denial of a preservation deposition for an abuse of discretion. *Penn Mut. Life Ins. Co. v. United States,* 68 F.3d 1371, 1374 (D.C. Cir. 1995).

ARGUMENT

I. UCC can be held liable if its actions were a substantial factor in creating the pollution at Bhopal.

UCC does not dispute that Plaintiffs' land has been polluted by toxins emanating from the plant and that such pollution is a trespass, and a public and private nuisance. *E.g. N.Y. v. Shore Realty Corp.,* 759 F.2d 1032, 1051-52 (2d Cir. 1985). "[E]veryone who . . . participates in the creation or maintenance [of a nuisance] is liable." *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig. ("MTBE"),* 725 F.3d 65, 121 (2d

Cir. 2013).

Under ordinary tort causation standards applicable to all of Plaintiffs' claims, a defendant is liable if its act was a "substantial factor in" bringing about the injury; that is, it "had such an effect in producing the injury that reasonable people would regard it as a cause." *MTBE,* 725 F.3d at 116. Below, Plaintiffs present several ways in which newly-submitted evidence demonstrates that UCC's role was a substantial factor in causing the pollution.

II. Plaintiffs present evidence, not before the Court in *Sahu I*, that all the design work done in India was overseen and approved by UCC.

There is no dispute that if UCC had authority over the detail design, particularly of the waste disposal system, UCC can be held liable. The district court acknowledged that Lucas John Couvaras was "the Project Manager overseeing the Bhopal Plant's construction," SPA20, and that Couvaras approved the detail design of the plant, including the waste disposal system. *Id*. Thus, the court accepted that if Couvaras worked for UCC, a jury could hold UCC liable; it made no alternative finding that a jury could not do so. *See* SPA30.

Couvaras testified that he was a UCC employee while serving as

the Project Manager. Couvaras ¶1. And this was confirmed by another new declaration, that of a plant operator, T.R. Chauhan, and by a declaration from Edward Munoz, UCIL's General Manager. Chauhan ¶2, A3335. A2899.

The fact that Couvaras himself declared that he worked for UCC at the relevant time should have defeated summary judgment. Instead, the district court came to the remarkable conclusion that the declarations of Couvaras and two other witnesses that he worked for UCC does not even create a *genuine dispute* as to whether he worked for UCC. Order at SPA20-24. This Court need look no further, because this error alone requires reversal.

But regardless of who Couvaras worked for, new expert evidence and witness testimony makes clear that UCC had to approve all design; in particular, any changes to UCC design had to be approved by UCC *in the United States*. von Lindern ¶¶22, 30, 47-48, A3314, A3316, A3319-3320; Chauhan ¶¶5-6, A3335; SOF § II.B. This new evidence also allows a jury to hold UCC liable.

A. The district court impermissibly weighed other evidence against Couvaras's declaration.

As the district court recognized, Couvaras's declaration can be

fairly read to state that he was employed by UCC when he was Bhopal Project Manager. SPA23; Couvaras ¶1, A3298. Since the fact that Couvaras worked for UCC is sufficient for liability, and his declaration at least "generates uncertainty" as to who employed him, *see In re Dana Corp.,* 574 F.3d 129, 151 (2d Cir. 2009), summary judgment must be reversed.

By rejecting Couvaras's declaration in favor of UCC's evidence, the district court ignored basic summary judgment standards. Courts must credit the evidence favoring the nonmovant and "may not . . . weigh the evidence." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150-51 (2000). The district court, however, held instead that Couvaras's declaration was "unsubstantiated." SPA23. But witness testimony based on personal knowledge need not be substantiated to be believed by a jury. A jury could certainly believe Couvaras knows who employed him. In any event, Couvaras's UCC employment is corroborated by the testimony of Chauhan and Munoz.[8]

Even where the non-movant "face[s] an uphill battle" in persuading a jury to credit his witness, deciding at summary judgment,

[8] The district court denied Plaintiffs the opportunity to obtain even more corroboration through Rule 56(d) discovery of Couvaras.

"before [the witness] testifies, the question of whether a reasonable jury might believe [him]" would be an impermissible credibility determination. *Stichting v. Schreiber*, 407 F.3d 34, 55 (2d Cir. 2005). In *Stichting*, this Court found that a jury could believe a witness's testimony that he did not do something that a criminal jury had already convicted him of doing. *Id.*

The district court found that UCC's documents contradict Couvaras's testimony, but that does not allow the court to resolve the factual dispute in UCC's favor. Courts may not grant summary judgment where the movant's documents conflict with the non-movant's witness testimony. *Morey v. Bravo Prods., Inc.*, No. 85 Civ. 10091, 1987 U.S. Dist. LEXIS 11280, at *15 (S.D.N.Y. Nov. 25, 1987); *Hamilton v. A C & S, Inc.*, 94 Civ. 4397, 1998 U.S. Dist. LEXIS 14884, at *20 (S.D.N.Y. Sept. 22, 1998) (finding testimony about events 30 years before precluded summary judgment). "[C]hoices between conflicting versions of the events" are for the jury, even where, unlike here, "the surrounding circumstances indicate . . . implausibility." *Stichting*, 407 F.3d at 55 (internal quotation omitted).

In short, courts "must disregard all evidence favorable to the

moving party that the jury is not required to believe." *Reeves*, 530 U.S. at 151. Thus, a court may only credit evidence supporting the movant "that is uncontradicted." *Id.* But all the evidence purportedly favoring UCC was contradicted by Couvaras and Plaintiffs' other witnesses. In "disregard[ing] critical evidence favorable to [Plaintiffs]", and in failing to disregard UCC's evidence and finding that it overwhelmed Plaintiffs', the district court "impermissibly substituted its judgment concerning the weight of the evidence for the jury's." *Id.* at 153.

B. Even if the district court could weigh other evidence against Couvaras's declaration, its review of that evidence contravened basic summary judgment standards.

Even if the district court could weigh the evidence, the court erred in relying on UCC's evidence despite credibility problems and ignoring Plaintiffs' corroborating evidence.

UCC's contradicted evidence.

The district court credited the declarations of two executives at the plant, Warren Woomer and Ranjit Dutta, submitted by UCC. SPA21-22. But a court "should give credence to" evidence supporting the movant only where it is not just uncontradicted, but also unimpeached. *Reeves*, 530 U.S. at 151. This testimony was obviously

contradicted. And Dutta was severely impeached. He more recently stated in a transcribed interview that Couvaras was "sent by [UCC]," that UCC approved detail design done in India, and that Couvaras was responsible for obtaining the approval of his UCC "counterpart" in the U.S. A2937-2938. If Dutta testified at trial in accord with his declaration, he could be impeached with this interview. Fed. R. Evid. 613. The court's reliance on these UCC declarations was impermissible.

The district court also read documents in the light most favorable to UCC, not to Plaintiffs. The court focused on a statement in the 1973 "Definition of Services" (DOS) that project management was a UCIL activity and that Couvaras was "loan[ed]" to UCIL. SPA21 (citing A2675-2676). But "loan" suggests UCC retained "ownership," especially since all reasonable inferences must be drawn in Plaintiffs' favor. *Reeves*, 530 U.S. at 150. Indeed, the 1973 CBP also noted that Couvaras was "loaned" to UCIL, while making clear that all design done in India required UCC review. A372, A396. A reasonable jury could conclude that Couvaras was conducting his design review on UCC's behalf.

The court similarly credited unverified lists purportedly of UCIL employees, and favored them over Couvaras's declaration. SPA22. But

who wrote the lists, what criteria were used and how Couvaras was found to meet those criteria are all entirely unknown. And there certainly is no reason to believe that the unknown list compiler knew better than Couvaras who employed him. A jury need not credit these documents.

Finally, the district court suggested that other documents "address Couvaras as a UCIL employee." SPA22. But these documents do not purport to identify Couvaras's employer: a letter lists his address, showing only that he worked *at* UCIL, not that he worked *for* UCIL, *see* A453; the other two documents are just cover pages of design reports Couvaras approved. A2431, 2475. In finding any of these documents contradicted Couvaras's declaration, the court impermissibly drew inferences in UCC's favor.

Plaintiffs' corroborating evidence.

The district court discounted or ignored evidence corroborating the fact that Couvaras was employed by UCC, including the Chauhan and Munoz declarations.

In stark contrast to its lenient treatment of the evidentiary foundation of the UCIL employee lists, the district court found that

Chauhan had not established personal knowledge of Couvaras's employer. SPA23. But courts must accept that a declarant has knowledge if it can be "reasonably inferred." *Directv, Inc. v. Budden*, 420 F.3d 521, 530 (5th Cir. 2005). Chauhan affirmed that he "ha[s] personal knowledge of the facts stated," and it is credible that someone in his position would learn these facts. *E.g.* Chauhan ¶¶2, 3, A3335 (Couvaras worked at the Bhopal plant at the same time; "Through my work as an operator of the MIC unit, I learned that the Bhopal plant was designed and built on the basis of decades of experience in making MIC at its West Virginia, USA plant."); *see id.* ¶ 1-2, 9, A3335-3336. In such circumstances, courts find knowledge. *Ondis v. Barrows*, 538 F.2d 904, 907 n.3 (1st Cir. 1976).

A court must review "the sum total of a plaintiff's evidence." *In re Joint E. & S. Dist. Asbestos Litig.*, 52 F.3d 1124, 1133 (2d Cir. 1995). But the district court, without explanation, failed even to consider Munoz's declaration. As UCIL General Manager, Munoz would know who employed Couvaras. And although Couvaras's key role was approving the design done in India, the district court also ignored the evidence that this was UCC's responsibility. A372.

In short, even if the district court could rely on contradicted evidence, UCC's evidence still could not be credited, and Plaintiffs' was improperly discarded. The evidence showing Couvaras worked for UCC is at least as compelling as that the district court credited, and more importantly, easily creates a genuine conflict.

C. UCC can be held liable for the detail design no matter who employed Couvaras, because UCC approved all design.

Even if Couvaras was not a UCC employee, a jury could find UCC was responsible for approving all design. *See* SOF § II.B; *Penn Cent. Transp. Co. v. Singer Warehouse & Trucking Corp.*, 447 N.Y.S.2d 265, 266-67 (App. Div. 1982) (finding triable issue where defendant authorized act that caused nuisance). As Dr. von Lindern concluded after reviewing the relevant documents, UCC had "complete primary or review authority" over the plant's design. von Lindern ¶48, A3320; *accord id.* ¶¶22, 30, 47, A3314, A3316, A3320-3321.

UCC "review[ed] any technology and design developed outside UCC." A372. And the Definition of Services made clear that while UCIL could "propose" changes to UCC's design, UCC had to "[r]eview and approve all changes." A2681; *accord id.* A2684-2685; von Lindern ¶¶18,

22; 30, A3313-3314, A3316; Chauhan ¶¶2, 5, A3335; SOF § II.B. UCC's review and approval was the responsibility of a UCC engineer *in the United States*. A2681. Couvaras communicated proposed changes to UCC engineers, and relayed their response back to UCIL. Chauhan ¶¶2, 5, A3335.

Courts on summary judgment may not cherry-pick passages favoring the movant, while ignoring passages in the same documents favoring the non-movant. Documents showing that UCC retained approval authority over final design are the same ones the district court relied upon as detailing the responsibilities of UCC and UCIL. SPA21, 31-32 (citing A372 and the Definition of Services). But the court failed to consider that these documents show UCC exercised final authority, including from the United States. This precludes summary judgment.

III. Expert testimony not at bar in *Sahu I* permits a jury to find that UCC's process that produced the toxins in Plaintiffs' water and UCC's waste disposal strategy that failed to contain them were each a substantial factor in causing the pollution.

Plaintiffs' newly-submitted evidence that Couvaras was a UCC employee should end the summary judgment inquiry. Nonetheless, new expert testimony from Dr. von Lindern and Dr. Exner also allows a jury

to find UCC liable, regardless of Couvaras's role. This expert testimony requires a reevaluation of much of the *Sahu I* record and provides the causation evidence found to be absent in *Sahu I*.

There is no dispute that UCC provided the MIC manufacturing process, a primary source of the pollutants, and Plaintiffs' experts demonstrated that UCC provided the basic waste disposal strategy of using solar evaporation ponds, which failed. And, as the experts showed, both the manufacturing process and the waste disposal strategy were integral to the waste management system, both were inappropriate for Bhopal, and both were causes of the pollution. This testimony allows a reasonable jury to conclude that UCC was a substantial factor in the resulting harm.

A. Plaintiffs present new evidence that UCC's MIC process, which created hazardous wastes without an adequate disposal option, was a substantial factor in the harm.

The Bhopal plant was built "based on proprietary UCC design." Couvaras ¶1, A3298; *accord* SOF § II.B. In particular, UCC provided "process" design for the highly dangerous MIC unit; the design done in India was "detail" design, which "implement[ed] the project." Couvaras ¶¶2, 3, A3298; SOF § II.B; SPA28 (detail design "necessarily follows"

process design).

UCC's process led to the pollution: "the *type of plant* [UCC provided for in the process design]. . . contributed to the contamination of the. . . groundwater." Exner ¶10, A3301 (emphasis added); *accord* von Lindern ¶¶21, 27-28, 42, 64, A3313-3315, A3318, A3324. The methods and impeccable qualifications of these experts were unquestioned; each reviewed the key documents and made conclusions independently, and Dr. Exner twice visited the Bhopal site to study the plant's contamination. Exner ¶2, A3300. No expert has disputed their findings.

Evidence not in the *Sahu I* record shows that UCIL's lack of expertise required UCC to take the lead, and that it tailored its design specifically for Bhopal. Herz C, A3367; von Lindern ¶¶56-57, 65, A3321-3324. Moreover, because MIC involved "extremely hazardous processes with complexity," UCIL had to work "closely" with UCC's foreign experts in "assimilating" UCC's technology and commissioning the plant, and UCC provided "all necessary technical supports in the areas of safety . . . [and] handling of highly corrosive and toxic chemicals." Herz D, A3369.

UCC's manufacturing process, which determined the amount and

kind of wastes generated and, thus, the disposal needs, was a central pillar of the waste management system. von Lindern ¶¶11, 12, 15, A3311-3312. The hydrochloric acid wastes – which necessitated the neutralization pits and ponds – were inherent in UCC's MIC process, rather than UCIL's detail design. SOF § II.C.1. Because UCC's MIC manufacturing process created serious disposal problems at Bhopal – which UCC knew from the outset, SOF § II.C.1 – UCC was a primary cause of the pollution, and summary judgment was in error.

1. Plaintiffs presented expert evidence that UCC's manufacturing process was inappropriate for the Bhopal site and therefore was a cause of the pollution.

In *Sahu I*, the district court correctly suggested that UCC could be liable if there were "specific indication" that UCC's technology "caused pollution." Heck A, 26. Plaintiffs presented that evidence here. *E.g.* Exner ¶10, A3301; von Lindern ¶¶21, 27-28, 42, 64, A3313-3315, A3318, A3324.

The MIC manufacturing process that UCC provided was essentially the same as that used at UCC's Institute plant. SPA26; SOF § III. UCC's MIC technology produced toxic acid wastes; at Institute, significant wastes were ultimately disposed of in a large river. SOF §

III. Even so, UCC had not solved the disposal problem. The Institute plant had an unusual number of leaks due to the manufacturing processes' high corrosivity, and it repeatedly released more toxins into the adjacent river than its permit allowed. von Lindern ¶¶26-27, 60-62, 64, A3315, A3323-3324.

The Bhopal site, lacking a river, presented even more serious disposal problems, SOF § III, which were inherent in using UCC's process at Bhopal. von Lindern ¶¶21, 27-28, 42, 64, A3313-3315, A3318, A3324. Indeed, new evidence shows that the absence of a receiving stream raised doubts about the very viability of the location. Herz A, A3348. And UCC engineers likewise expressed doubts that safe ponds could be built economically. SOF § III.

As Dr. von Lindern concluded, using this type of plant at this site involved "high risk." von Lindern ¶64, A3324. If proper waste treatment could not be applied to a particular manufacturing process at a particular site, then the process is inappropriate. von Lindern ¶¶9(ii), 15, A3311-3312.

The district court held that evidence regarding Institute is irrelevant. SPA29. But that would not change the expert evidence that

UCC's process was unfit for Bhopal and a cause of the harm. Nonetheless, the lower court was mistaken. The pollution at Institute *was* due to the MIC process. That process produces the bulk of the toxic waste in the production of Sevin, SOF § II.C.1, and an environmental impact assessment for Bhopal noted that Institute processes "for the manufacture of SEVIN" discharged "significant" pollution into the adjacent river. A427; *accord* von Lindern ¶¶60-62, A3323-3324. Accordingly, UCC itself saw Institute as highly relevant to Bhopal. It repeatedly referenced Institute or Bhopal's lack of a river, being a comparison to Institute. von Lindern ¶39, A3317-3318; A427, A431; Herz A, A3348.

Ignoring the evidence that UCC's manufacturing process was a leading cause of the harm, the district court held that the "record . . . indicates that pollution was caused by the disposal of wastes." SPA28-29. As the court recognized, courts on summary judgment should not make credibility determinations about an expert. SPA10. Although "an expert's report is not a talisman against summary judgment," SPA10 (quoting *Raskin v. Wyatt Co.*, 125 F.3d 55, 66 (2d Cir. 1997)), once expert evidence is admitted (as it was here), its weight must be

determined by the jury; the court may not weigh it against other evidence. *Raskin*, 125 F.3d at 65-66; *accord Viterbo v. Dow. Chem. Co.*, 826 F.2d 420, 422 (5th Cir. 1987). But that is exactly what the district court did in discounting Plaintiffs' experts' unrebutted conclusions.

Expert testimony regularly makes the difference between the grant or denial of summary judgment in pollution cases.[9] The expert testimony here that UCC's process was a cause of the harm was not before the court in *Sahu I*. Whether to credit that evidence was for a jury to decide. Summary judgment was improper.

2. The district court impermissibly disregarded Plaintiffs' evidence that UCC's manufacturing process was part of the waste management system.

Surely a jury could find a defendant liable where it designed an inappropriate component of a failed waste management system. *See infra* Section III.A.3. Plaintiffs provided expert evidence, not at bar in *Sahu I*, that consideration of the wastes that must be disposed of is an "inherent responsibility" in process design. von Lindern ¶¶10-16, 48,

[9] *E.g. United States v. Ala. Power Co.*, 730 F.3d 1278, 1280 (11th Cir. 2013); *Envtl. Conservation Org. v. City of Dallas*, No. 3-03-CV-2951, 2005 U.S. Dist. LEXIS 15502, at *11-12 (N.D. Tex. July 26, 2005); *Sierra Club v. Ga. Power Co.*, No. 3:02-CV-151, 2007 U.S. Dist. LEXIS 100219, at *13-19 (N.D.Ga. Jan. 11, 2007).

A3311-3313, A3320; *accord* Exner ¶7, A3301. In fact, UCC tried to solve Bhopal disposal problems by modifying the manufacturing process. von Lindern ¶¶56-57, 65, 3321-3322, A3324. The effort, however, created new disposal problems that further contributed to the waste management failure. *Id.* ¶¶27-28, 58, 63, 65, A3315, A3323-3324.

Although the district court was required to credit this expert evidence, the court rejected it as a "mischaracterization" in light of other evidence. SPA27. Here again, the court impermissibly weighed the evidence.

The court focused on a statement in the Definition of Services that UCIL was responsible for designing waste *disposal* facilities. SPA27-28 (citing A2683). But that is no answer to the experts' showing that disposal was only one part of waste *management*, and that process design was also critical. Indeed, the Definition of Services itself stated that where, as with MIC, UCC "furnish[ed] the *process* design," UCC was "responsib[le] for the safety and operability of the *plant* design." A2676 (emphasis added).

Ignoring Dr. von Lindern's detailed explanation of UCC's process design's central role in waste management, the district court instead

singled out his reference to the plant's General Operating Manual. SPA28 (citing von Lindern ¶16, A3312-3313). But the fact that the Operating Manual focuses, as one would expect, on plant operations, does not support the court's conclusion that only operations matter. Indeed, the Manual confirmed that UCC's manufacturing process *was* part of the waste management system. von Lindern ¶¶16, 57, A3312-3313, A3322-3323. And it emphasized "sharp operations" at least in part because UCC's design revisions had introduced additional waste management problems. *Id.* ¶¶57-58, A3322-3323.

The district court derided the experts' testimony as "reasoning [that] seems calibrated to gloss over" traditional tort notions. SPA27. But the expert's conclusion that the manufacturing process is a critical part of pollution control – and was treated as such by UCC – is a statement of *fact*. Courts may not discard material facts that a jury may credit. The centrality of UCC's process to *pollution control* further shows that the process was not remote from the harm. The district court's ruling is based on a distinction between manufacturing process and waste management that does not exist in the real world and did not exist at Bhopal. The decision must be reversed.

3. The district's court's suggestion that only the party responsible for waste *disposal* can be held liable misconstrues traditional tort principles.

To the extent that the district court held that only the party responsible for waste disposal can be liable, *see* SPA28-29, this was an error of law.

Under traditional tort notions, UCC's actions need not be the only cause of the injury, nor the last in time causation. *Mortensen v. Mem'l Hosp.,* 483 N.Y.S.2d 264, 270 (1st Dep't 1984); *Henrietta D. v. Bloomberg*, 331 F.3d 261, 277 (2d Cir. 2003). Even assuming UCIL had sole responsibility for waste disposal, UCC's provision of a polluting process without adequate waste disposal options is a proximate cause because UCIL's actions were "normal or foreseeable," *Woodling v. Garrett Corp.,* 813 F.2d 543, 555-56 (2d Cir. 1987), and were not "extraordinary." *Gordon v. Eastern Ry. Supply, Inc.,* 82 N.Y.2d 555, 562 (1993).

Summary judgment was improper unless UCC showed UCIL's conduct was the "sole proximate cause" of Plaintiffs' injuries. *Donald v. Shinn Fu Co. of Am.*, 99-CV-6397, 2002 U.S. Dist. LEXIS 27967, at *19 (E.D.N.Y. Sept. 4, 2002) (quoting *Amatulli v. Delhi Constr. Corp.*, 77

N.Y.2d 525, 534 (1991)). This showing is "difficult" on summary judgment, *id.*, and it certainly was not made here. The district court did not cite anything in the *record* suggesting that waste disposal was the *only* substantial factor. SPA28-29.

Given the evidence that UCC's manufacturing process was also an important cause, the "quintessential jury question[]" of causation should have been "entrusted to fact finder adjudication." *Lombard v. Booz-Allen & Hamilton, Inc.*, 280 F.3d 209, 215-16 (2d Cir. 2002); *see also Monell v. City of N.Y.*, 444 N.Y.S.2d 70, 71 (1st Dep't 1981) (holding proximate cause is "almost invariably" a fact issue to be determined by a jury).

Pollution cases also refute the district court's suggestion that only the party responsible for handling toxins can be a proximate cause. In *MTBE*, this Court upheld a verdict finding Exxon liable for polluting New York City's water supply with a gasoline additive that "spilled from service stations *not* owned or controlled by Exxon." 725 F.3d at 88 (emphasis in original). This Court approved jury instructions providing that Exxon was a cause of the City's injury if its "manufacturing . . . or selling gasoline containing MTBE was a substantial factor in causing

the [harm]." *Id.* at 88, 91, 115-117 and n.37 (citations omitted). Exxon was a substantial factor even though it provided only about 25% of the gasoline that spilled, and even though Exxon did not control how it was stored. *Id.* at 116-17; *see also State v. Schenectady Chems., Inc.*, 459 N.Y.S.2d 971, 974 (Sup. Ct. Rensselaer Cnty. 1983) (holding chemical manufacturer could be held liable for groundwater pollution resulting from indiscriminate dumping by a disposal company that the manufacturer hired).

Ignoring the basic holding of *MTBE*, the district court instead focused on the statement that Exxon was liable "not for the mere use of MTBE, but because it engaged in additional tortious conduct." SPA18-19 (quoting *MTBE*, 725 F.3d at 101 n.22). This Court so stated in rejecting Exxon's argument that tort liability was tantamount to an outright ban on MTBE. *MTBE*, 725 F.3d at 104. As other passages make clear, "additional tortious conduct" simply refers to the fact that the ordinary elements of torts such as negligence and nuisance had to be met. Thus, *MTBE* upheld a negligence verdict and reaffirmed that anyone participating in the creation of a nuisance can be held liable. *Id.* at 104. In so doing, the Court applied the substantial factor test.

While, as the district court noted, the *MTBE* jury found Exxon acted with "knowledge," SPA19, that is not what this Court required. For negligence, *MTBE* applied the familiar "standard of ordinary care." 725 F.3d at 119. Similarly, for nuisance, Exxon did not have to know its gas would actually be spilled and pollute others' property, it only had to know this was "likely." *Id.* at 121. And, as the district court recognized, where the nuisance involves an unreasonably dangerous activity, fault is not required. SPA15 (citing *Schenectady Chems., Inc.*, 459 N.Y.S.2d at 976, 979. UCC does not dispute that the activities at issue are inherently dangerous, and *MTBE* did not purport to change that rule. Regardless, UCC knew its MIC process posed serious risks to local drinking water. SOF § III; Section III.A.1.

The district court emphasized that this Court's decision in *Sahu I* is consistent with *MTBE*. SPA17-19, SPA29. This is beside the point; it is the district court's decision below, not this Court's *Sahu I* ruling, that cannot be reconciled with *MTBE*.

The district court also cited the Court's rejection in *People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.* of the notion that a defendant is necessarily liable no matter how far removed the harm is from the

defendants' actions. SPA28 (citing *Spitzer*, 761 N.Y.S.2d 192, 202 (1st Dep't 2003)). That generic proposition is inapposite. *Spitzer* approved *Schenectady Chemicals*, expressly noting that it involved "specific harm directly attributable to [the] defendant." 761 N.Y.S.2d at 198, n.2. Thus, *Spitzer* cited *Schenectady Chemicals* as a case in which traditional tort notions *had been met*.

In any event, *MTBE* is far more relevant than *Spitzer*, which was not a pollution case; there, the court refused to "widen the range" of public nuisance to include claims against gun makers for others' "unlawful use of handguns." *Id.* at 194, 196. In *MTBE*, improper handling of toxins was the immediate cause of the harm, and the court held that a defendant who did not release the toxins was liable.

* * *

In sum, the law is clear that a defendant can be held liable for providing the source of the toxins without involvement in waste management. But this Court need not apply that rule. In contrast to *MTBE*, where Exxon's sale of gasoline had no direct bearing on whether toxins escaped, Plaintiffs here presented evidence that UCC's process was an integral part of pollution control and was inappropriate for the

site. Plaintiffs' experts concluded, and a jury could easily find, that the process that caused pollution at Institute — where there was a river for disposal — was a cause of pollution at Bhopal, where there was not.

B. Evidence not before the Court in *Sahu I* allows a jury to conclude UCC's waste disposal strategy was a cause of the waste disposal system's failure.

In *Sahu I*, this Court suggested UCC could be held liable upon a showing that the "idea to use evaporation ponds . . . was a cause of the hazardous conditions." *Id*. That certainly is sufficient under this Court's later decision in *MTBE*. Given the record *here*, Plaintiffs easily meet that standard.

Based on their review of UCC and UCIL's plant design, Plaintiffs' experts concluded that UCC provided the overall ponds-based waste disposal strategy, that UCC's plan was followed and that the plan – including the *idea* for the ponds – was a cause of the harm. The district court impermissibly refused to credit that testimony. And the court further erred in requiring Plaintiffs to show that UCC *dictated* the design. Regardless, abundant evidence shows that it did: all design in India was overseen and approved and by UCC, and any changes in UCC design had to be approved by UCC engineers in the United States.

1. UCC provided the waste disposal strategy.

Expert testimony not at bar in *Sahu I* shows that UCC played the "dominant role" in developing "the overall waste management system." von Lindern ¶¶17, 20, A3313. UCC "selected and mandated the waste treatment strategy" and determined the major components of the waste treatment facilities, including the use of ponds. von Lindern ¶¶28-29, A3315-3316; SOF § II.C.2. Indeed, UCIL detail design documents specifically note that they are based on UCC's plans. SOF § II.C.2.

The procedure for handling a manufacturing process's wastes is an integral part of the process design. Exner ¶¶4, 7, A3300-3301; von Lindern ¶10A3311. As part of UCC's process design, UCC determined the waste disposal method. Exner ¶¶3-5, 9, 11, A3300-3302; von Lindern ¶¶21, 28, A3313-3315. And detail design "necessarily follows" process design. SPA28.

An internal UCC letter recognized that the major disposal problem associated with the lack of a river at Bhopal "concerns us all" because it called the viability of the Bhopal location into question and affects "[o]ur own design work." Herz A, A3348.

Ultimately, UCC provided the design criteria for the waste

disposal system, delegating to UCIL the task of "specifying UCC design requirements to local conditions." von Lindern ¶¶18, 30, A3313-3316. Delegating "site-specific aspects of certain elements [of] the overall waste management design to [UCIL] does not relieve [UCC] of responsibility with regard to the efficacy of the overall waste treatment system." von Lindern ¶31, A3316. The waste disposal system that was built was the one UCC specified. Exner ¶9, A3301.

In rejecting all of this evidence, the district court concluded that it understood the relevant design documents better than Plaintiffs' experts; indeed so much better that the experts' conclusions do not even create a factual dispute. SPA31. Such findings are not proper on summary judgment.

2. UCC's disposal strategy was a cause of the pollution.

Plaintiffs presented expert evidence that UCC's "high risk" Bhopal waste strategy was a cause of the groundwater contamination. von Lindern ¶66, A3325; Exner ¶¶10-11, A3301-3302. Although the MIC manufacturing process mirrored that at Institute, and although Institute's waste disposal system was inadequate, UCC's disposal

strategy for UCIL was *worse*. SOF § III.[10] Indeed, the very idea of storing toxins in ponds above the aquifer was a cause of the harm. von Lindern, ¶66, A3325; Exner, ¶11, A3301-3302. Ponds were an inadequate substitute for the river at Institute. von Lindern, ¶¶21, 23-26, 31, 63, A3313-3316, 3324. And, based on his experience evaluating over 100 contaminated sites, Dr. Exner noted that such ponds "often leaked and were major contributors to groundwater pollution," and they "leaked despite supposedly impermeable clay confining layers or attempts at confinement with plastic sheeting." Exner ¶11, A3301-3302.

The district court erred in failing to credit Plaintiffs' experts' testimony. SPA31. That failure would have been impermissible even if UCC had produced conflicting expert opinion, *In re Joint E. & S. Dist. Asbestos Litig.*, 52 F.3d at 1135, which it did not. Since, given the experts' testimony, reasonable people could regard UCC's strategy as a cause of the pollution, *see MTBE*, 725 F.3d at 116, summary judgment was improper.

3. In requiring that UCC's waste disposal design be "mandatory," the district court applied an erroneous legal standard.

[10] The district court erroneously discounted this as irrelevant, SPA29, n.3, even though it shows UCC's Bhopal strategy was flawed.

The district court's requirement that UCC's waste disposal design be "final or mandatory," SPA33, conflicts with the holding in *MTBE* that a defendant need not control how the toxins were handled. 725 F.3d at 121.

It need only be foreseeable that UCIL would use UCC's waste disposal strategy. Section III.A.3, *supra*. "The fact that the intervening third party may exercise independent judgment in determining whether to follow a course of action recommended by the defendant does not make acceptance of the recommendation unforeseeable or relieve the defendant of responsibility." *Kerman v. City of N.Y.*, 374 F.3d 93, 127 (2d Cir. 2004). It makes no difference whether UCIL decided on its own to follow UCC's design, since a jury could find it "foreseeable" that UCIL would do so.

New York applies the Restatement (Second) of Torts §324A (1965). *Cohen v. Cabrini Med. Ctr.*, 94 N.Y.2d 639, 643 (2000); *Dorking Genetics v. United States*, 76 F.3d 1261, 1267 (2d Cir. 1996). Thus, one who provides services which he should recognize are necessary to protect a third person is liable to that person for harms resulting from his failure to exercise reasonable care if "the harm is suffered because of *reliance* of

. . . the third person upon the undertaking." Restatement (Second) of Torts §324A(c) (emphasis added).

This suffices to demonstrate proximate cause, *Johnson v. Abbe Eng'g Co.*, 749 F.2d 1131, 1132 (5th Cir. 1984), which is a jury question. *Pratt v. Liberty Mut. Ins. Co.*, 952 F.2d 667, 671 (2d Cir. 1992). Thus, this Court held that an insurer could be liable for workplace injuries, where it provided safety "recommendations," and the employer "relied to some degree" on the insurer for this expertise. *Pratt*, 952 F.2d at 671. There was no requirement that the insurer could dictate safety measures. *Id.* at 671.

Likewise, a contractor who inspected a factory for safety violations could be liable for negligently failing to detect the hazard that injured plaintiff. *Canipe v. Nat'l Loss Control Serv. Corp.*, 736 F.2d 1055, 1062-63 (5th Cir. 1984). The factory's reliance on the defendant did not need to be preclusive of it undertaking its own safety measures; "partial reliance" is enough. *Id.* at 1062-63. A jury could find the contractor was a proximate cause even though it merely made "recommendation[s]." *Id.* at 1058, 1062.

UCC recognized that adequate waste disposal was necessary to

protect local residents and it at least "recommended" the method of waste disposal. It was foreseeable that UCC's strategy would be implemented, and it was foreseeable that this "high risk" strategy would fail. Given Plaintiffs' experts' conclusion that UCC's waste disposal strategy was a cause of the harm, this is sufficient for liability.

4. UCC's strategy was mandatory.

Even if UCC could only be held liable if its disposal strategy was mandatory, there is abundant evidence – including expert evidence not at bar in *Sahu I* – that UCIL was not free to discard it. von Lindern ¶¶30, 47-48; Section II.C; SOF § II.C.2.c. In finding that UCIL could go its own way, the district court ignored all of this evidence.

The court "beg[an] its analysis" by plucking from the CBP the statement that "all possible [engineering] work . . . will be done in India with UCIL assuming an overall responsibility for *implementation* of the project." SPA31 (quoting A372). But "implement" what? Clearly, UCC's basic plant design. SOF § II.B. And the very next sentence in the CBP – which the court ignored – mandated that all design will be either provided or reviewed by UCC. A372.

The district court similarly erred in relying on a statement in the

Definition of Services that UCIL would have the "primary responsibilities" for designing the "facilities" for waste disposal. SPA31-32 (quoting A2683). The court ignored the fact that UCC provided the design criteria and specifications; UCIL was implementing UCC's pond *strategy*. von Lindern ¶¶18, 30, A3313, 3316. And the Definition of Services mandates that UCC design could not be changed without UCC engineers' consent. *E.g.* A2681; von Lindern ¶30, A3316.

The court also emphasized that a report "describing 'proposed Waste Disposal Facilities for the [Bhopal plant]' was prepared by [UCIL]" and "approved by Couvaras." SPA32 (quoting A2431, A2433). But given the evidence that Couvaras was a UCC employee, his approval further shows UCC exercised final authority. Regardless, this report addresses "Facilities", and does not suggest that UCIL could scrap UCC's *strategy* without UCC's consent.

Nor does it matter that UCC's July 1972 memorandum contained a "preliminary" evaluation. SPA32 (citing A431). UCC revised it. A2268, 2274-2277. But more importantly, it reflected the "selection of the [pond] strategy" as the "*basis* for final design." von Lindern ¶¶39, 42, A3317-3318 (emphasis added). And UCIL's designs were explicitly

based upon UCC's July 1972 design. A2289, A2295, A2301. UCIL implemented UCC's strategy. Exner ¶9, A3301.

UCIL could not disregard that strategy. Indeed, when, subsequent to UCC's 1972 memo, UCIL suggested an alternative pond concept, UCC rejected it. A2267; von Lindern ¶¶30, 48-51, A3316, A3320-3321; SOF § II.C.2.c. Ignoring this, the district court found it "critical[]" that UCC told UCIL that, *after* providing the memo in which UCC vetoed UCIL's pond proposal, the memo's author "'has no further obligation to provide general information on the disposal of plant wastes – other than any reviews or consultations that may be specifically requested by personnel in India.'" SPA35 (quoting A2265). But UCC had already laid down the law. And under the Definition of Services, UCIL was *required* to request review and receive approval by UCC of any change it might subsequently suggest.

The court pointed to alleged differences between UCC's vision and the actual ponds, and concluded that this demonstrates the ponds were "designed by" UCIL. SPA33-34. That was error. First, there is evidence that UCIL did not make any such changes. The district court noted that UCC's 1972 strategy envisioned a clay liner, but UCIL later devised a

plan to switch to polyethylene to save money. SPA33 (citing A433 and A2970). But there is evidence that the ponds *were* lined with clay. A1340.[11]

Similarly, according to the district court, UCC suggested ponds of 35 acres, yet UCIL built three ponds "totaling well below the 35 acres." SPA34 (citing A2268 and A505). But there is evidence that the three ponds together "[we]re built over an area of nearly 35 acres." A657.

Second, UCC left the precise pond size to UCIL, at least in the first instance. von Lindern ¶¶30, A3316. In the next sentence after that referencing 35 acres – which the court ignored – UCC noted that "[u]ndersizing" had "advantages," including lower capital costs. A2268. But that document dictated the pond *concept*. This was the same document in which UCC rejected UCIL's pond philosophy. A2267.

Third, even if these *changes* were made, and made by UCIL alone, the *ponds* were not "designed by" UCIL alone. The idea for ponds was cooked up by UCC. Changes to detail design do not suggest authority to abandon the entire strategy. And the very idea to store toxins over Bhopal's aquifer was a cause of the harm. Section III.B.2. *supra*.

[11] *But see* A553 (noting polyethylene liner without mentioning clay).

Fourth, the district court did not cite any evidence that such design changes, if they even occurred, contributed to the harm. Indeed, ponds leak regardless of whether they are lined with plastic or clay. Exner ¶11, A3301-3302. And even if any changes did contribute, the court could not make the additional required finding that the changes were the "sole proximate cause." A UCC engineer raised doubts at the outset that ponds with impervious linings could be built economically. A2244. So it was certainly not "extraordinary" that a cheaper liner would be used or that whatever liner was used might leak.

Fifth, the court ignored the evidence that UCC had to approve all changes to UCC design, *including these specific changes*. UCIL told local authorities that the waste disposal system was being designed "under the guidance of [UCC]." A2304. The document suggesting the liner change was sent to Couvaras, A2970, who approved all detail design. He was both a UCC employee, Section II.A; II.B, and the conduit who sought the required approval of design changes from UCC in the United States. Section II.C.

Indeed, Chauhan declared that UCC approved the sizing of the ponds, and the materials for the liner and any changes thereto.

Chauhan ¶6, A3335. The district court suggested this statement was unsupported, SPA34 n.4, but there is reason to believe that an operator of the MIC unit would know this. *See* Chauhan ¶¶2-3, A3335. Regardless, both Pareek, the UCIL Safety Superintendent, and the Definition of Services confirm that UCC had to approve changes to construction materials. A2685, A2903.

* * *

The district court essentially held as a matter of law that only the party that does the detail design for the waste disposal system can be held liable, and that the party that designs other, equally or more important aspects of waste management – the manufacturing process and the overall waste disposal strategy – is immune. There is no such rule. UCC's provision of the improper process that produced the toxins and the waste disposal strategy that was inadequate to deal with them is sufficient for liability.

IV. Couvaras's advanced age and the importance of his testimony justify a preservation deposition.

As Project Manager, Couvaras was a central player. SOF § II.B; Section II. He declared that he worked for UCC, and it is undisputed that this is a key question. But Couvaras is in his late eighties. To avoid

the risk that Plaintiffs would be unable to present his testimony at trial, which could be years away, Plaintiffs requested a preservation deposition. The district court's refusal conflicts with clear precedent requiring courts to permit a party to preserve key testimony about critical, long-ago events from an elderly witness.

First, "the district court abused its discretion in failing to take into account [Couvaras's] age." *Penn Mut. Life Ins. Co.,* 68 F.3d at 1374. In the leading case, *Borda*, the Third Circuit held that the advanced age of a key witness justifies perpetuating testimony, and that the district court's refusal to grant a preservation deposition was an abuse of discretion. 383 F.2d at 609; *see also De Wagenknecht v. Stinnes*, 250 F.2d 414, 417 (D.C. Cir. 1957). The witnesses in these cases were a good deal younger than Couvaras; in *De Wagenknecht*, the witness was 74; in *Borda*, only 71.

Second, the district court failed to weigh the prejudice each side may incur. *See 19th St. Baptist Church v. St. Peters Episcopal Church*, 190 F.R.D. 345, 349 (E.D. Pa. 2000). A single deposition would not prejudice UCC; losing a key witness would prejudice Plaintiffs. *See id.* at 349-50.

Third, the court discounted a preservation deposition's value because the events occurred long ago. SPA24. But Couvaras's declaration shows that he recalls key facts, and time does not render his testimony unreliable. *Cleveland v. Bradshaw*, 693 F.3d 626, 641 (6th Cir. 2012). Any "doubts caused by the lapse of time go to the [testimony's] weight" and are "for the jury." *Clayton v. Eli Lilly & Co.*, 421 F. Supp. 2d 77, 81 (D.D.C. 2006) (denying summary judgment based in part on testimony about events 40 years prior). In fact, the age of the events *favors* preservation. *Borda*, 383 F.2d at 609; *Robinson v. Winslow Twp.*, Civ. No. 10-2824, 2010 U.S. Dist. LEXIS 86248, at *8 (D.N.J. Aug. 23, 2010).

Fourth, the court's finding that the testimony of Couvaras would be "cumulative" was an error of law. Evidence is "cumulative" only if the same fact is already "established by the existing evidence." Black's Law Dictionary 636 (9th ed. 2009); *accord Smith v. Sec'y of N.M. Dep't of Corrections*, 50 F.3d 801, 829 (10th Cir. 1995). Evidence is not "cumulative" if it "fill[s] in a missing link" in one side's case. *Zappulla v. N.Y.*, 391 F.3d 462, 472-73 (2d Cir. 2004). Couvaras's testimony could be "cumulative" only if the court had found it otherwise "established" that

Couvaras worked for *UCC*. It did not.

Last, the content of Couvaras's testimony is not "speculative." SPA12, 24. He has already declared that he worked for UCC.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court reverse the district court's dismissal in its entirety and permit Plaintiffs to preserve Mr. Couvaras's testimony.

Dated: November 21, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 12,122 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in proportionally-spaced typeface using Microsoft Word in Century Schoolbook 14-point font.

Dated: November 21, 2014 Respectfully submitted,

By: /s/ Richard L. Herz

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Special Appendix

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JAGARNATH SAHU, et al.,

Plaintiffs,

-against-

UNION CARBIDE CORPORATION and MADHYA PRADESH STATE,

Defendants.

No. 07 Civ. 2156 (JFK)

OPINION & ORDER

Appearances

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JOHN F. KEENAN, United States District Judge:

Three motions are presently before the Court. First, Defendant Union Carbide Corp. ("UCC") has moved for summary judgment on all of Plaintiffs' claims against it. Second, Plaintiffs move under Rule 56(d) for a "continuation" of UCC's summary judgment motion to allow them to take the deposition of Lucas John Couvaras, a former employee of UCC and of its former

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affiliate, Union Carbide India Limited ("UCIL"). Third, Plaintiffs also move under Rules 26(d) and 30(a) to take an early deposition of Couvaras.

For the reasons that follow, UCC's motion for summary judgment is granted. Plaintiffs' Rule 56(d) motion is denied, as is their motion made under Rules 26(d) and 30(a).

I. Background

A. Procedural History

This action, which will be referred to as Sahu II, and its predecessors arise out of the leak of hazardous chemicals originating from a chemical manufacturing facility in Bhopal, India (the "Bhopal Plant") that was operated from 1969 to 1984 by UCIL, of which Defendant UCC was then a majority owner. Prior to the filing of this case, Plaintiffs were absent class members of a putative class in another action before this Court, Bano v. Union Carbide Corp., No. 99 Civ. 11329 (S.D.N.Y.). I ultimately dismissed that action, in part because the statute of limitations had expired. See id., 2003 WL 1344884 (S.D.N.Y. Mar. 18, 2003), aff'd in part, 361 F.3d 696 (2d Cir. 2004).

Some of the Plaintiffs in the instant case were also plaintiffs in a similar action, Sahu v. Union Carbide Corp., No. 04 Civ. 8825 ("Sahu I"), which asserted personal injury claims and sought damages and injunctive relief. In that action, I

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granted summary judgment for UCC on June 26, 2012. See id., 2012 WL 2422757 (S.D.N.Y. June 26, 2012). I concluded, based on the voluminous evidence in the record, that there was no genuine dispute of material fact that would allow a reasonable juror to find UCC either directly or indirectly liable for any of the injuries alleged. The Second Circuit affirmed that decision in full. See 528 F. App'x 96 (2d Cir. 2013). In its June 27, 2013 summary order, the panel stated: "Sahu and many others living near the Bhopal plant may well have suffered terrible and lasting injuries from a wholly preventable disaster for which someone is responsible. After nine years of contentious litigation and discovery, however, all that the evidence in this case demonstrates is that UCC is not that entity." Id. at 104.

In 2007, Plaintiffs filed the instant case to toll the running of the statute of limitations on their property damage claims while Sahu I was before the Second Circuit on an earlier appeal. Immediately after filing this action, Plaintiffs moved for a stay pending the resolution of the Sahu I appeal. As Plaintiffs then observed,

> The facts at issue in [Sahu I] parallel those at issue in this action. In both cases, plaintiffs allege that Defendants caused massive contamination of the soils and drinking water supply of many residential communities in the vicinity of the former UCIL plant with toxic and carcinogenic chemicals emanating and spreading through a common groundwater aquifer from the land and premises of the former UCIL

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> plant. Whether the District Court was correct to grant summary judgment to Defendants on the issue of their potential liability, which is now on appeal, will bear upon the litigation of the instant action. . . . [T]he Second Circuit's decision will soon provide this Court with invaluable guidance and clarification of this issue.

(ECF. No. 3 at 3-4.) I granted Plaintiffs' motion and stayed this action on April 3, 2007. It remained stayed while the parties litigated Sahu I upon its remand by the Second Circuit for further discovery.

On June 26, 2012, after again entering summary judgment in favor of Defendants in Sahu I, I directed the parties to address the effect of that ruling on the instant action, Sahu II. Counsel for the Sahu II Plaintiffs urged that the stay should continue pending their appeal of my Sahu I decision, again because "the forthcoming decision of the Second Circuit in [Sahu I] will likely provide guidance to the Court and the parties" in Sahu II. (July 31, 2012 Gambhir Ltr. at 3.) I agreed with Plaintiffs that a Second Circuit ruling in Sahu I would aid the consideration of this matter, and left the stay in place. (ECF No. 21.)

The Second Circuit affirmed my entry of summary judgment in Sahu I on June 27, 2013. See 528 F. App'x 96. It denied the Sahu I plaintiffs' petition for rehearing on July 25, 2013, and the mandate issued on August 1, 2013. Thereafter, UCC informed

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the Court that it intended to move for summary judgment in Sahu II "for the same reasons, and on the same record, as in Sahu I because the factual allegations, legal theories and relevant evidence are the same in both cases." (Aug. 26, 2013 Heck Ltr. at 1.) Plaintiffs then advised the Court that they wished to amend their complaint prior to the litigation of UCC's contemplated motion. I granted leave to both sides and set a briefing schedule. Plaintiffs later sought and obtained additional leave to make the motion under Rules 26(d) and 30(a) for an early deposition of Couvaras.

B. Plaintiffs' Amended Complaint and Summary Judgment Facts

Plaintiffs filed their amended complaint on November 6, 2013, asserting claims for damage to their property. At the outset, the Court observes that the amended complaint removes Warren Anderson, UCC's former Chief Executive Officer, who was a defendant in the original complaint. The amended complaint adds the state of Madhya Pradesh, which owns the site of the former Bhopal Plant. The only relief Plaintiffs seek against the state is an injunction directing it to cooperate in any court-ordered clean-up of the site. The state has not appeared in this action.

The following facts are undisputed. UCIL was incorporated in India in 1934. In 1969, the Bhopal Plant began operations as

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a pesticide formulations plant on land leased from the state of Madhya Pradesh. As a formulations plant, UCIL imported the chemical components of pesticide products and mixed the final product, such as the "Sevin" pesticide, in India. During this period, UCC owned 60 percent of UCIL.

In the 1970s, the Government of India implemented new restrictions designed to strengthen domestic production and control of industry. For example, India required "that local manufacture replace imports as soon as feasible." (Heck Aff. Ex. H at A-105.) Consequently, the Bhopal Plant was back-integrated into a facility capable of manufacturing pesticides. Moreover, the Government of India mandated that "all possible work in engineering and construction will be done in India." (Id. at A-97.) Because Indian legislation also required "a dilution of foreign held equity whenever new capital expenditures are made," UCC's ownership interest in UCIL was reduced to 50.9 percent. (Pl. Oppo. Br. at 3-4; Heck Aff. Ex. H. at A-1606.)

The Bhopal Plant operated as a manufacturing facility for several years. In the normal course of operations, the plant generated wastes. Generally, solid wastes were disposed of in onsite tanks and pits, while wastewater was treated and then pumped to three solar evaporation ponds lined with black polyethylene sheets. Plaintiffs allege that chemicals seeped

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into a ground aquifer, polluting the soil and drinking water in residential communities near the Bhopal Plant site. In 1984, after a catastrophic gas leak, the Indian Government closed the Bhopal Plant. In 1994, UCC sold its stake in UCIL; UCIL's name was later changed to Eveready Industries India Limited ("EEIL"). In 1998, EIIL terminated its lease of the Bhopal Plant site and surrendered the property to the government of Madhya Pradesh.

Plaintiffs bring negligence, public and private nuisance, strict liability, and trespass claims against UCC. They seek compensatory and punitive damages, as well as injunctive relief to remedy the complained-of property damage.

C. The Instant Motions

Relying in large part upon the record developed in Bano and Sahu I, UCC moves for summary judgment as to all theories of liability. Plaintiffs counter that there is evidence in this case, not present in Sahu I, establishing genuine issues of material fact. This evidence includes a declaration by Couvaras, which Plaintiffs have submitted not only in opposition to UCC's summary judgment motion, but also in support of their two motions seeking leave to take Couvaras's deposition.

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II. Relevant Legal Standards

A. The Scope of this Court's Review

In view of the complex procedural history of this action and its predecessors, it is appropriate to clarify how the Court has approached the resolution of these motions. This action involves many, but not all, of the same parties and attorneys as Sahu I. It is well settled that collateral estoppel generally may not apply against a plaintiff who did not appear in the earlier action. See, e.g., Hansberry v. Lee, 311 U.S. 21, 40 (1940) ("It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process."); see also Taylor v. Sturgell, 553 U.S. 880, 891-95 (2008) (discussing the limited exceptions to this principle). Although Plaintiffs' counsel acknowledged at oral argument that collateral estoppel might apply to those Plaintiffs who were parties in Sahu I, I believe the simpler and more prudent course is to evaluate the claims of all Plaintiffs on the merits.

As will be discussed, the evidentiary record contains several new documents, but is otherwise composed of the same materials as were analyzed by this Court and the Second Circuit in Sahu I. At oral argument, Plaintiffs' counsel conceded that

I may rely on my previous readings of individual documents that were in the Sahu I record, and acknowledged the general persuasive value of Sahu I. (Oral Arg. Tr. at 12.) However, with respect to the evidentiary record as a whole — i.e., the Sahu I record combined with new documents submitted to "fill the gaps" in the Sahu I plaintiffs' proof — and whether that record shows that UCC is entitled to summary judgment, I emphasize that I am starting fresh.

B. Summary Judgment Standard

A moving party is entitled to summary judgment when the evidence, viewed in the light most favorable to the non-movant, shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a); Vacold LLC v. Cerami, 545 F.3d 114, 121 (2d Cir. 2010). The movant bears the initial burden of demonstrating "the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the moving party meets that burden, the opposing party must then come forward with specific evidence demonstrating the existence of a genuine dispute of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). "Conclusory allegations or denials are ordinarily not sufficient to defeat a motion for summary judgment when the moving party has set out a documentary

case." Scott v. Coughlin, 344 F.3d 282, 287 (2d Cir. 2003). "The mere existence of a scintilla of evidence in support of the non-movant's position will be insufficient; there must be evidence on which the jury could reasonably find for the non-movant." Hayut v. State Univ. of N.Y., 352 F.3d 733, 743 (2d Cir. 2003) (alterations omitted). If it is clear that no rational jury "could find in favor of the nonmoving party because the evidence to support its case is so slight," summary judgment should be granted. F.D.I.C. v. Great Am. Ins. Co., 607 F.3d 288, 292 (2d Cir. 2010) (quoting Gallo v. Prudential Residential Servs., Ltd. P'ship, 22 F.3d 1219, 1224 (2d Cir. 1994)).

The Second Circuit has cautioned that "an expert's report is not a talisman against summary judgment." Raskin v. Wyatt Co., 125 F.3d 55, 66 (2d Cir. 1997) (citing Viterbo v. Dow Chem. Co., 826 F.2d 420, 422 (5th Cir. 1987) (summary judgment not impossible "whenever a party has produced an expert to support its position")). Generally, a court should not make credibility determinations about an expert when deciding a summary judgment motion, because "credibility issues are normally resolved by a jury based on the in-court testimony." City of N.Y. v. Golden Feather Smoke Shop, Inc., No. 08 Civ. 3966, 2013 WL 3187049, at *18 (E.D.N.Y. June 20, 2013) (citing Jeffreys v. City of New

York, 426 F.3d 549, 551 (2d Cir. 2005)); see also Scanner Techs. Corp. v. Icos Vision Sys. Corp., 253 F. Supp. 2d 624, 634 (S.D.N.Y. 2003). But if, after construing the expert reports in the non-movant's favor, the court concludes that an admissible report is "insufficient to permit a rational juror to find in favor of the plaintiff, the court remains free to . . . grant summary judgment for defendant." Amorgianos v. Nat'l R.R. Passenger Corp., 303 F.3d 256, 267 (2d Cir. 2002).

Finally, Rule 56(d) (formerly Rule 56(f)) allows a court to grant additional time for discovery if the non-movant cannot present facts justifying its opposition to summary judgment. However, "a plaintiff cannot defeat a motion for summary judgment by merely restating the conclusory allegations contained in his complaint, and amplifying them only with speculation about what discovery might uncover." Contemporary Mission, Inc. v. U.S. Postal Serv., 648 F.2d 97, 107 (2d Cir. 1981). Accordingly, the court may properly deny Rule 56(d) relief "if it deems the request to be based on speculation as to what potentially could be discovered." Paddington Partners v. Bouchard, 34 F.3d 1132, 1138 (2d Cir. 1994).

C. Early Discovery Standard

Plaintiffs also move to take Couvaras's deposition under Rule 26(d) and Rule 30. Rule 26(d)(1) states that discovery

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should not occur before Rule 26(d) conference unless authorized by the Federal Rules of Civil Procedure, by stipulation, or by court order. "Although the rule does not say so, it is implicit that some showing of good cause should be made to justify such an order, and courts presented with requests for immediate discovery have frequently treated the question whether to authorize early discovery as governed by a good cause standard." 8A Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice and Procedure § 2046.1 (3d ed. 2010); see also Pearson Educ., Inc. v. Doe, No. 12 Civ. 4786, 2012 WL 4832816, at *3-4 (S.D.N.Y. Oct. 1, 2012) (collecting cases). Rule 30 likewise states that a party must obtain leave of court to take an early deposition. See Fed. R. Civ. P. 30(a)(2)(A). As always, the court "plainly has discretion to reject a request for discovery if the evidence sought would be cumulative or if the request is based only on speculation as to what potentially could be discovered." In re Dana Corp., 574 F.3d 129, 148-49 (2d Cir. 2009) (citation and internal quotation marks omitted).

D. Substantive New York Law

It is undisputed that New York law applies to the instant action. Both Plaintiffs and UCC cite New York law in their briefs. (Pl. Oppo. Br. at 14-16; Def. Reply Br. at 6-8.) That is consistent with the approach taken both by this Court and by

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the Second Circuit in Sahu I. See 528 F. App'x at 101 & n.3; 2012 WL 2422757, at *4. Accordingly, this Court applies New York law to Plaintiffs' claims, which sound in negligence, nuisance, strict liability, and trespass.

1. Negligence

It is black letter law that a prima facie claim for negligence requires a plaintiff to establish the elements of duty, breach, causation, and damages. E.g., Aegis Ins. Servs., Inc. v. 7 World Trade Co., L.P., 737 F.3d 166, 177 (2d Cir. 2013); Sawyer v. Wight, 196 F. Supp. 2d 220, 226 (E.D.N.Y. 2002) (citing Denman v. Coppola Gen. Contracting Corp., 683 N.Y.S.2d 617, 618 (3d Dep't 1998)). As the Fourth Department has explained,

> Causation incorporates at least two separate but related concepts: cause-in-fact and proximate cause. Cause-in-fact refers to those antecedent events, acts or omissions which have "so far contributed to the result that without them it would not have occurred." Ordinarily, this requirement is satisfied if the given act or omission was a substantial factor in producing the resultant injury. It is not sufficient to find a defendant negligent, unless it is further shown that such negligence was the proximate cause of the injuries suffered by a plaintiff. "[P]roximate cause is a question separate and apart from that of duty and negligence and it is only when these initial issues are resolved against the tort-feasor that the question of proximate cause arises." Proximate cause serves to limit, for legal or policy reasons, the responsibility of an actor for the consequences of his conduct.

Monahan v. Weichert, 442 N.Y.S.2d 295, 298 (4th Dep't 1981).

2. Nuisance

A public nuisance "is an offense against the State and is subject to abatement or prosecution on application of the proper governmental agency." Copart Indus., Inc. v. Consolidated Edison Co. of New York, Inc., 362 N.E.2d 968, 971 (N.Y. 1977). "It consists of conduct or omissions which offend, interfere with or cause damage to the public in the exercise of rights common to all, in a manner such as to . . . endanger or injure the property, health, safety or comfort of a considerable number of persons." Id. (internal citations omitted). In resolving the instant motions, the Court assumes without deciding that Plaintiffs have standing to pursue a public nuisance claim. Accord Sahu I, 528 F. App'x at 102 n.4.

Private nuisance requires defendant's "invasion of another's interest in the use and enjoyment of land" that is "(1) intentional and unreasonable, (2) negligent or reckless, or (3) actionable under the rules governing liability for abnormally dangerous conditions or activities." Copart Indus., 362 N.E.2d at 971. Such invasion is considered intentional "when the actor (a) acts for the purpose of causing it; or (b) knows that it is resulting or is substantially certain to result from his conduct." Id. at 972-73. On the other hand, "whenever a [private] nuisance has its origin in negligence, negligence

must be proven." Id. at 972. Whether public or private, "[o]ne who creates a nuisance through an inherently dangerous activity or use of an unreasonably dangerous product is absolutely liable for resulting damages, [regardless] of fault." State v. Schenectady Chemicals, Inc., 459 N.Y.S.2d 971, 976 (N.Y. Sup. Ct. 1983), aff'd as modified, 479 N.Y.S.2d 1010 (3d Dep't 1984). "While ordinarily nuisance is an action pursued against the owner of land for some wrongful activity conducted thereon, everyone who creates a nuisance or participates in the creation or maintenance of a nuisance are liable jointly and severally for the wrong and injury done thereby." Id. (internal quotation omitted).

3. Trespass

Trespass is the intentional invasion of another person's property. Scribner v. Summers, 84 F.3d 554, 557 (2d Cir. 1996); accord Volunteer Fire Ass'n of Tappan, Inc. v. Cnty. of Rockland, 956 N.Y.S.2d 102, 105 (2d Dep't 2012). The New York Court of Appeals has explained that

> while the trespasser, to be liable, need not intend or expect the damaging consequence of his intrusion, he must intend the act which amounts to or produces the unlawful invasion, and the intrusion must at least be the immediate or inevitable consequence of what he willfully does, or which he does so negligently as to amount to willfulness. To constitute such a trespass, the act done must be such as 'will to a substantial certainty result in the entry of the foreign matter'.

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> The application of the above-stated rule, in the few pertinent New York cases, to damage claims arising from the underground movements of noxious fluids, produces this conclusion: that, even when the polluting material has been deliberately put onto, or into, defendant's land, he is not liable for his neighbor's damage therefrom, unless he (defendant) had good reason to know or expect that subterranean and other conditions were such that there would be passage from defendant's to plaintiff's land.

Phillips v. Sun Oil Co., 307 N.Y. 328, 331 (1954) (citations omitted); accord Scribner, 84 F.3d at 557.

4. Whether In re Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation Mandates a Different Analysis

As set forth above, the standards governing Plaintiffs' causes of action are well settled; all require Plaintiffs to show that UCC caused the complained-of injury. See, e.g., Aegis Ins. Servs., 737 F.3d at 178–79 (negligence); Bigio v. Coca-Cola Co., 675 F.3d 163, 173 (2d Cir. 2012) (trespass); Scribner, 84 F.3d at 559 (private nuisance); Shore Realty Corp., 759 F.2d at 1044 n.17 (strict liability); People ex rel. Spitzer v. Sturm, Ruger & Co., Inc., 761 N.Y.S.2d 192, 197–99 (1st Dep't 2003) (public nuisance). As the Second Circuit noted, then, the dispositive question is "whether UCC played a sufficiently direct role in causing the hazardous wastes to seep into the ground to be held liable." Sahu I, 528 F. App'x at 101–02 (citing Spitzer, 761 N.Y.S.2d at 198 n.2).

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Plaintiffs argue that a recently decided Second Circuit case compels a new, more generous legal standard that is different than the one used by this Court and the Second Circuit in Sahu I. They refer to In re Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation, 725 F.3d 65 (2d Cir. 2013), cert. denied, 134 S. Ct. 1877 (2014). That case concerned Exxon's liability for its MTBE-treated gasoline contaminating a system of water wells in Queens. The jury first found that Exxon was liable as a "direct spiller" for gasoline leaks emanating out of storage tanks at Exxon-owned gas stations. Second, the jury also found that Exxon was liable as a "manufacturer, refiner, supplier, or seller" of the MTBE-treated gasoline that leaked or spilled from gas stations not owned by Exxon. Plaintiffs conclude that because the Second Circuit affirmed liability, it thereby approved a "different, less stringent standard than that in Sahu I." (Pl. Oppo. Br. at 16.)

Plaintiffs are incorrect. First, In re MTBE did not announce a new standard of law. Indeed, as Plaintiffs acknowledge, the test applied in that case is the "traditional 'substantial factor' test" for causation of an injury. (Pl. Oppo. Br. at 16.) The Second Circuit panel wrote:

> Under New York law, an act or omission is regarded as a legal cause of an injury "if it was a

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> substantial factor in bringing about the injury." Schneider v. Diallo, 788 N.Y.S.2d 366, 367 (1st Dep't 2005). The word "substantial" means that the act or omission "had such an effect in producing the injury that reasonable people would regard it as a cause of the injury." Rojas v. City of New York, 617 N.Y.S.2d 302, 305 (1st Dep't 1994) (internal quotation marks omitted).

In re MTBE, 725 F.3d at 116. The New York cases cited in this section are not new; they are from 2005 and 1994, preceding the Sahu I panel's decision by several years. To be sure, Plaintiffs can eventually try to convince the Second Circuit that the Sahu I panel overlooked or misread those decisions. But they cannot persuasively argue before this Court that In re MTBE renders Sahu I a dead letter.

Second, as a substantive matter, Sahu I can be squared with the legal test in In re MTBE. Both the Second Circuit and I concluded that "no reasonable juror could find that UCC participated in the creation of" the alleged nuisance. 528 F. App'x at 102; accord 2012 WL 2422757 at *16 ("Plaintiffs have not adduced evidence that both UCC and UCIL participated in the creation of a nuisance."). Absent such participation, UCC simply cannot have been a "substantial factor" in creating the injury alleged by the Sahu I plaintiffs.

Finally, In re MTBE is distinguishable on its facts. As the panel in that case noted, "Exxon incurred tort liability not for the mere use of MTBE, but because it engaged in additional

tortious conduct." In re MTBE, 725 F.3d at 101 n.22. There, the jury heard testimony that "Exxon knew station owners would store this gasoline [containing MTBE] in underground tanks that leaked, and introduced evidence that Exxon knew specifically that tanks in the New York City area leaked." Id. at 121. The jury concluded that "Exxon knew that the gasoline containing MTBE . . . would be spilled," and that Exxon was "substantially certain" that its gasoline would leak into groundwater. Id. at 120. This and other knowledge tortious conduct sufficed to demonstrate Exxon's participation in a nuisance and trespass. By contrast, both the Sahu I panel and I concluded that nothing in the Sahu I record indicated any tortious conduct by UCC. See 528 F. App'x at 102; 2012 WL 2422757, at *12–13, *16. That lack of evidence distinguishes Sahu I.

Thus, as stated earlier, the central question remains "whether UCC played a sufficiently direct role in causing the hazardous wastes to seep into the ground to be held liable." Sahu I, 528 F. App'x at 101–02. This question is answered below as to each of Plaintiffs' theories of liability.

III. Analysis

The Court first addresses Plaintiffs' contention that Couvaras was a UCC employee during the relevant periods, as well as their motions for leave to take Couvaras's deposition. The

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Court then turns to the resolution of UCC's summary judgment motion.

A. Plaintiffs' "New" Evidence Regarding Couvaras Does Not Create a Genuine Dispute of Material Fact

Plaintiffs assert that Couvaras, the Project Manager overseeing the Bhopal Plant's construction, was actually a UCC employee during the relevant periods, not a UCIL employee as previously believed. From this proposition, Plaintiffs contend that "jury may find that UCC [through Couvaras] had final authority over even detail design, including of the waste disposal system." (Pl. Oppo. Br. at 2; see id. at 5, 8, 20.) The argument is that everything Couvaras did can now be imputed to UCC, which provides a basis for holding UCC liable.

To support their assertion that Couvaras was a UCC employee, Plaintiffs cite to two new declarations. First, Couvaras's own declaration states that he "was a UCC employee assigned to UCIL from 1971 to the end of 1981, to manage the engineering and construction of the plant based on proprietary UCC design." (Couvaras Dec. ¶ 1.) Second, the declaration of Tota Ram Chauhan, who identifies himself as a UCIL employee from 1975 to 1985, states that Couvaras was a UCC employee "who was sent to India to oversee the detail design and erection of the plant." (Chauhan Dec. ¶ 2.)

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The Court concludes that, late-breaking declarations notwithstanding, Plaintiffs have failed to create a genuine dispute of material fact as to Couvaras's status. The documentary evidence from the relevant time period consistently and conclusively demonstrates that Couvaras acted as a UCIL employee when he served as Project Manager. This evidence first includes the Definition of Services between UCC and UCIL, which states that UCC's Chemicals and Plastics Engineering Department would provide "a project manager on loan to UCIL for the project," in view of the fact that project management was specifically listed as UCIL's responsibility. (Heck Aff. Ex. S at A-3128-29). Second, the summary judgment record also includes a 1985 affidavit of Ranjit Dutta, originally submitted in the earlier Union Carbide litigation before this Court.[1]

[1] Plaintiffs dispute the admissibility of the Dutta affidavit because (1) UCC did not rely on the affidavit in its initial moving brief, and (2) Plaintiffs did not get to depose him. (Pl. Surreply at 5-7.) They made a similar argument in Sahu I. In that case, I decided not to consider the Dutta affidavit, even though "all the documents were previously produced to Plaintiffs in [Sahu I] or in Bano." Sahu I, 2012 WL 2422757, at *2.

Two years have passed since that ruling, and Plaintiffs' counsel have had notice and possession of the Dutta affidavit during that time. Moreover, it was submitted as an exhibit to UCC's motion for summary judgment. Finally, it is squarely relevant to Plaintiffs' argument that Couvaras was a UCC employee. For these reasons, the 29-year-old affidavit is unquestionably fair game, and the Court will no longer decline to consider it.

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Dutta was a former plant manager and General Manager of the Agricultural Products Division of UCIL, and states in part:

> When Mr. Couvaras came to UCIL in 1972, he became a UCIL employee and he remained a UCIL employee for nine years, until 1981, when he went to the Middle East. He is consistently listed as a UCIL employee in UCIL's annual reports. (Indian law requires annual reports to list employees). As a UCIL employee, he reported to me, when I was plant manager and also when I was General Manager of UCIL's Agricultural Products Division. As a UCIL employee, he also reported to UCIL management and all of his activities on the project were supervised and directed by UICL's management.

(Heck Aff. Ex. N at A-1785.) Third, as Dutta notes, Couvaras was listed as a UCIL employee in UCIL's annual reports. (Heck Reply Aff. Ex. 1, 2, 3.) Fourth, other documents in the record address Couvaras as a UCIL employee. See Heck Aff. Ex. H at A-178; Heck Aff. Ex. R at A-2879, A-2923. Fifth, the record contains a 1985 affidavit by Warren J. Woomer, who was formerly the Works Manager of the Bhopal Plant. See generally In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984, 634 F. Supp. 842, 853 (S.D.N.Y. 1986), aff'd as modified, 809 F.2d 195 (2d Cir. 1987). Woomer avers: "Plaintiffs have also attempted to portray L.J. Couvaras as a Union Carbide employee who was responsible for every aspect of the design and construction of the plant. In fact, Mr. Couvaras was employed by UCIL for nine years and reported within that organization in

Bombay, and was at the Bhopal plant only for limited periods." (Heck Aff. Ex. O at A-1890.)

Couvaras's own declaration avers that he was "a UCC employee assigned to UCIL from 1971 to the end of 1981, to manage the engineering and construction of the plant." (Couvaras Dec. ¶ 1.) This statement is arguably susceptible to more than one interpretation on the question of who was Couvaras's actual employer during his tenure as Plant Manager. Accordingly, the Court construes it in the light most favorable to Plaintiffs, and reads it to posit that Couvaras was a UCC employee during that period. But even if that is what Couvaras meant, the contention is wholly unsubstantiated. Rather, the documentary evidence shows that Couvaras became a UCIL employee when he took on the role of Project Manager.

Nor does the Chauhan declaration offer any compelling insight, because it provides no basis for Chauhan's conclusory statement that Couvaras was a UCC employee during the relevant periods. See Fed. R. Civ. P. 56(c)(4) (declaration "must be made on personal knowledge"). UCC asserts that the Chauhan declaration must be disregarded altogether because Chauhan asserts no personal knowledge on that question. The Court declines to reach the question of the Chauhan declaration's admissibility, because even if the declaration is admissible, it

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presents no bar to the entry of summary judgment in view of the evidence.

Finally, Plaintiffs have not shown that deposing Couvaras is necessary under Rule 56(d), nor that good cause exists to do so pursuant to Rules 26(d) and 30. Plaintiffs have already procured a sworn declaration from Couvaras; the Court is unable to discern what might be gained by going back to the well. Plaintiffs urge that Couvaras is "uniquely qualified" to opine on the relationship between UCC and UCIL. (Pl. Rule 56(d) Moving Br. at 3-4.) But the evidentiary record in this case is literally thousands of pages long, and the documents contained therein are contemporaneous with the conduct alleged in the amended complaint, whereas Couvaras would be testifying based upon decades-old recollection if deposed. Because deposing Couvaras would be cumulative of the summary judgment record in this case, and because Plaintiffs' justifications for such a deposition do not rise above the speculative, Plaintiffs' motions are denied.[2]

[2] In light of this ruling on the merits of Plaintiffs' Rule 56(d) request, it is not necessary to consider UCC's argument that the motion is "procedurally improper" because Rule 56(d) "does not contemplate a separate motion." (UCC Rule 56(d) Oppo. Br. at 1.) The Court nevertheless observes that UCC cites no authority for its position, which appears to be against the weight of practice in this Circuit. See, e.g., XAC, LLC v. Deep, 517 F. App'x 25, 27 (2d Cir. 2013) (summary order) (reviewing district court's denial, on the

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B. No Reasonable Juror Could Find for Plaintiffs on Any of Their Theories

As discussed, the dispositive question is whether UCC caused the damages alleged by Plaintiffs — as phrased by Plaintiffs, whether "UCC's acts were a substantial factor in causing the pollution." (Pl. Oppo. Br. at 1.) Plaintiffs contend that a rational jury could find UCC liable on the evidentiary record before the Court, and offer five principal arguments in support of their position. The first argument, that the Second Circuit has adopted a new, lower standard for tort claims under New York law, was rejected above. See supra Part II.D.4, slip op. at 16–19. The remaining four are discussed in turn.

1. Plaintiffs' Contention that UCC Is Liable for Providing the MIC Process

UCIL's 1973 Capital Budget Proposal envisioned that the Bhopal Plant would include facilities to manufacture methyl isocyanate ("MIC"), among other chemicals. (Heck Aff. Ex. H. at

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merits, of a Rule 56(d) motion); Nat'l Union Fire Ins. Co. of Pittsburg, PA. v. Stroh Cos., 265 F.3d 97, 117 (2d Cir. 2001) (same under the former Rule 56(f)); accord, e.g., Hicks v. Johnson, --- F.3d ----, 2014 WL 2793806, at *2–3 (1st Cir. 2014); Lunderstadt v. Colafella, 885 F.2d 66, 71 (3d Cir. 1989). But see Miller v. Wolpoff & Abramson, L.L.P., 321 F.3d 292, 299 (2d Cir. 2003) (mentioning, without comment, that the lower court had declined to entertain a motion made under the former Rule 56(f), and had directed the movant to seek such relief "in his formal opposition to the pending motions, in a manner compliant with the Rule's requirements").

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A-112.) The Capital Budget Proposal anticipated UCC providing UCIL with technology for MIC production. (Id.) The status of UCC's MIC process was listed as "commercial," meaning that it was already in use at plants then in operation. (Id.)

Plaintiffs contend that by-product of the MIC process constituted the primary source of the pollutants emanating from the Bhopal Plant. Their amended complaint alleges that the plant's MIC unit generated "hydrochloric acid wastes that posed the plant's major disposal problem and necessitated the acid neutralization pits and solar evaporation ponds," and that the groundwater was eventually contaminated by toxins found under those ponds. (Amended Compl. ¶ 58.) Plaintiffs argue that a jury could therefore find UCC liable for their damages because UCC's MIC process design was a substantial factor in creating pollution. (Pl. Oppo. Br. at 18.)

This argument is distinct from Plaintiffs' contentions, discussed below, that UCC tortuously designed a faulty system for disposing of the MIC unit's waste. Rather, here they argue that liability flows from the MIC production process itself. To support this claim, Plaintiffs and their experts purport to dissolve the distinction between the general design of the MIC process, which UCC contributed, and the detail design, implementation, and construction performed by UCIL and its

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contractors. Thus, Plaintiffs urge that UCC's MIC process design is actually "part of" the waste management system. (Pl. Oppo. Br. at 18.) One of their experts, Dr. Jurgen H. Exner, adds that "[d]etailed design follows and implements process design." (Exner ¶ 5.) Tying it all together, another expert, Dr. Ivan von Lindern, asserts that "process engineering and design are never far removed, and are generally not separable, from pollution control." (von Lindern Dec. ¶ 14.) This blurring of lines, according to Plaintiffs, constitutes new evidence that precludes the entry of summary judgment. (Pl. Oppo. Br. at 18.)

On the contrary, this line of reasoning seems calibrated to gloss over the "traditional notions of remoteness, proximate cause, and duty" that were fatal to the Sahu I plaintiffs' claims. Sahu I, 528 F. App'x at 101. Because Plaintiffs have no evidence of actual tortious conduct by UCC, they seek instead to lump together all of the steps that led to the construction of the MIC unit. This mischaracterization cannot succeed, however, because the documents in evidence show that in fact, UCC and UCIL delineated their responsibilities very clearly. UCIL had responsibility for the "overall venture" at Bhopal, and was charged with contracting for detailed design, with construction, and with operation of the plant. (Heck Aff. Ex. S at A-3128.) Even with respect to processes supplied by UCC, such as the MIC

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process, the task of designing and providing facilities for the disposal of waste was reserved to UCIL. (Id. at A-3136.) Dr. von Lindern attempts to distinguish waste disposal from "overall waste management strategy," and approvingly cites the Bhopal Plant General Operating Manual for the proposition that "the premier consideration in the overall waste management strategy is 'sharp' operations." (von Lindern ¶ 16.) But even if the Court accepts this proposition, UCC is not liable because UCIL operated the Bhopal Plant, not UCC. (Heck Aff. Ex. S at A-3128.) UCIL was therefore responsible for managing the wastes the plant produced in the course of those operations.

This Court does not need an expert to explain the self-evident proposition that detail design necessarily follows general process design, and it is equally obvious that the process of manufacturing chemicals produces waste. But it does not necessarily follow that the production of chemicals itself constitutes legal causation of a tort. Cf. Spitzer, 761 N.Y.S.2d at 202 ("While plaintiff aptly recognizes that it must prove defendants caused or contributed to the nuisance, we cannot also conclude that, no matter how far removed from defendants' lawful business practices the harm is felt, defendants nevertheless remain liable under a common-law public nuisance theory."). The record in this case indicates that pollution was caused by the

disposal of waste at Bhopal. As in Sahu I, Plaintiffs cannot succeed in holding UCC liable for the overall manufacturing operations of UCIL upon a mere showing that UCC provided the MIC process technology. See 2012 WL 2422757, at *10. And while Plaintiffs insist that In re MTBE compels a different result, that claim is rejected for the reasons discussed in Part II.D.4 above.

Plaintiffs make three other points in furtherance of this theory of liability, none of which are compelling. First, Plaintiffs and von Lindern repeatedly assert that UCC's Institute plant, which also used the MIC process, had problems with leaks and discharged more toxins than its permits allowed. (Pl. Oppo. Br. at 18–19 (citing von Lindern Dec. ¶¶ 26–27, 60–62, 64).) But even if it is true (and admissible) that another plant experienced waste disposal problems, and even if it is true that those problems arose from MIC production at Institute — which Plaintiffs do not even allege, much less demonstrate — such waste disposal problems are distinct from, and thus utterly irrelevant to, the question whether liability attaches to the MIC process itself.[3] Second, Plaintiffs direct the Court's

[3] Nor are alleged waste disposal issues at Institute relevant to the waste disposal issues at the Bhopal Plant, because as discussed below, and as Plaintiffs concede, the methods for waste disposal at Bhopal were very different from those at Institute. See infra Part

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attention to a letter from UCIL to the Indian Department of Industrial Development dated September 30, 1982, seeking approval for continued collaboration on MIC-based pesticides with UCC. (Herz Dec. Ex. D.) The import of this document is not clear, since UCC acknowledges that it provided the MIC process design. See, e.g., Heck Reply Aff. ¶ 20. Although Plaintiffs apparently believe the letter shows "that UCC played an integral role in determining how UCC's design would be implemented" (Pl. Oppo. Br. at 19), the Court notes that the letter was written well after the design was implemented and the MIC unit was built. Finally, Plaintiffs repeat their contention that Couvaras remained a UCC employee when he served as Project Manager, and that "UCC therefore approved" the Bhopal Plant's design. (Pl. Oppo. Br. at 20.) Because the evidence demonstrates that Couvaras was a UCIL employee during this period, Plaintiffs' contention is rejected. See supra Part III.A, slip op. at 20–24.

2. Plaintiffs' Contention that UCC Designed the Bhopal Plant's Waste Disposal System

Plaintiffs posit that UCC dictated the strategy for waste disposal at the Bhopal Plant, and that UCC's strategy was implemented. They further argue that the designs furnished by

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III.B.2; accord Pl. Oppo. Br. at 22–23 (noting that the waste disposal strategy at Bhopal "lacked key components of the Institute system").

UCC caused the pollution alleged in the amended complaint. They also contend that any design work done in India was overseen by Couvaras, and therefore by UCC.

In support of these arguments, Plaintiffs' memorandum chiefly cites the reports of their experts, von Lindern and Exner. For example, Plaintiffs' brief quotes the von Lindern declaration for the proposition that "UCC played the 'dominant role' in developing 'the waste management strategy and the design of the overall waste management system.'" (Pl. Oppo. Br. at 21 (quoting von Lindern Dec. ¶¶ 17, 20).) UCC argues that these declarations are not admissible under Rule 702, because they merely offer legal conclusions instead of helping to understand the evidence. (Def. Reply Br. at 5.) But as with the Chauhan declaration, the Court need not rule on admissibility. It is sufficient to conclude that the summary judgment record simply does not support Plaintiffs' theory, certainly not to the extent that creates a dispute of material fact.

The Court begins its analysis with the general statement from the Capital Budget Proposal that "all possible work in engineering and construction will be done in India with UCIL assuming an overall responsibility for implementation of the project." (Heck Aff. Ex. H at A-97.) The July 12, 1973 Definition of Services elaborates:

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> Pressure to hold U.S. engineering involvement to a minimum has come both from the current U.S. shortage of engineers and from the desire by UCIL to perform as much of the design as possible in India. As a result . . . many portions of the design that would normally be performed at the [UCC] Technical Center as an extension of the process design will instead be transferred in whole or in part to India.

(Heck Aff. Ex. S at A-3127.)

With respect to waste disposal specifically, the memorandum plainly states that "UCIL will have the primary responsibilities for designing and providing the . . . facilities for . . . disposal of wastes." (Id. at A-3136.) Consistent with that allocation of responsibility, the February 7, 1976 report describing "proposed Waste Disposal Facilities for the Pesticides Plant of Union Carbide India Limited at Bhopal, India" was prepared by UCIL's Engineering Department, Agricultural Products Division. (Heck Aff. Ex. R at A-2879.) The report was approved by Couvaras — who, contrary to Plaintiffs' theory, was a UCIL employee. See supra Part III.A.

Plaintiffs contend that UCC had a specific vision for the solar evaporation ponds, and that UCIL merely carried out this vision. (Pl. Oppo. Br. at 7.) The documentary evidence proves otherwise. First, UCC's July 21, 1972 memorandum contains a "preliminary" evaluation of waste disposal problems, one that was "based on very preliminary and incomplete information." (Heck Aff. Ex. H at A-156.) Notwithstanding these disclaimers,

von Lindern somehow concludes that the evaluation constitutes the "final design basis for the waste disposal system." (von Lindern ¶ 42.) But this evaluation was undertaken not to dictate a final or mandatory design of the Bhopal Plant's waste disposal facilities. Rather, its purpose is plainly announced: to "(a) provide a basis for estimating investment and operating cost, (b) recommend further development, and (c) serve as a basis for negotiations with the Indian Government." (Heck Aff. Ex. H at A-156.)

More important, the ponds that were actually constructed at the Bhopal Plant were very different from UCC's early suggestions, confirming that they were designed by UCIL and its contractors. First, the 1972 preliminary evaluation memorandum states that "[t]o 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." (Heck Aff. Ex. H at A-158.) But in January 1977, UCIL's engineering consultants determined that building the pond as suggested by UCC would be too expensive. (Heck Aff. Ex. T at A-3508.) Instead, UCIL and its consultants devised an "alternative scheme for the Pond so as to effect cost reduction," which used a polyurethane lining to "reduce use of

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expensive murum and non-swelling clay," and which eliminated a catch drain.[4] (Id. at A-3508-09.)

Second, UCC's June 15, 1973 memorandum on UCIL's waste disposal plans notes that UCIL planned to build a 13-acre solar evaporation pond with a life expectancy of nine months. (Heck Aff. Ex. R at A-2715.) The author of the UCC memorandum, G.R. Hattiangadi, opined that "[s]izing a pond for a life expectancy of under a year . . . is not advisable," and suggested a 35-acre pond. (Id. at A-2716.) Nevertheless, UCIL's February 7, 1976 Waste Disposal System Description of Facilities conveys UCIL's plan to construct a 10-acre evaporation pond anticipated to "last about four months after Phase II goes into operation, then a second pond will have to be constructed." (Id. at A-2895.) Ultimately, one 4-acre evaporation pond with an estimated life of 4 years, one 18-acre evaporation pond, and a third back-up pond were built — totaling well below the 35 acres of pond area suggested by UCC. (Heck Aff. Ex. H at A-230.)

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[4] Plaintiffs attempt to tie UCC to these decisions by repeatedly citing the sixth paragraph of the Chauhan declaration, which posits: "UCC engineers approved the creation, sizing and choice of materials for the solar evaporation ponds . . . . Any change in choice of materials or pond liners would have been approved by UCC engineering." (Chauhan ¶ 6.) Chauhan does not cite any documents to support this supposition, and indeed it is unsupported by the evidence in the summary judgment record. See Great Am. Ins. Co., 607 F.3d at 292 ("conclusory allegations or unsubstantiated speculation" present no bar to summary judgment).

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Plaintiffs cite a May 5, 1972 letter from UCC to Couvaras for the proposition that "UCC determined the method of waste disposal, including the ponds." (Pl. Oppo. Br. at 21 (citing Herz Dec. Ex. A).) In fact, the letter merely memorializes a conversation wherein Byer, a UCC employee, "expressed to you our concern" regarding the disposal of byproduct hydrochloric acid. (Herz Dec. Ex. A.) This concern is consistent with Byer's subsequent memorandum of May 16, 1972. (Heck Aff. Ex. Q at A-2695.) Indeed, it led to UCC's suggestion that UCIL employ a clay lining for the evaporation pond "[t]o avoid danger of polluting subsurface water supplies" (id. at A-2513), and to Hattiangadi's June 15, 1973 memorandum, which made pond size suggestions that UCIL chose to disregard (Heck Aff. Ex. R at A-2714). Critically, UCC informed UCIL that "[a]fter he transmits the comments he has prepared on the proposals that have been made in India, Mr. Hattiangadi has no further obligation to provide general information on the disposal of plant wastes – other than any reviews or consultations that may be specifically requested by personnel in India." (Id.) Thus, UCC made clear that further responsibility for the design of the Bhopal Plant's waste disposal system belonged to UCIL. This delineation was memorialized in the December 2, 1973 Capital Budget Proposal. See Heck Aff. Ex. H at A-97.

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In sum, the record simply does not support Plaintiffs' contention that UCC determined the method of waste disposal at the Bhopal Plant. To the extent that von Lindern contends otherwise, he does so by ignoring or misreading the documentary evidence. Instead, the record indicates that (1) UCC offered a preliminary evaluation and limited feedback to UCIL, which then (2) worked with its local contractors to implement a disposal system that disregarded many of UCC's concerns, leading to (3) the pollution that allegedly caused Plaintiffs' property damage. In light of this sequence of events, Plaintiffs' argument that "the very idea" to use evaporation ponds caused pollution is baseless. (Oral Arg. Tr. at 18-19; see also Pl. Oppo Br. at 15 n.12.) On this record, no reasonable juror could premise liability on the limited contributions of UCC.

3. Plaintiffs' Contention that UCC Had "Oversight Authority over Waste Handling"

As part of their opposition, Plaintiffs present excerpts from UCC's corporate policy manual on environmental affairs. (Herz Dec. ¶ 3.) The exhibit includes Policy 2.30, with the subject "Health, Safety and Environmental Laws and Regulations — Compliance and Enforcement." (Id. Ex. B at 1-9.) It also includes Policy 2.32, with the subject "Environmental Affairs" (id. at 10-15), as well as a memorandum entitled "Management of Health, Safety, and Environmental Affairs in International

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Affiliates (id. at 16–17). To these excerpts, UCC adds a section of the manual entitled "International Affiliates — Corporate Policy and Procedures Application." (Heck Reply Aff. Ex. 5.)

Plaintiffs argue that this statement of corporate policy evidences UCC's "oversight authority over waste handling," as well as control of its affiliates' compliance with environmental laws. (Pl. Oppo. Br. at 23–24.) Accordingly, Plaintiffs posit, "a jury may find UCC was a substantial factor in waste handling failures at UCIL." (Id. at 24.) These mischaracterizations notwithstanding, no reasonable jury could find UCC liable based on the contents of this manual.

To begin with, the manual explains that while it proposes "objectives, commitments, and systems of management" that are "intended to apply, wherever feasible, worldwide," UCC recognizes that these policies might be "modified or expanded" by its affiliates as appropriate. (Heck Reply Aff. Ex. 5 at 2.) Moreover, the manual plainly affirms that "[i]nternational affiliates are separate legal entities." (Id.) As such, "[t]he UCC-affiliate relationship should preserve the authority and accountability of the Board of Directors of the affiliate for the management of the affiliate, and recognize the legitimate rights and interests of host governments and non-UCC

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shareholders." (Id.) This section also clarifies that "policies and procedures which are labeled as applicable to the international are primarily directed to the UCC manager who has a line role to represent UCC's interests on the boards of directors of international affiliates." (Id.) Given the manual's explanation of its intended audience, and its clear distinction between UCC and the affiliates, no reasonable juror could conclude that UCC "controlled" UCIL's handling of waste as Plaintiffs urge.

To be sure, the document professes UCC's worldwide commitment to compliance with environmental and health laws. But under the heading "Delegation," Policy 230 explicitly states that international affiliates such as UCIL are assigned and delegated the responsibility for

> [d]evlopment and administration of a management system, including policies, procedures, objectives, and audits, for compliance with, and responses to enforcement actions relating to, governmental health, safety, and environmental laws and regulations, patterned after the UCC system but modified or expanded, as necessary, to accommodate the scope and kind of activities carried out in the area company or affiliate, and adapted, as necessary, to conform to the legal, political and social constraints on the affiliate.

(Herz Dec. Ex. B at 3.) In similar language, Policy 232 also states in no uncertain terms that it is the affiliate's responsibility to develop context-specific policies and

procedures to ensure environmental compliance. (Id. at 12.) Policy 232 also expressly reserves to affiliates such as UCIL the "line duty and end-result accountability for protection of the environment at locations in which the affiliates operate." (Id.)

In sum, while Plaintiffs suggest that the manual demonstrates UCC's control over UCIL, down to the handling of waste, review of the document reveals that suggestion to be baseless. Plaintiffs' argument is rejected.

4. Plaintiffs' Contention that UCC Is Liable with Respect to Rehabilitation of the Site

The amended complaint alleges that the remediation of the Bhopal Plant site was "insufficient and grossly negligent," which exacerbated the damage to Plaintiffs' property. (Amended Compl. ¶ 2; see id. ¶¶ 86–112.) Plaintiffs argue that "UCC was a substantial factor" in this remediation, such that it can be held liable for the damage. UCC's alleged involvement includes providing input on a plan for acid sludge disposal, devising and implementing a plan for soil-washing, developing rehabilitation strategies and standards, holding meetings, and participating in the creation of the landfill in the third evaporation pond. (Pl. Oppo. Br. at 24.)

First, Plaintiffs claim that "UCIL's request of UCC for an 'on-site joint review . . . to finalize [an acid sludge

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disposal] action plan,' suggests UCIL required UCC's input, if not approval." (Pl. Oppo. Br. at 24 (citing Heck Aff. Ex. H at A-263).) The problem with this theory is that there is no evidence such a review ever actually occurred. Indeed, UCC had advised UCIL the prior year that it had "no additional advice to offer for removal of the sludge" aside from forwarding UCIL recommendations it had obtained from other entities. (Heck Aff. Ex. H at A-258-59.)

Second, Plaintiffs assert that "UCC's soil-washing plan for the ponds was implemented." (Pl. Oppo. Br. at 24.) However, neither the amended complaint nor Plaintiffs' brief attributes any pollution or other damage to soil-washing. Indeed, the evidentiary record indicates that the pumping and soil-washing had no environmentally destructive effects. (Heck Aff. Ex. U at A-3570.)

Third, Plaintiffs claim that UCC "developed clean-up standards and a rehabilitation strategy" for the Bhopal site. (Pl. Oppo. Br. at 24; see also id. at 12 (citing Heck Aff. Ex. I at A-498-501).) But in fact, the UCC memorandum cited by Plaintiffs confirms that UCIL would appoint the National Environmental Engineering Research Institute ("NEERI") in tandem with consultant Arthur D. Little "to initiate their assessment of both the major site and ponds and develop . . . a remediation

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strategy for both locations." (Heck Aff. Ex. I at A-499.) NEERI had previously been retained by the Government of Madhya Pradesh to investigate the environmental damage caused by waste disposal in the evaporation ponds and to propose decontamination procedures. (Heck Aff. Ex. K at A-992.) After UCIL developed a remediation program for the ponds with NEERI and Arthur D. Little, the memorandum states that "UCIL, using contractors and in accord with NEERI/ADL direction [would] implement remediation." (Id. at A-500.) Other internal documents confirm that "responsibility for the investigation of and any future rehabilitation of the Bhopal site rests with the affiliate, UCIL." (Heck Aff. Ex. I at A-373.)

Fourth, Plaintiffs point to the fact that meetings about remediation were held at UCC. The evidentiary record indicates that on several occasions, employees of each company attended or planned to attend meetings concerning the progress of the Bhopal site rehabilitation. See, e.g., Heck Aff. Ex. H at A-270 (report from a June 1989 meeting in South Charleston); Heck Aff. Ex. I at A-384 (proposing an August 1990 meeting in Danbury). Another document suggests that UCC made its scientists available to UCIL employees to familiarize them with the procedures and instruments used in clean-up work generally. (Heck Aff. Ex. I at A-398-400.) But Plaintiffs point to nothing in the record about

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these meetings which would support a finding that UCC was a "substantial factor" in causing a tort.

Fifth and finally, Plaintiffs attempt to attach liability to UCC in connection with the conversion of the third evaporation pond into a landfill. (Pl. Oppo. Br. at 24.) The amended complaint alleges that this landfill "has been, and continues to be, one of the primary sources of contamination spreading through the underground aquifer in and around the UCIL premises." (Amended Compl. ¶ 106.) But Plaintiffs concede that the idea for converting the pond into a landfill was proposed not by UCC but rather by NEERI. (Pl. Oppo. Br. at 12-13 (citing Heck Aff. Ex. U at A-3647-49); accord Amended Compl. ¶ 105.) This was consistent with NEERI's earlier recommendation that the third pond "be converted into a secure landfill to contain the sediments and contaminated soil leaving 11 hectares of SEP area for reuse." (Heck Aff. Ex. K at A-992.)

Nor do Plaintiffs substantiate their conclusory allegation that "UCC participated in the landfill's creation." (Pl. Oppo. Br. at 24.) After NEERI again recommended the landfill strategy in 1992, the Madhya Pradesh Pollution Control Board issued an order directing the conversion of the third pond into a landfill. (Heck Aff. Ex. I at A-573). Thus, the decision to bury toxic waste in the former evaporation pond was proposed by

NEERI and mandated by the Government of India. On this record, no reasonable juror could hold UCC liable for the problems that arose out of the landfill.

5. UCC's Approval of the Bhopal Plant's Back-Integration

Although Plaintiffs allege that UCC approved the back-integration of the UCIL plant, see Pl. Oppo. Br. at 3, they apparently do not contend that such acquiescence was itself a cause of their damages, see generally id. at 15-24. Nevertheless, in an abundance of caution, the Court notes that such a contention would fail.

As mentioned earlier, the Bhopal Plant originally formulated pesticides but did not manufacture them. After the Indian government began "requir[ing] that local manufacture replace imports as soon as feasible" (Heck Aff. Ex. H at A-105), UCIL proposed back-integrating the Bhopal Plant to manufacture pesticides. Plaintiffs' amended complaint recognizes that the back-integration plan originated with UCIL. See Amended Compl. ¶ 48; accord Heck Aff. Ex. O at A-1888-89 (UCIL's 1973 back-integration proposal).

UCC's Management Committee "endorsed" UCIL's proposal on December 10, 1973. (Heck Aff. Ex. H at A-171-72.) Given the transformative nature of the plan, and the fact that it proposed to reduce UCC's equity stake in UCIL, such review is not

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surprising. It is also not tortious conduct. Furthermore, nothing in the 1973 Capital Budget Proposal, the minutes of the UCC Management Committee meeting in which UCC endorsed the Capital Budget Proposal, or the 1977 Review of the Capital Budget Proposal suggests that UCC participated in any polluting activity. Rather, as has been discussed, these documents indicate that the manufacturing processes and waste disposal systems to be implemented at the Bhopal Plant were all initially proposed by UCIL. (Heck Aff. Ex. O at A-1916-18, A-1924-26.)

C. Judgment for Defendant Madhya Pradesh State Is Warranted

As mentioned earlier, Plaintiffs' amended complaint added the Indian state of Madhya Pradesh, which owns the site of the former Bhopal Plant, as a defendant. The only relief Plaintiffs seek against Madhya Pradesh is an injunction directing them to cooperate in clean-up of the site ordered by this Court against UCC. Because I conclude that there is no basis to hold UCC liable for Plaintiffs' damage, there will be no court-ordered cleanup in this action, and thus, no basis for enjoining Madhya Pradesh. It is therefore appropriate to enter judgment in favor of the state on Count VII of the amended complaint.

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IV. Conclusion

For the foregoing reasons, Defendant UCC's motion for summary judgment is granted. Judgment is entered for UCC on Counts I through VI of the amended complaint. Plaintiffs' motions relating to the deposition of Couvaras are denied. Judgment is also entered for Defendant Madhya Pradesh State on Count VII of the amended complaint. The Clerk of Court is respectfully directed to close this case.

SO ORDERED.

Dated: New York, New York
July 30, 2014

John F. Keenan
United States District Judge

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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Jagarnath Sahu, et al.,

Plaintiffs,

-against-

Union Carbide Corporation and
Madhya Pradesh State,

Defendants.

----------X

07 **CIVIL** 2156 (JFK)

JUDGMENT

Defendant Union Carbide Corporation ("UCC") having moved for summary judgment (Doc. #40) pursuant to Fed. R. Civ. P. 56, Plaintiffs move under Rule 56 (d) for a "continuation" of UCC's summary judgment motion to allow them to take the deposition of Lucas John Couvaras, a former employee of UCC and of its former affiliate, Union Carbide India Limited ("UCIL"), and Plaintiffs also move under Rules 26 (d) and 30 (a) to take an early deposition of Couvaras, and the matter having come before the Honorable John F. Keenan, United States District Judge, and the Court, on July 30, 2014, having rendered its Opinion & Order (Doc. #71) granting Defendant UCC's motion for summary judgment and entering judgment for UCC on Counts I through VI of the amended complaint. Plaintiffs' motions relating to the deposition of Couvaras are denied and also entering judgment for Defendant Madhya Pradesh State on Count VII of the amended complaint and directing the Clerk of Court to respectfully close the case, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Opinion & Order dated July 30, 2014, Defendant UCC's motion for summary judgment is granted. Judgment is entered for UCC on Counts I through VI of the amended complaint. Plaintiffs' motions relating to the deposition of Couvaras are denied. Judgment is also entered for

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Defendant Madhya Pradesh State on Count VII of the amended complaint; accordingly, the case is closed.

Dated: New York, New York
July 30, 2014

RUBY J. KRAJICK

Clerk of Court

BY: K. Mango

Deputy Clerk