

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CURATIVE PETITION (C) NO. 345-347 OF 2011

IN THE MATTER OF:

UNION OF INDIA

...PETITIONERS

VERSUS

M/S UNION CARBIDE CORPORATION AND ORS.

...RESPONDENTS

AND IN THE MATTER OF:

BHOPAL GAS PEEDITH MAHILA STATIONARY

KARAMCHARI SANGH

...APPLICANTS

VERSUS

M/S UNION CARBID CORPORATION AND ORS.

...RESPONDENTS

AFFADAVIT OF PHILIP LOCHNER
CONCERNING THE AVAILABILITY OF ASSETS AFTER IMPLEMENTATION
OF MERGER AGREEMENT BETWEEN DOW CHEMICAL COMPANY
AND E. I. DUPONT NEMOURS & CO.

JULY 27, 2017

Philip R. Lochner, Jr., LLB, Ph.D.

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DECLARATION OF PHILIP R. LOCHNER

I, Philip Lochner, LLB, Ph.D., hereby solemnly affirm and state as follows:

I. Scope and Purpose

1. I have served as Commissioner of the United States Securities and Exchange Commission, board member of Time Warner Inc, and Associate Dean at The State University of New York Law School. In all, I have accumulated more than four decades of legal, managerial, regulatory and corporate governance experience. Further details about my background and qualifications are set forth in PART II below.
2. I understand that on February 28, 2011, this Honorable Court agreed to hear and adjudicate a "curative" petition filed by the Union of India ("Petitioner"), thereafter joined by the Indian human rights groups *Bhopal Gas Peedith Sangharsh Sahyog Samiti* (BGPSSS), *Bhopal Gas Peedith Mahi/a Udyog Sangathan* (BGPMUS), and *Bhopal Group for Information and Action* (BGIA) (together, "Applicants"), seeking to cure, amend, or if necessary, vitiate and renegotiate the 1989 Bhopal settlement agreement in light of new information about the scale of deaths and injuries suffered by area communities, and other new developments. The Petitioner and Applicants named as defendants Union Carbide India Limited ("UCIL"), its U.S. parent Union Carbide Corporation ("UCC"), and The Dow Chemical Company ("Dow"), which merged with or acquired UCC in 2001.
3. I understand that in both public and legal responses to the curative petition both Dow and UCC have indicated that they intend to resist the Supreme court's jurisdiction on the basis inter alia of arguments on corporate limited liability and separate legal personality. In contrast, I understand that Applicants intend to argue that (1) any alleged separateness, or "corporate veil," between UCIL and UCC should be disregarded, or "pierced," and (2) that Dow should be considered to have fully inherited UCC's liabilities along with its assets in the 2001 transaction.
4. I further understand that on 11th December, 2015, Dow and E. I. du Pont de Nemours and Company ("DuPont") announced they had "entered into a definitive agreement under which Dow will combine with DuPont". I understand that Applicants are apprehensive, given arguments raised within responses of Dow and UCC to this Court, that the merger of Dow and DuPont may raise additional limited liability and separate legal personality doctrinal barriers, and that a proposed post-merger division of Dow-Dupont into three separate Spin-Off companies may create further complexity, leading to a dissipation and/or effective removal of assets required to be available to satisfy potential findings of liability against each defendant by this Court.
5. I understand that these issues will be examined and adjudicated by this Court in accordance with applicable Indian law, and also that in respect to veil piercing and successor liability, Indian law is in many respects consonant with U.S. law. Accordingly, Applicants have requested me to appear before this Court through this affidavit to offer what insights I can to assist this Court in determining whether the

pending merger of Dow and DuPont is likely to generate barriers impermeable enough to frustrate the will of this Court in seeking to remedy the alleged insufficiency of proportionate restitution afforded to Bhopal victims.

6. As set forth below, I believe that it is important that this Court understand that the proposed triangular merger between Dow and DuPont and its consolidated subsidiaries promises at best a great deal of uncertainty regarding the future availability of assets to satisfy a potential judgment, that this Court be aware that Dow and DuPont have not publicly acknowledged liabilities pending within this Court and do not appear to have taken reliable measures to preserve assets to meet these liabilities that would inspire confidence in involuntary creditors, and that it may therefore be prudent and pragmatic for this Court to consider instructing Dow to maintain a sufficient amount of assets in India by which to meet potential findings by this Court.

II. Background and Qualifications

1. I have more than four decades of legal, managerial, regulatory and corporate governance experience, including service on the boards of a wide range of public and private companies and nonprofit organizations. I was an Associate Dean and Assistant Professor of Law at The State University of New York Law School. I spent nearly 2 decades at Time Inc. and Time Warner Inc. where I served various legal and administrative positions, including Vice President, General Counsel and Secretary.
2. I served as Commissioner of the United States Securities and Exchange Commission from 1990 to 1991 and have extensive regulatory and corporate governance experience.
3. I served as a member of the Board of Governors of the National Association of Securities Dealers; as a member of the Legal Advisory Committee of the New York Stock Exchange and as a member of the Boards of Directors of the Investor Responsibility Research Center, a proxy voting and governance research organization and the National Association of Corporate Directors. I served as Governor and Member of the Board of Directors of American Stock Exchange LLC.
4. I was a Fulbright Fellow at the University of London. I hold a Bachelor of Arts Degree from Yale College (1964), a Bachelor of Law Degree from Yale Law School (1967) and a Ph.D. from Stanford University (1971).
5. I have not been compensated in any way for the making or submission of this affidavit.

III. Opinion

1. The Merger Agreement between Dow and DuPont (“Agreement”) is largely silent with respect to any liabilities either Dow or DuPont may have as of the February 2017 SEC filing, other than to refer to previous SEC filings and financial statements by each company, and to affirm that such liabilities are not material to Dow or DuPont. Moreover, the most recent Dow Form 10-K filed with the SEC (10-K), which includes Dow’s 2016 year-end financial statements¹, does not disclose any liabilities material to Dow arising from the Bhopal incident.
2. Liabilities that are undeclared in pre-merger SEC filings can become significantly material to a company’s valuation and earnings post-merger. In the case of the merger between Dow and UCC, Dow reorganized its relationship with UCC in a manner that could shield assets from legitimate pending claims, which would include UCC’s potential liabilities in Bhopal.
3. Settlement of historical UCC asbestos liabilities caused Dow’s stock to fall 30% and wiped out \$7.16 billion from the company’s equity, necessitating an \$828 million pre-tax charge to Dow’s 2002 earnings². Dow subsequently provided UCC with a secured credit line, an action that confers upon Dow a first-priority claim on UCC’s assets in the event claims are large enough to cause UCC to seek bankruptcy protection. This reorganized structure, which takes the form of a revolving loan and credit agreement, affords UCC access to Dow funds for its “daily working capital”.
4. Significantly, under the terms of these arrangements, Dow is able to withdraw capital from UCC in 30 days or less, potentially leaving UCC unable to meet obligations to Applicants. If, claims in this petition were to overwhelm UCC’s current assets, Dow could simply fail to reauthorize its revolving loan, thus markedly reducing UCC’s available capital.
5. Most important to note is that after the merger is effected, there is nothing in the Agreement to prevent DowDuPont, the consolidated company, from moving assets between what would then be its consolidated subsidiaries. Thus DowDuPont could move all existing Dow assets to DuPont, leaving Dow without any assets against which Applicants could proceed.
6. Dow and DuPont have publicly announced that, after the merger, they currently intend to divide DowDuPont into three separate and independent public companies (“Spin-Off Companies”), and that then current shareholders of DowDuPont would become shareholders of the three Spin-Off Companies instead of being shareholders of DowDuPont, which would no longer be an operating company.

¹ The Dow Chemical Company, Annual Report (Form 10-K), Securities and Exchange Commission, December 31, 2016, available at <http://www.dow.com/-/media/dow/business-units/dow-us/pdf/dow-2016-10k-wrap.ashx?la=en-us>

² The Dow Chemical Company, 2002 Annual Report, at 5, 2002, available at http://www.annualreports.com/HostedData/AnnualReportArchive/t/NYSE_DOW_2002.pdf.

7. As the plans for the Spin-Off Companies are not specific and have not been reduced to binding legal agreements, it is unclear how existing Dow and DuPont liabilities would be divided among the Spin-Off Companies. It should be noted that Dow and DuPont have stated that the Spin-Off Companies would be unlikely to take place until 2017 or 2018, or may never take place. Thus, it is unclear and unpredictable now and it is likely to remain unclear and unpredictable, where the Applicants would turn to collect on any judgment they are successful in obtaining.
8. Finally, with respect to the current status of the Respondent, UCC, it is not apparent from the Agreement or the 10-K whether Dow acknowledges potential UCC liability, despite the matter pending before the Supreme Court of India. The UCC financials reflect no material liabilities regarding the Bhopal litigation and only account for those proceeding from asbestos litigation to which UCC has been subject to and which is similar in material particularities to the Bhopal litigation, not least as it concerns legacy issues that predate the merger of UCC and Dow.
9. It is possible that such asbestos litigation could cause losses sufficient to cause UCC to seek bankruptcy protection, as has happened to several other unrelated companies with material asbestos liabilities. If that were to happen, under United States Bankruptcy Law, the Applicants could find it practically impossible to have a court judgment satisfied, due in part to Dow having secured \$1 billion of UCC assets for itself in the event of a bankruptcy declaration.
10. An affidavit by Harvard Professor Guhan Subramanian, submitted in the Madhya Pradesh High Court in 2010 on behalf of Dow ("Subramanian affidavit")³, attests that the technical form of its merger with UCC, a triangular merger, ensures limited liability and partition of assets and, in this way, preserves a 'liability shield' between Dow and UCC. Professor Subramanian argues that to make Dow responsible for satisfying UCC's liabilities would therefore be to disregard essential elements of the corporate form. The Subramanian affidavit omits mention of veil-piercing, an accepted feature of corporate law that can, under certain circumstances, permit courts to 'disregard essential elements of the corporate form'. It also fails to acknowledge the material costs previously admitted by Dow with respect to UCC's asbestos liability. Dow's management is not treating the asbestos and Bhopal liabilities equally.

IV. Conclusion

1. The proposed triangular merger between Dow and DuPont and its consolidated subsidiaries promises at best a great deal of uncertainty regarding the future availability of assets to satisfy a potential judgment. What is certain is that the proposed merger is likely to make it far more difficult to collect a future judgment. In fact the corporate

³ Affidavit of Professor Guhan Subramanian, on behalf of respondent no.4, The Dow Chemical Company, USA, in the High Court of Madhya Pradesh, Jabalpur, WP No.2802 of 2004, verified at Cambridge, Massachusetts, USA on the 29th November, 2010."

parties could in the end orchestrate other merger options that make it even harder to meet the current potential liabilities, should they become actual liabilities.

2. The fact that since its merger with UCC, Dow has failed to disclose any potential liability with regard to the Bhopal disaster in its SEC filings may imply a differential treatment of First World and Developing World liabilities.
3. Prudence and pragmatism would instruct this Court to at least order Dow to maintain a sufficient amount of assets in India and submit proof thereof to the Court pending resolution of the Appellants' claims.

County of: FAIRFIELD

State of: CONNECTICUT

Country: UNITED STATES OF AMERICA

Before me, the undersigned notary public, this day, personally, appeared PHILIP LOCHNER JR (name of affiant) to me known, who being duly sworn according to law, deposes the following:

I declare that the foregoing is a true statement of my independent professional opinion.

Philip R. Lochner, Jr.

(Signature of Affiant)

Philip R. Lochner, Jr.

(Name of Affiant)

Subscribed and sworn to before me this 31ST day of JULY, 2017.

[Signature]

Notary Public

