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PLAINTIFF'S EXHIBIT

DOW-2893

October 23, 2000

Re: Cause No. 98-07074-J; *B.F. Angell, et al vs. Owens Corning Fiberglass, et al*; In the 191st Judicial District Court of Dallas County, Texas (M/W No. 0829-0115; Dow No. 9900475)

Ms. Stephanie Finch
BARON & BUDD, P.C.
3102 Oak Lawn Ave., Suite 1100
Dallas, Texas 75219

Via Federal Express

Dear Stephanie:

I am enclosing a copy of a Motion for Summary Judgment that Dow filed in another case when they were sued, alleging that they were a successor to Dow Badische. This sets out the corporate history very well. I am also enclosing copies of some of the exhibits to that motion which are of relevance, including some affidavits.

As you can see from this, Dow Badische was a separate corporation, and was operated as a separate corporation. The stock was owned 50% by Dow and 50% by BASF. When Dow sold its interest to a BASF subsidiary in 1978, it was a simple stock transaction, and there was no retention of liabilities by Dow. Based upon these, I hope that it is clear that BASF is the proper successor to sue for Mr. Cortez's exposures that occurred at Dow Badische.

When you look at the testimony that he gave, he was only at Dow for one year, primarily working as a foreman.

If you have any questions concerning this, please do not hesitate to give me a call. Obviously, the name is a confusing matter, and you are probably going to have other clients who are going to talk about Dow Badische as being a place of employment, and I am sure you will be wanting to add BASF as a defendant. In fact, if you need service information on them I can probably rustle that up for you as well.

Very truly yours,

Arthur R. Almquist /SDB

Arthur R. Almquist
For the Firm

ARA/sdb
Enclosure

MW/106980

file
Pleadings

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH CAROLINA

ANDERSON DIVISION

Dale and Emily Owen, Plaintiffs,	)	**CA No. 8:96-360-3**
vs.	)	**MOTION FOR SUMMARY JUDGMENT**
The Dow Chemical Company, Defendant.	)	

Pursuant to Federal Rule of Civil Procedure 56, defendant The Dow Chemical Company ("Dow") moves the Court for summary judgment on the grounds that there are no genuine issues as to any material facts and that Dow is entitled to judgment as a matter of law.

This motion is based on the pleadings, depositions, answers to discovery, together with the enclosed memorandum, affidavits and exhibits.

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Attorneys for Defendant
The Dow Chemical Company

July 22, 1996
Columbia, South Carolina

7/22/96

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON DIVISION

Dale and Emily Owen, Plaintiffs, v. Dow Chemical Company, Defendant.	CASE NUMBER: 8:96-360-3 MEMORANDUM IN SUPPORT OF DEFENDANT'S SUMMARY JUDGMENT MOTION

INTRODUCTION

Defendant the Dow Chemical Company ("Dow") submits the following memorandum in support of its Motion for Summary Judgment.

STATEMENT OF FACTS

1. Plaintiffs filed the present action against defendant The Dow Chemical Company ("Dow") on May 25, 1995 in the Anderson County Court of Common Pleas and served Dow on June 7, 1995. Plaintiffs Complaint alleges several causes of action against Dow, including, negligence, strict liability, trespass, nuisance, negligence per se and for injunctive relief. Plaintiffs seek actual and punitive damages, as well as medical monitoring costs and injunctive relief arising out of waste materials allegedly existing on their property located in Anderson, South Carolina (the "Site") (Complaint, Exhibit A).

2. Dow removed the present case to federal District Court for the District of South Carolina, Anderson Division on February 9, 1996.

3. On January 22, 1996, in response to plaintiffs'

discovery, Dow produced numerous documents in its possession which referenced "Dow-Badische." These records constitute all records in Dow's possession responsive to plaintiffs' Interrogatories and Document Production Requests located after a diligent search of Dow's corporate records conducted by or on behalf of Dow's in-house counsel (See attached Exhibit B, Affidavit of Michael T. Kay).

4. Attached as Exhibit C are excerpts of true and correct copies of Dow's Board of Director and Executive Committee meeting minutes produced to plaintiffs on January 22, 1994.

5. In their Complaint, plaintiffs do not allege that Dow deposited any waste on the Site. Rather, plaintiffs allege that Dow's "predecessors in interest wrongfully disposed of certain industrial waste substances on [the Site]." (Exh. A, ¶ 9). According to their Complaint, this alleged predecessor in interest was Dow-Badische Company (hereinafter referred to as "Dow-Badische"), a chemical company which operated a synthetic fiber manufacturing plant from 1966 to 1978 in Anderson (Exh. A, ¶ 2).

6. Dow-Badische Chemical Company (changed in 1966 to "Dow-Badische Company") was duly incorporated under the laws of Delaware on or about May 16, 1958, with Dow and BASF Overzee N.V. ("BASF") owning equal shares of its stock. (Exhibit D, Certificate of Incorporation of Dow Badische Chemical Company).

7. Dow-Badische's operations expanded from one manufacturing site located in Freeport, Texas in 1958 to numerous manufacturing facilities located in Williamsburg, Virginia, Anderson, South Carolina, Europe and various subsidiaries by 1978. (See Exh. C.,

Bates # Dow 201-204, 307, 311).

8. Dow-Badische was formed and incorporated pursuant to an agreement dated April 2, 1958 between Dow and BASF (the "Formation Agreement," attached hereto as Exhibit E). See also, Exh. C, Bates # Dow 25-26. The initial purpose of forming this new, independent company was to engage in the manufacture and sale of acrylic products, primarily based upon technology provided by its BASF parent (See Exh. E, Article VI; and the Affidavit of Earle B. Barnes, ¶ 5, attached hereto as Exhibit F). Dow and BASF, as equal shareholders, were required to have equal representation on Dow-Badische's Board of Directors (Exh. E, Art. V).

9. Pursuant to the Formation Agreement, Dow-Badische was not restricted in the scope of its operations or business, but instead was permitted to engage in any business enterprise its Board of Directors saw fit (Exh. E, Art. VI; See also Exh. D, Art. III). Moreover, the Formation Agreement specifically contemplated and authorized Dow-Badische to engage in business endeavors that would compete with those of its parents, Dow and BASF (Exh. E, Art. XII).

10. Among other things, the Formation Agreement called for Dow to enter into contracts with Dow-Badische for the provision of materials, supplies and services required for the operation of Dow-Badische's plant at "market prices prevailing from time to time..." (Exh. E, Art. X). In addition, the Formation Agreement contemplated that Dow would provide marketing services to Dow-Badische and licensing for patent rights and certain technical information, all for adequate compensation (Exh. E, Art. VIII, IX).

11. From 1958 - 1978, Dow and Dow-Badische entered into a number of contracts with one another for Dow to supply to Dow-Badische numerous services, raw materials, technology licenses and real property at then prevailing market rates. Copies of contracts and related correspondence between Dow and Dow-Badische in Dow's possession and produced to plaintiffs on January 22, 1996 are attached as Exhibit G. (See also, Exh. C, Bates # 46-49,63,69,75-77, 101-102, 110-121, 135-137, 138-140, 142-144, 152-153, 165-166, 168-169, 173-177, 181-183, 191-193, 207, 209, 211-216, 288-289).

12. Throughout its corporate existence as "Dow-Badische," Dow-Badische held and kept minutes of regular quarterly Board of Director meetings and annual Shareholder meetings. (See. Exh. F, ¶ 7, and Affidavit of William A. Groening, ¶ 3, attached hereto as Exhibit H).

13. According to Dow-Badische's Chairman of the Board from 1958 to 1978, Earle B. Barnes, Dow-Badische maintained its own accounting and financial records, held bank accounts in its own name, prepared and filed its own annual tax returns and generally observed all requisite corporate formalities during its entire corporate life (Exh. F, ¶ 8).

14. Dow-Badische paid reasonable dividends to its shareholders in at least three years during its life. In addition, consistent with Dow-Badische's existence as a separate and independent company, Dow-Badische was not fully consolidated into Dow for financial purposes, but instead was consolidated on the equity method of accounting. Exhibit I, Dow's Documentation of

Final Consolidation Entries for 1973.

15. On or about May 8, 1978, Dow sold all of its shares of Dow-Badische stock to Luchem Corporation, a BASF affiliated company. Under the Dow/Luchem Stock Purchase Agreement, attached hereto as Exhibit J, Dow neither assumed nor retained any liabilities of Dow-Badische. BASF currently owns and operates the former Dow-Badische Anderson, South Carolina facility whose alleged disposals on plaintiffs' property give rise to the instant suit.

16. Plaintiffs purchased the Site in 1976 from James and Effie Nix. "Several months" prior to October 1991, while plowing the fields at the Site, plaintiffs discovered "a lot of fiber, large chunks of plastic, drums of plastic, fabric and many other items" buried on the Site. These other items included a 55 gallon drum containing a "liquid with a strong odor." Plaintiffs subsequently contacted Owens-Corning Fiberglass and Mr. Larry Walker, BASF's Safety and Ecology Manager for BASF's Anderson, South Carolina plant on September 30, 1991 to discuss their findings. Mr. Walker visited the Site on October 1, 1991 and contemporaneously reported his observations and the substance of his conversation with plaintiffs in a letter to BASF corporate environmental counsel. Mr. Walker's letter is attached hereto as Exhibit K. Among other things, Mr. Walker reported that he observed "two drums . . . that were partially exposed and full of a white solid plastic," as well as "two pirn caps with 'Dow-Badische' imprinted on them." (Exh. K).

17. Plaintiffs contacted the South Carolina Department of

Health and Environmental Control ("DHEC") in October 1991 to report the apparent disposals on the Site. DHEC personnel visited the site and recorded their findings in a DHEC Site Discovery Form (See attached *Exhibits L and M*, the Site Discovery Form and internal DHEC memos dated May 1, 1992, and April 4, 1995 respectively). Among other things, DHEC reported that they observed while at the Site, "five drums...full of a hardened white resin material...[and]...waste such as nylon fibers and fiberglass." (Exh. M). Following the initial visits, DHEC apparently evaluated the Site for inclusion in the federal Comprehensive Environmental Response, Compensation and Liability Act, 42 USCA § 9601 et. seq. ("CERCLA," or more commonly known as "Superfund") program (Exh. M).

18. Mr. James Nix was deposed during discovery in a related suit filed by the plaintiffs against the Nixes and BASF in the South Carolina State Anderson County Court of Common Pleas Court, entitled Dale and Emily Owens v. BASF, et al., 39-CP-04-1302.[1] Excerpts of Mr. Nix's deposition are attached hereto as *Exhibit N*. In his deposition, Mr. Nix testified that sometime in 1968 he was contacted by an unidentified man who requested permission from him to place "mostly cafe stuff...stuff [that] will rot" in a gully located on Mr. Nix's property. Mr. Nix consented to the man's request. Approximately two weeks later, the man began dumping loads of waste on the Site (Exh. N, p. 11). Mr. Nix stated that the unidentified man did not identify himself as an employee of

[1]This suit is still currently pending in State Court against BASF. Plaintiffs have made similar allegations against BASF as they have asserted against Dow in this litigation.

Dow-Badische, nor did the truck the man used for his disposals at the Site bear any markings or other indications that Dow-Badische owned the vehicle (Exh. N, pp. 60,61).

19. In his deposition, Mr. Nix also testified that he personally observed these disposals on three or four occasions (Exh. N, p. 22), and that the disposals continued for approximately six months in 1968 (Exh. N, p. 56). Mr. Nix stated that he knew that the disposals took place in 1968 because that was the time that his son was away in military service (Exh. N, p. 26) and because he recalled that the disposals took place prior to his purchasing a new 1968 car (Exh. N, p. 35).

20. To date, no hazardous, dangerous, unhealthy or unsafe materials have been found on the Site. On February 13, 1996, DHEC completed a detailed Site investigation, which included "a review of available file information, a site reconnaissance, and environmental sampling, and a thorough target survey." See Site investigation report attached hereto as Exhibit O, hereinafter referred to as "DHEC Study." The DHEC Study found a "lack of detected contamination" and observed no release into the environment. Sampling revealed no organic compounds on the property, and only low levels of a few metals were detected (Exh. O, p. 6). However, all metals detected were "at levels below their established health-based benchmark." (Exh. O, p. 3).

LEGAL ARGUMENT

I. PLAINTIFFS' COMPLAINT DOES NOT ALLEGE AND THERE IS NO EVIDENCE DEMONSTRATING A FACTUAL BASIS JUSTIFYING PIERCING DOW

BADISCHE'S CORPORATE VEIL TO HOLD DOW, A SEPARATE, INDEPENDENT CORPORATION, LIABLE FOR THE ALLEGED ACTS OR OMISSIONS OF DOW BADISCHE.

Plaintiffs' claims do not allege injury as a result of any action of Dow. Rather, the plaintiffs allege that Dow, "by and through their predecessors in interest, [Dow-Badische] wrongfully disposed of certain industrial waste substances on Plaintiffs' property." (Exhibit A, Plaintiffs' Complaint, ¶ 9). Plaintiffs' complaint asserts that Dow is a responsible predecessor because "Dow previously owned a major interest in Dow-Badische, the corporation which caused most of the damage complained of herein." (Exh. A, ¶ 2). Dow's ownership of shares of Dow-Badische does not make Dow liable for Dow-Badische's acts or debts. Delaware Corp. Laws Ann. §§ 102(b)(6), 282. Any liability of Dow-Badische can be imputed to Dow only by disregarding Dow-Badische's corporate form.

After over one year of discovery in this case, which included Dow's responses to Plaintiffs' Interrogatories and Request for Production of Documents, as well as numerous depositions of fact witnesses, plaintiffs have produced *not one thread of evidence* that would tend to support, let alone justify, piercing Dow-Badische's corporate veil to hold one of its shareholders, Dow, responsible for Dow-Badische's alleged waste disposal on plaintiff's property.[2]

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[2]Moreover, it is clear that plaintiffs do not seriously contend that Dow is responsible for Dow-Badische's alleged past acts. With less than one month before the trial term which includes this matter begins, plaintiffs have only served Dow with several interrogatories and Document Production Requests seeking information potentially relevant to a corporate veil analysis. In November 1995, in an effort to inform plaintiffs that in suing Dow, they perhaps mistakenly sued the wrong party, Dow provided plaintiffs with a number of Dow-Badische corporate documents and

Based on the evidence there is no genuine issue of any material fact with respect to the adequacy of Dow-Badische's corporate veil. Therefore, as a matter of law, Dow is entitled to summary judgment on all of plaintiffs' asserted causes of action.

A. Standard of Review

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, admissions and affidavits, if any, demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.Proc. 56. The rule mandates the entry of summary judgment when a party fails to make a showing sufficient to establish the existence of an essential element of that party's case, and on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 323 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). To create a genuine issue of material fact, the party opposing the motion must raise more than metaphysical doubt as to the material facts. When the record taken as a whole could not lead a rational person to find for the non-moving party, there is no genuine issue for trial. Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

Federal Rule of Civil Procedure 56(b) provides that "a party

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the affidavit of Dow-Badische's Chairman of the Board of Directors, Earle Barnes (Exh. F) (See Affidavit of Michael Kay, Exh. B). These documents, as well as the documents produced pursuant to plaintiffs' discovery requests identify a number of individuals who may have information relevant to the formation and operations of Dow-Badische, as well as its dealings with Dow. Plaintiffs have not contacted or attempted to depose any of these individuals.

against whom a claim . . . is asserted . . . may, at any time, move . . . for summary judgment in his favor as to all or any part thereof." Indeed, the plain language of Rule 56 requires that summary judgment "shall be rendered" if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(e) then specifies that when a summary judgment motion is made and properly supported, the burden of proof shifts to the opposing party; and that in shouldering his burden,

> [he] may not rest upon mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

The Fourth Circuit has not hesitated to uphold summary judgment under these provisions where a defendant specifically established the legal insufficiency of the allegations against him. See, e.g., Hester v. Martindale-Hubbell, Inc., 659 F.2d 433 (4th Cir. 1981), cert. denied, 455 U.S. 981 (1982); Principle v. McDonald's Corp., 631 F.2d 303 (4th Cir. 1980).

The burden upon the party opposing the motion is not a light one:

> [He] simply cannot make a secret of his evidence until the trial, for in doing so he risks the possibility that there will be no trial. A summary judgment motion is intended to "smoke out" the facts so that the judge can decide if anything remains for trial.

Donnelly v. Guion, 467 F.2d 290, 293 (2d Cir. 1972). The Fourth Circuit has recognized in a similar vein that the,

> [opposing] party must provide specific facts showing that there is a genuine issue for trial, rather than resting upon bald

> assertions of pleading; genuine, issue means that evidence must create a fair doubt, and wholly speculative assertions will not suffice.

Ross v. Communications Satellite Corp., 759 F.2d 355 (4th Cir. 1985). Failure of the opposing party to come forward with "significant probative evidence that a genuine issue of (material) fact exists . . .," will necessitate the entry of judgment against him. Joe Requeira, inc. v. American Distilling Co., Inc., 642 F.2d 826 (5th Cir. 1981) (emphasis added).

B. Plaintiffs Bear the Burden of Proving That Dow-Badische's Corporate Identity Should be Disregarded in Order to Impose Liability on Dow.

Dow-Badische's corporate records, as well as Dow Board of Directors and Executive Committee Meetings minutes and other various documents produced in this litigation which reference Dow-Badische, show that, at all times pertinent to these proceedings, Dow-Badische was a corporation duly formed and in good standing under the laws of Delaware, with power to own its assets and carry on its businesses. To prevail in its effort to hold Dow liable for the acts of Dow-Badische, plaintiff must persuade the court to disregard Dow-Badische's jural personality -- i.e. "pierce the corporate veil."

Plaintiff has the burden of proving that Dow-Badische's corporate identity should be disregarded in order to impose liability on Dow. Ball v. Canadian American Express Company, Inc., 314 S.C. 272, 442 S.E.2d 620, 623 (Ct. App. 1994), citing Sturkie v. Sifly, 280 S.C. 453, 313 S.E.2d 316 (Ct. App. 1984).

Because the plaintiff is asking the court to disregard a legal construct and ignore the shareholder's statutory protection from personal liability, "it is settled authority that the doctrine of piercing the corporate veil is not to be applied without substantial reflection." Sturkie, supra at 318, citing Baker v. Equitable Leasing Corp., 275 S.C. 359, 271 S.E.2d 596 (1980). The power to pierce the corporate veil is exercised "reluctantly" and "cautiously." DeWitt Truck Brokers v. W. Ray Flemming Fruit Co., 540 F.2d 681, 683 (4th Cir. 1976).

In order to carry its burden, plaintiff must meet a two-pronged test derived from DeWitt and adopted by the South Carolina Court of Appeals in Sturkie. The Sturkie test has been cited with approval by the South Carolina Supreme Court. Multimedia Publishing of South Carolina, Inc. v. Mullins, 314 S.C. 551, 431 S.E.2d 569, 571 (1993).[3]

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[3] For purposes of this Summary Judgment Motion only, we assume that South Carolina law applies to assess Dow-Badische's corporate veil. However, because Dow-Badische was duly incorporated under the laws of the State of Delaware, Delaware's substantive law arguably applies to the issue of whether Dow-Badische's corporate veil can be pierced to hold one of its shareholders, Dow, responsible for the past acts or omissions of Dow-Badische (see, e.g., Restatement 2(d) Conflict of Laws § 307 (1971) - "law of the state of incorporation will be applied to determine the existence and extent of the shareholder's liability"). However, both state's laws in this regard are substantially similar and the result of applying either to the facts at hand is the same, i.e., Dow-Badische's corporate veil cannot be pierced to hold Dow liable for plaintiffs' claims. See e.g. Harco National Insurance Co. v. Green Farms, Inc., 15 Del. J. Corp. L. 1030, 1989 WL 110537 (Del. Ch. 1989) (reciting relevant factors in undertaking veil piercing analysis under an alter ego theory: "These factors include whether the corporation was adequately capitalized for the corporate undertaking; whether the corporation was solvent; whether dividends were paid, corporate records kept, officer sand directors functioned properly, and other corporate formalities were observed; whether the dominant shareholder siphoned corporate funds; and whether, in general the

The first prong of the <u>Sturkie</u> test is an eight factor analysis of the defendant/shareholder's relationship to the corporation: (1) whether the corporation was grossly undercapitalized; (2) failure to observe corporate formalities; (3) non-payment of dividends; (4) insolvency of the corporation; (5) siphoning of funds of the corporation by the dominant stockholder; (6) non-functioning of officers or directors other than the dominant shareholder; (7) absence of records; and (8) whether the corporation was merely a facade for the operations of the dominant stockholder. <u>Cumberland Wood Products, Inc., v. Bennett</u>, 308 S.C. 268, 417 S.E.2d 617 (S.C. App. 1992). As discussed below, plaintiff does not allege any of these factors, and the evidence produced after over one year of discovery does not even support one of these factors.

The second prong requires plaintiff to demonstrate that fundamental unfairness will result from recognition of the corporate form. <u>Sturkie</u> at 457; See <u>Dewitt</u>, 540 F.2d at 687. <u>Sturkie</u> provides a two-step test to establish the requisite unfairness; First, the defendant must have been aware of the plaintiffs' claim against the corporation and, second, the defendant must have acted in a self-serving manner with regard to the property of the corporation and in disregard of the plaintiffs'

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corporation simply functioned as a facade for the dominant shareholder."). Delaware law also requires a showing of fraud or inequity. This fraud or inequity must directly result from the shareholder's purposeful manipulation of the corporate form. <u>See e.g., Mobil Oil Corp. v. Linear Films, Inc.</u>, 718 F.Supp. 260, 267-269 (D.Del 1989) <u>and Alberto v. Diversified Group, Inc.</u>, 55 F.2d201 (5th Cir. 1995).

claim in the property. 280 S.C. 453, 459, 313 S.E.2d 316, 319. Again, neither do plaintiffs allege any unfairness will result from recognizing Dow-Badische's corporate form nor does the evidence support any such unfairness.

C. Plaintiffs Have Produced No Evidence Justifying Piercing the Corporate Veil, Nor Can They.

In order to meet the first prong of Sturkie, not all eight factors must be present, but "a *number*" must be involved. Dumas v. InfoSafe Corp., ___ S.C. ___, ___, 463 S.E.2d 641, 644 (Ct. App. 1995). See also, Dewitt, 540 F.2d at 687. In the present case, plaintiffs have not alleged and the evidence indicates not even one of the elements can be satisfied.

1. Dow-Badische was not a mere instrumentality or alter ego of Dow, or a facade for Dow's operations.

The gist of the first prong of the corporate veil piercing test under Sturkie requires plaintiffs to demonstrate that Dow completely dominated and controlled Dow-Badische such that the latter has no independent existence separate and apart from Dow. Here, Dow owned 50% of Dow-Badische and had the power attendant upon such a shareholder interest. But such powers, inherent as they are in shareholder status, do not forfeit the protection of limited shareholder liability. To the contrary, as on leading treatise has explained.

> "The control necessary to invoke the rule is not majority or even complete stock control but such domination of finances, policies, and practices that the controlled corporation has, so to speak, no separate mind, will, or existence of its own, and is but a conduit for its principal."

Fletcher, Cyclopedia of Private Corporations § 43.10, at 748 (1990). Nearly all jurisdictions have made it clear that the control inherent in the parent-subsidiary relationship is not sufficient grounds to disregard the corporate veil. Truglia v. KFC Corp., 692 F. Supp 231, 275 (S.D. N.Y. 1988); aff'd. 875 F.2d 308 (2nd Ct. 1989); In Re: Silicon Gel Breast Implant Products Liability Litigation 837 F. Supp. 1128 (N.D. Ala 1993); Hargrave v. Fiberboard Corp., 710 F.2d 1154, 1162 (5th Cir. 1983).

The very notion that Dow-Badische is the alter ego or mere instrumentality of its former 50% shareholder, Dow, does not make conceptual sense on the facts of this case. The alter ego doctrine requires a showing that a parent corporation totally "absorbs" the subsidiary into its own enterprise. That is, control must be exercised so that there is a unity of interest between the parent and subsidiary and the subsidiary's separate corporate form is a "sham." The logical underpinning of this doctrine is that if two seemingly separate corporations are actually one, they forfeit the right to be treated as separate for liability purposes.

But, there could not be a "unity of interest" between Dow and Dow-Badische such that Dow-Badische was a mere conduit or alter ego of Dow because 50% of Dow-Badische's shares during its corporate life were held by BASF, a wholly separate, publicly owned corporation. And, indeed, the Complaint here does not even allege that Dow and Dow-Badische were alter egos of one another or that there was a unity of interest between them.

For related reasons, neither Dow nor BASF could have treated

Dow-Badische as its mere instrumentality. Similarly, Dow-Badische could not have been a facade for Dow's operations. The economic realities of a corporation with two equal and wholly separate shareholders are that neither shareholder could treat the subsidiary as its own without incurring the wrath of the other. If, for example, Dow used Dow-Badische's employees, facilities, or assets for its own purposes without providing adequate consideration, it would do so directly at the expense of BASF. The Complaint does not allege, nor does the evidence even suggest that Dow engaged in such conduct, it would be economically irrational for BASF to acquiesce in the plundering of its investment by an unrelated co-investor; and the courts are not constrained to assume that corporations act in economically irrational ways.[4]

2. Dow-Badische was adequately capitalized.

Under the mere instrumentality or alter ego veil piercing doctrines, whether a corporation is grossly undercapitalized is one of the factors considered that is universally given substantial weight. DeWitt Truck Brokers, Inc. v. Ray Flemming Fruit Company, 540 F.2d 681, 684 (4th Cir. 1976).[5] See, e.g., Anderson v. Abbott, 321 U.S. 349, 362 (1944).

Plaintiff does not allege, and records produced to plaintiffs

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[4]See, e.g. DeLeo v. Ernst & Young, 901 F.2d 624, 629 (7th Cir.) cert. denied, 111 S.Ct. 347 (1990); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

[5]"One fact which all the authorities consider significant ..., and particularly so in the case of the one-man or closely-held corporation, is whether the corporation was grossly undercapitalized for the purposes of the corporate undertaking." DeWitt at 684.

do not suggest, that Dow-Badische was undercapitalized. To the contrary, it is crystal clear that Dow-Badische's shareholders, Dow and BASF, contributed equal and substantial capital to Dow-Badische throughout the corporation's life. The formation agreement indicates that both BASF and Dow were required to each initially purchase $2 million worth of shares in Dow-Badische (Exh. E, Art. III)[6] Thereafter, Dow alone contributed staggering sums to ensure that Dow-Badische was adequately capitalized, through the purchase of stock as well as by contributing physical assets, such as Dow's Williamsburg, Virginia based synthetic fibers business (Exh. C, Bates # Dow 201-202). By way of example, between 1958 and 1978, Dow's corporate records indicate that Dow's Board of Directors authorized Dow's purchase of Dow-Badische stock in an amount exceeding $68 million (Exh. C, Bates # Dow 68-72, 228-230, 322, 328-329, 296). In order to comply with the formation agreement and maintain a 50:50 investors balance, BASF was required to purchase an equal number of shares.

In addition, Dow's corporate records indicate that Dow made substantial loans to Dow-Badische throughout its life. Again, by way of example, by 1970 Dow had made loans and advances to Dow-Badische in the amount of $38.3 million (Exh. C, Bates # Dow 288).[7]

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[6]Dow's Board of Director Meeting minutes of September 9, 1950 indicate that Dow and BASH's initial capital contributions were actually in the amount of $1 million each (Exh. C, Bates # Dow 29-31).

[7]In addition, Dow's records reflect that Dow's Board authorized a subsequent loan to Dow-Badische of $10 million in 1974 (Exh. C, Bates # Dow 331-332). The records indicate that Dow's loans to Dow-Badische were made at then prevailing market rates

Taken with the amount of capital Dow and BASF had contributed to Dow-Badische, it simply defies credulity to suggest that Dow-Badische was undercapitalized.[8]

Moreover, Dow-Badische developed from a single acrylic products manufacturing facility in Freeport, Texas in 1958, to an international multi-product business with facilities located in Williamsburg, Virginia; Anderson, South Carolina; Europe, and various subsidiary companies (Exh. C, Bates # Dow 208-209, 307, 389). It is difficult to fathom that this type of expansion could have occurred over Dow-Badische's 20 year life while at the same time being "grossly undercapitalized."

3. Dow-Badische observed all requisite corporate formalities.

Plaintiffs do not allege that Dow-Badische did not observe corporate formalities, nor could such an allegation be sustained. Dow-Badische held and kept minutes of regular quarterly board of Director meetings and annual Shareholder meetings, as described in the Groening Affidavit (Exh. H, ¶3) and the Barnes Affidavit (Exh. F, ¶7). In addition, the Chairman of Dow-Badische's Board of Directors from 1958-1978 stated in his sworn affidavit that Dow-Badische maintained its own accounting and financial records,

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(1967 $30 million loan authorization - annual interest rate of 6¼% payable quarterly on unpaid balance; 1974 $10 million authorization - 90 day notes at a fixed interest rate equal to prime + 1%).

[8] See Terry Apartments Assocs. v. Associated-East Mortgage Co., 337 A.2d 585 (Del. Ch. 1977) (noting that corporate veil between parent and subsidiary companies will not be ignored solely because the parent loaned the subsidiary money.)

maintained bank accounts in its own name and files its own tax returns (Barnes Aff., Exh. F, ¶8).[9,10]

In addition, Dow-Badische managed its own affairs, and dealt at arm's length with Dow. As the formation agreement makes clear, and Dow's records support, all of Dow-Badische's dealings with Dow were done on terms consistent with the prevailing market rates. Throughout its corporate existence, Dow-Badische entered into a number of contracts and contract amendments with Dow for various materials and services. Dow was compensated for these products and services at prevailing rates. (Exh. E, Exh. G)

4. Dow-Badische paid dividends when appropriate.

Again, Plaintiffs do not allege that Dow-Badische did not pay dividends. Dow's records indicate that Dow-Badische did, in fact, pay reasonable dividends to its shareholders, when appropriate. One Dow record located and produced to plaintiffs, excerpts from Dow's "Documentation of Final Consolidation Entries For 1973" (Exh. I, Bates #Dow 790-794), indicates that Dow-Badische paid out moderate dividends in three separate years between 1958-1973 (1964 - $105,000; 1965 - $1,005,000 and 1973 - $750,000).[11]

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[9] See, also, the minutes of Dow-Badische's First Board of Director's meeting, which indicates that the company opened a bank account in its own name with First National City Bank of New York (Exh. P).

[10] In addition, Dow-Badische was not fully consolidated on Dow's books, but rather was consolidated on the equity method of accounting (See Exh. I, Bates #792).

[11] These dividend payments are consistent with the state of Dow-Badische's business operations at the respective times. Like most fledgling businesses, there is a time gap between the operation's start up period and the generation of sufficient profits to justify

5. Dow-Badische was a solvent, thriving business throughout its corporate life.

Plaintiffs do not allege the Dow-Badische was insolvent at the time of the acts complained or at any time thereafter. The present record holds no hint that it was. To the contrary, as indicated above, Dow-Badische continually thrived and expanded from its inception in 1958 until 1978 when BASF assumed 100% ownership of its stock. In fact, any assertion to the contrary is belied by the fact that Dow-Badische's Anderson facility continues in operation today as BASF, Inc.

6. Dow did not siphon off funds from Dow-Badische, nor could it.

Plaintiff does not allege that Dow siphoned funds from Dow-Badische. Again, there is no hint in the record that Dow did so or could have done so if it desired. The records reflect, as noted above, that Dow, in fact, contributed enormous capital to Dow-Badische while at the same time recovered little of its investment through dividends. In addition, it defies common sense to suggest that one shareholder could raid the corporation's assets while an equal co-investor idly stands by.

7. Non-functional of officers or directors.

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paying out dividends to its shareholders. Dow-Badische incurred significant costs in initially constructing and starting its Freeport, Texas manufacturing facilities beginning in 1958. Dow's records reflect that 6 years passed before Dow-Badische declared its first dividends. Similarly, Dow-Badische began construction and start-up of its Anderson, South Carolina fibers operations in 1966, as well as improvements to the Williamsburg facility during the same period. Dow-Badische then declared a dividend seven years later in 1973.

This factor relates to domination by a controlling shareholder so complete that the nominal officers and directors of the corporation cease to function. See, e.g., C.T. Lowndes & Co. v. Suburban Gas & Appliance Co., Inc., 307 S.C. 394, 415 S.E.2d 404 (Ct. App. 1991). Plaintiff does not allege this measure of domination by Dow, nor would the record sustain such an allegation.

Dow-Badische conducted substantial operations at more than one location under the direction of its officers and directors.[12] Dow-Badische's Chairman of the Board stated in his affidavit that Dow-Badische operated as a completely independent corporation and was not controlled or otherwise excessively influenced by Dow (Barnes Aff., Exh. F, ¶9). Moreover, according to the formation agreement between Dow and BASF, both shareholders were required to have equal representation on Dow-Badische's Board of Directors (Exh. E, Art. V).[13] Again, it is beyond comprehension to imagine that Dow could have dominated Dow-Badische so completely to justify piercing the

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[12]Dow-Badische's Certificate of Incorporation sets forth in Article IX the powers of Dow-Badische's Board: "In furtherance, and not in limitation of the powers conferred by law, the Board of Directors is expressly authorized ... [to] ... have and exercise ... [their' powers ... in the management of the business and affairs of the Company ..." Exh. D, Art. IX, Bates #Dow 366.

[13]Although Dow and Dow-Badische did, from time to time share a few directors and officers, this fact alone does not warrant piercing Dow-Badische's corporate veil. Courts have generally recognized this business reality and consider it a "practice frequently found in parent subsidiary relationships." In Re Silicone Gel Breast Implant Products Litigation, 837 F.Supp. 1128, 1135 (N.D. Ala. 1993). But itself, some overlapping directors and officers is not sufficient to justify piercing the corporate veil. CM Corp. v. Oberer Development Co., 631 F.2d 536, 539 (7th Cir. 1980); Bendix Home Systems, Inc. v. Hurston Enterprises, Inc., 566 F.2d 1039, 1042 (5th Cir. 1978).

veil without objection from Dow-Badische's other equal shareholder, BASF, or its representatives on the Dow-Badische Board. Given the substantial stake which BASF undoubtedly maintained in Dow-Badische, in terms of capital and the technology which BASF contributed to Dow-Badische, Dow could not have "controlled" or otherwise used Dow-Badische for its own benefit. (See Barnes Aff., Exh. F, ¶5).[14]

8. There is no evidence that Dow-Badische did not maintain corporate records. Plaintiffs do not allege, nor does the evidence generated in over one year of discovery in this matter suggest, any failure by Dow-Badische to maintain appropriate corporate records.

To the contrary, Dow's former general counsel stated that he received copies of Dow-Badische's regular board and shareholder meeting minutes.

Even if plaintiffs could establish that the first prong of Sturkie was satisfied, which they cannot, that would only establish that inquiry into the second prong is warranted. Cumberland Wood Products, supra. The second prong requires plaintiff to demonstrate that fundamental unfairness will result from recognition of the corporate form. Sturkie at 457-58; see DeWitt, 540 F.2d at 687. Sturkie provides a two-step test to establish the requisite unfairness: First, the defendant must have been aware of the plaintiff's claim against the corporation and, second, the

[14]The formation agreement also specified that Dow, BASF and Dow-Badische could sell products and compete against one another in any market (Exh. E, Art. XII). This further undercuts any hypothetical argument that Dow controlled or excessively influenced Dow-Badische.

defendant must have acted in a self-serving manner with regard to the property of the corporation and in disregard of the plaintiff's claim in the property. 280 S.C. 453, 459, 313 S.E.2d 316, 319.

This second-prong fairness test links the first-prong factors to the plaintiff's claim. This link is illustrated by DeWitt and the South Carolina cases. For example, in DeWitt, the shareholder/defendant siphoned all cash out of his wholly-owned corporation, assuring that the corporation would have no assets with which to pay the known obligations to the plaintiff which were the basis of the lawsuit. Similarly, in Dumas, the shareholder/defendant siphoned the corporation's funds off to his personal use, despite being aware that the plaintiff was not being paid his salary.

By contrast, nothing in the record in the present case in any way suggests that Dow somehow manipulated Dow-Badische's corporate form in a way to advantage itself while making Dow-Badische unable to perform on a known liability to plaintiff.[15]

Taking the reported cases as a whole, the present circumstances are clearly outside the pattern which has justified piercing the veil. In the words of one United States District Court,

[T]he corporate entity may be ignored only where a third party

[15]To be sure, the events allegedly giving rise to plaintiffs' claims in this case occurred ten years after Dow-Badische was formed and incorporated. See Exh. N, p. 56. It defies logic, then, to suggest that any inequity or fraud worked on plaintiffs (which there was none) is a result of Dow's purposeful manipulation of Dow-Badische's corporate form which could have only occurred ten years prior.

> has been led to take action to his detriment by reason of actions of the corporation and its sole or majority shareholders and equity demands that the corporate entity be ignored.

Crabtree Investments v. Aztec Enterprises, 479 F.Supp. 448, 451 (M.D. La. 1979). Dow was neither a majority nor dominant shareholder; its ownership in Dow-Badische was balanced by BASF's. At the time of Dow's half ownership, Dow-Badische was a properly formed, free-standing corporation observing corporate formalities. Dow no longer owns any part of Dow-Badische; Dow-Badische continues in business, evidently able to answer for its obligations as they arise in the ordinary course. There is no basis in equity for making Dow liable for Dow-Badische's acts.

In summary, where "a number" of factors from the Sturkie eight-factor test must be shown as a first step in piercing the veil, plaintiff has alleged none, and the record holds no evidence that any could be shown. Even were the first prong of Sturkie to be met, plaintiff would not be able to show fundamental unfairness in the sense of the two-step, second prong of Sturkie.

Plaintiffs' request to pierce the corporate veil can appropriately be dismissed. Sturkie itself affirmed dismissal of an action based upon piercing the veil. Indeed, Sturkie was a weaker case for dismissal than is the present case, as a sufficient number of first-prong factors were present to justify piercing the veil; the matter was dismissed based on failure to meet fundamental unfairness prong. 280 S.C. 453, 313 S.E.2d 316. The United States District Court in Crabtree also granted a dismissal motion.

II. PLAINTIFFS' CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS

Notwithstanding that Dow cannot be held responsible for the alleged past disposal activities of Dow-Badische for the reasons set forth above in Section I, Dow is also entitled to Summary Judgment on all of plaintiffs' claims because plaintiffs' suit was filed after the applicable statute of limitations expired; more than three years after they knew or reasonably should have known of the causes of action included in their complaint filed and served upon Dow June 7, 1995.

Plaintiffs filed this lawsuit on May 25, 1995 in the Anderson County Court of Common Pleas and served The Dow Chemical Company on June 7, 1995. Pursuant to South Carolina Rule of Civil Procedure 3(a) this action was commenced for statute of limitation purposes on June 7, 1995. The applicable statute of limitations is set forth in S.C. Code § 15-3-535 which requires that all actions be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action.[16]

Under § 15-3-535, the standard as to when the limitations period begins to run is objective rather than subjective and, therefore, the statutory period of limitations begins to run when a person could or should have known, through the exercise of reasonable diligence, that a cause of action might exist in his or her favor, rather than when a person obtains actual knowledge of

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[16] Except as to actions initiated under Section 15-3-545, all actions initiated under Section 15-3-530(5) must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action.

either the potential claim or of the facts giving rise thereto. Burgess v. American Cancer Soc., South Carolina Div., Inc. 300 S.C. 182, 386 S.E.2d 798 (Ct. App. 1989). Exercise of reasonable diligence means that injured party must act with some promptness where the facts and circumstances of injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist. The statute of limitations begins to run from this point, and not when advice of counsel is sought or full-blown theory of recovery is developed. Snell v. Columbia Gun Exchange, Inc. 276 S.C. 301, 278 S.E.2d 333 (1981). Thus, if plaintiffs knew or, through the exercise of reasonable diligence, should have known that they had a cause of action against Dow-Badische prior to June 7, 1992, then their claims in the present action are time barred.

All of the evidence clearly demonstrates that plaintiffs *actually had knowledge* of the basis for their claims asserted in the instant suit (i.e., their alleged property damage) and, further, knew the cause of their alleged damages; i.e., the identity of the entity which allegedly "produced wastes that were buried in and upon the plaintiffs' real property" (Exh. A, ¶ 3) no later than December 12, 1991.

These admissions by the plaintiffs and the undisputed evidence clearly shows that the plaintiffs knew or reasonably should have known several months prior to October 1991 of their claimed alleged damages, i.e. that certain solid wastes existed on their property. In addition, the record shows that Plaintiffs had reason to know that Dow-Badische was allegedly responsible for those damages. The plaintiffs' discovery and knowledge of waste materials on their property, i.e., the damages which they seek from Dow in the instant action, in 1991 is not in dispute. The record shows that plaintiffs discovered waste materials on their property no later than 1991. Plaintiffs contacted DHEC, BASF and Owens-Corning, and representatives from each of these entities visited the Site in October 1991 and observed the waste at the Site, about which plaintiffs complain in the instant action. Since plaintiffs clearly had actual knowledge of the presence of waste at their property, their alleged damages and the identity of companies, including Dow-Badische, who allegedly caused damage to their property greater than three years before filing and serving this case against Dow, plaintiffs' claims are barred by the applicable three year statute of limitations.

Attached hereto as Exhibit K is an October 3, 1991 letter of Larry Walker, who worked for Dow-Badische at the Anderson, South Carolina Plant for ten years and then BASF, after 1978, for an additional 18 years. Mr. Walker's letter, which he drafted to BASF's in-house counsel, Carlos Leal immediately following his conversation with Ms. Owen, states that he received a telephone call from plaintiff Emily Owen on September 30, 1991. During their conversation, Ms. Owen indicated to Mr. Walker that she and her husband had found fiber and plastic and some items with "Dow-Badische" printed on them. Mr. Walker's letter also reflects he spoke with Dale Owen on September 30, 1991 and arranged a visit to plaintiffs' property on October 1, 1991. During this visit, Mr. Walker observed what he characterized as appearing to be an "old industrial solid waste landfill" approximately 75 yards behind the plaintiffs' residence. This area had been tilled and worked extensively revealing "a lot of material." This material including "two drums . . . that were partially exposed and full of white solid plastic." Mr. Owens conveyed to Mr. Walker during this visit that earlier in the year he had uncovered a drum that "contained a liquid with a strong odor." He also observed with Mr. Owens "two pirn caps with 'Dow-Badische' imprinted on them" at the site (a pirn cap is a plastic bobbin cap).

Significantly, Mr. Owen told Mr. Walker during this visit that nothing had ever grown on about 1.5 acres of his property where the material appeared to be buried and that "several months ago he decided to plow [the area] and plant some grass . . . [and that is] . . . when he began uncovering a lot of fiber, large chunks of plastic, drums of plastic, fabric and many other items." Mr. Owen also had several of these pirn caps in his possession. Exh. K.

Attached hereto as Exhibit Q are the interrogatory responses answered by Dale and Emily Owen in a state court case entitled Dale and Emily Owen v. BASF, et al., 93-CP-04-1302 which is currently pending in the Anderson County Court of Common Pleas.[17] In those responses, the Owens admit that waste materials were found on their property on September 17, 1991. See Exh. Q.

[17] This action arises out of the same facts, and alleges substantially similar claims against BASF, as are present in the instant case.

Finally, documents obtained from the South Carolina Department of Health and Environmental Control ("DHEC") indicate that plaintiffs were concerned enough about the condition of their property in 1991 that they contacted DHEC, and DHEC visited the Site on October 1, 1991 (Exh. M). DHEC memorialized their initial findings in a document entitled "Site Discovery Form," dated November 13, 1991. This document states under the "Site Description" section of the form: "Old open dump with industrial wastes, some from former Dow-Badische plant, now BASF..." In addition, the form describes some of the waste at the Site, "Some solvent waste, nylon, fiberglass, Dow-Badische wastes, observed by landowner." (Exh. L).

In addition, Mark Harvley, DHEC's representative who initially visited the Site on October 1, 1991, reported that plaintiffs indicated to him during this visit that: (1) they had found a 55 gallon drum "about 1 year ago," (2) a neighbor recalled that solid wastes from Dow-Badische's Anderson plant were dumped on plaintiffs' property' (3) a drum which plaintiff found on the Site contained "dark brown or black liquid that looked like a thin syrup and had a strong solvent-like odor" and (4) plaintiff was afraid that his cow might drink the chemical, so he punctured the drum, allowed the contents to spill onto the ground, and covered it up. (Exh. M, DHEC memorandum dated April 4, 1995.)

By October 1991, the plaintiffs unquestionably knew that some <u>right of theirs</u> had been invaded or that some claim against another party might exist. The statute of limitations began "to run from this point and not when advice of counsel is sought or full blown theory of recovery is developed." Snell v. Columbia Gun Exchange, Inc., 276 S.C. 301, 278 S.E.2d 333 (1981). See also, Hinson v. Owens-Illinois, Inc., 677 F.Supp. 406, 412 (D.S.C. 1987). Therefore, to be timely, plaintiffs' claims against Dow in this action must have been brought prior to October 1994. Because plaintiffs delayed and filed their claim and served Dow on June 7, 1995, all of their claims in this suit are barred by the applicable 3 year statute of limitations and Dow is entitled to summary judgment.

In 1991, the plaintiffs discovered material with the words "Dow-Badische" on them; they discovered fiber and plastic; they discovered drums of plastic; they discovered a drum that contained a dark liquid with a solvent-like odor (in paragraph ending "...they discovered a drum that contained a dark liquid with solvent-like odor.). They were concerned enough by these findings and informed enough to call DHEC, Owens-Corning and BASF (successor to Dow-Badische). DHEC subsequently, and prior to June 1992, began investigating the plaintiffs' property and assessing it for inclusion in the federal Comprehensive Environmental Response, Compensation and Liability Act, "CERCLA" (more commonly referred to as "Superfund") program (Exh. M). Plaintiffs then filed suit on August 13, 1993 in State court against BASF, the prior property owners, the Nixes, and True Temper (and several of its alleged successors). However, plaintiffs delayed in filing and serving the instant suit against Dow until June 7, 1995, nearly two years later. Perhaps this delay was due to their inability to extract acceptable settlements from the nam... defendants in the State action. Regardless, this inordinate delay is lethal to their claims here. For these reasons, plaintiffs' case is barred by the applicable three year statute of limitations.

III. DOW IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' TRESPASS CLAIMS BECAUSE THE PRIOR OWNERS OF PLAINTIFFS' PROPERTY AT THE TIME THE WASTE MATERIALS WERE PLACED ON THE PROPERTY CONSENTED TO THE DISPOSALS

Plaintiffs were not the owners of the property when the waste materials were placed on the property in 1968. The property was owned by the Nixes.

Mr. Nix gave an unnamed waste hauler permission to come onto his property and dump waste material to fill in a gully:

> Q. And during the entire time that the gully was being filled in, did the waste hauler have your permission to come onto your property and dispose of waste materials?
>
> A. Yes, Sir.

Exh. N, Deposition of James Nix, p. 50-51.

Mr. Nix testified that he told the unidentified man that he did not want "nothing out in there that's going to be a damage to the land or nobody..." He was assured that the waste would consist of "mostly cafe stuff...[and]...that stuff I'm putting in there will rot." (Exh. N, p. 11). This was the essence of their agreement. However, Mr. Nix also testified that he subsequently saw big boxes and big cans of "cafe stuff" and rod and reels and 55 gallon barrels. Mr. Nix testified that he inspected the material dumped in the gully from time to time and removed and used for his own personal use some materials that could not reasonably be defined as cafe waste. Exh. N, p. 12.

The alleged disposals on Mr. Nixes' land were not done in secret, nor was it a case of "midnight dumping"; it was performed openly during daylight hours for anyone to see. Exh. N, p. 14. Mr. Nix clearly had knowledge that other than cafe and degradable wastes were being deposited on his property pursuant to his agreement with the unidentified hauler. He had adequate opportunity to object to these disposals or revoke his prior permission, yet he did not.

There is no evidence that this unidentified man was an employee of Dow-Badische. Depo of Nix at p. 60. There is no evidence that the truck that brought the waste was owned, operated or controlled by Dow-Badische. Depo of Nix at p. 61.

All of the dumping at the Nix's property was done with the consent of Mr. Nix, the then owner of the property.[18] This consent was both express and implied, since Mr. Nix never took any action once he saw that material other than "cafe wastes" were being

[18] In the Owens suit against BASF, the complaint of which is attached as Exhibit R, the Owens affirmatively allege that the Nixes "provided and arranged for" the alleged dumping prior to the time they sold the property to the Owens. Complaint, para. 6. The Owens, with this admission, cannot now say there was no consent. A genuine issue of material fact cannot be created by a plaintiff's conflicting testimony. Barwick v. Celotex, 736 F.2d 946, 960 (4th Cir. 1984).

placed on the property. This undisputed consent constitutes an absolute defense to each of plaintiffs' theories of recovery. Ravan, 315 S.C. 447, 434 S.E.2d 296 (Ct. App. 1993) ("The essence of trespass is the unauthorized entry onto the land of another. *** Here respondent's entry into the landfill property was authorized by Putnam, its owner"). See, also Snow v. City of Columbia, 305 S.C. 544, 409 S.E.2d 797,800-03 (Ct. App. 1991).

This consent by Mr. Nix further operates to bar any causes of action relating to the waste from accruing to the Owens when they purchased the property. If the Nixes had a cause of action for the activities of the unknown waste hauler, it arose when Mr. Nix observed materials being dumped which he says he did not authorize.

Further, the plaintiffs have not identified any substance from the Dow-Badische plant which is anything other than harmless inert garbage, all of which would have fallen within the Nixes' express and implied consent. See, Exh. O.

For the reasons of consent, plaintiff's suit is barred.

IV. Strict Liability

Plaintiffs' second cause of action is for strict liability. This cause of action fails for two reasons.

First, it is premised on "suspected hazardous waste substances;" and "potentially abnormally activities." Exh. A, Complaint, ¶ 21 and 22. No such substances have been found on the plaintiffs' property.[19] No organic compounds, no contamination,

[19] Even if such substances were found, there is no evidence that creates a genuine issue of fact that Dow-Badische produced or deposited the substances.

and no threat to human health and the environment exists on the plaintiffs' property. See page 5 infra relating to the DHEC Study which is attached hereto as Exhibit O.

Second, if chemicals were found on the property, South Carolina has not "declared that one engaged in handling dangerous chemicals is strictly liable for damages caused by those activities." Ravan v. Greenville County, 315 S.C. 447, 434 S.E.2d 296 (Ct. App. 1993). A scholarly discussion of this issue is set forth in Snow v. City of Columbia, 305 S.C. 944, 409 S.E.2d 797 (Ct. App. 1991). Judge Bell's opinion holds that the rule in Rylands v. Fletcher forms no part of the common law of South Carolina and the "fault principle underlies civil liability from the early history to modern times." Snow, 409 S.E.2d at 799.

The Fourth Circuit Court of Appeals has addressed the issue and reached the same conclusion in an unpublished opinion:

> In South Carolina, the strict liability doctrine for the most part has been confined to a small number of ultrahazardous activities. *See Snow*, 409 S.E.2d at 800; *Wallace v. A.H. Guion & Co.*, 237 S.C. 349, 117 S.E.2d 359, 361 (21960) (adopting view of *Restatement of Torts* that blasting is ultrahazardous and subject to strict liability; decision limited to blasting). The state's courts or legislature have not extended the doctrine to cover either the disposal or reprocessing of hazardous chemical waste. . . . While chemical waste is undoubtedly dangerous, it is unclear whether disposal of such waste is inherently as ultrahazardous an activity as is, for example, blasting. . . . Accordingly, we hold that, because the law of South Carolina currently does not recognize strict liability for damages caused by hazardous waste disposal or reclamation, the damages caused by hazardous waste disposal or reclamation, the district

> court erred in denying appellant's JNOV motions. . . .

Shockley v. Hoechst Celanese Corp., No. 92-1521 (4th Cir. June 28, 1993), Slip Op. at 13. (Copy attached hereto as Exhibit R).

Conclusion

For the reasons set forth above, Dow is entitled to summary judgment.

SINKLER & BOYD, P.A.

By: ______________________
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Federal I.D. No. 1563

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Attorneys for The Dow Chemical Company

July 22, 1996.

<u>CERTIFICATE OF SERVICE</u>

I do hereby certify that I have this 22 day of July 1996, X caused to be shipped via Federal Express, prepaid/_____ caused to be hand delivered, a true and correct copy of Motion For Summary Judgment and Memorandum In Support Of Motion For Summary Judgment properly addressed to all known counsel of record, shown below, as follows:

Robert Buffington

Beverly B. Potter
Secretary to Robert W. Buffington

Mailed To:

Joseph S. Lyles, Esquire
Howard, Howard, Francis & Reid
111 Pettigru Street
Greenville, South Carolina 29601

CERTIFICATE OF INCORPORATION

of

DOW BADISCHE CHEMICAL COMPANY

ARTICLE I

The name of the corporation (which is hereinafter referred to as the "Company") is:

DOW BADISCHE CHEMICAL COMPANY.

ARTICLE II

The principal office of the Company shall be located at No. 100 West Tenth Street, in the City of Wilmington, County of New Castle, State of Delaware. The name of its resident agent in charge thereof is The Corporation Trust Company, whose address is No. 100 West Tenth Street, in the City of Wilmington, County of New Castle, State of Delaware.

ARTICLE III

The nature of the business of the Company and the objects and purposes proposed to be transacted, promoted, or carried on by it, are as follows, to-wit:

(a) To manufacture, produce, buy, sell and deal in chemicals of every description, organic and inorganic, natural or synthetic, in the form of raw materials, intermediates, or finished products and any other related products whatsoever and by-products derived from the manufacture thereof and products to be made therefrom and to do all things incident thereto.

(b) To engage in research, exploration, laboratory and development work relating to any substance, compound or mixture, now known or which may hereafter be known, discovered or developed, and to perfect, develop, manufacture, use, apply and generally deal in any such substance, compound or mixture.

(c) To erect, purchase, sell, lease, manage, occupy and improve buildings and to do and perform all things needful and lawful for the holding, development and improvement of the same for residence, trade and business purposes; to buy, own, operate, improve, lease and occupy lands and buildings for hotels, restaurants, apartment houses, dwelling houses, hospitals and business structures of all kinds, for the accommodation of the public and of individuals.

(d) To transact any manufacturing business, and to purchase and sell goods, wares and merchandise used for such business.

(e) To purchase or otherwise acquire, lease, assign, mortgage, pledge or otherwise dispose of any trade names, trade marks, concessions, inventions, formulae, improvements, processes of any nature whatsoever, copyrights, and letters patent of the United States and of foreign countries, and to accept and grant licenses thereunder.

(f) To subscribe or cause to be subscribed for, and to purchase or otherwise acquire, hold for investment, sell, assign, transfer, mortgage, pledge, exchange, distribute or otherwise dispose of the whole or any part of the shares of the capital stock, bonds, coupons, mortgages, deeds of trust, debentures, securities, obligations, notes and other evidences of indebtedness of any corporation, stock company or association, now or hereafter existing, and whether created by or under the laws of the State of Delaware, or otherwise; and while owners of any of said shares of capital stock or bonds or other property to exercise all the rights, powers and privileges of ownership of every kind and description, including the right to vote thereon, with power to designate some person for that purpose from time to time to the same extent as natural persons might or could do.

(g) To purchase, hold, sell and reissue the shares of its own capital stock.

(h) To endorse, guarantee and secure the payment and satisfaction of bonds, coupons, mortgages, deeds of trust, debentures, securities, obligations and evidences of indebtedness, and also to guarantee and secure the payment or satisfaction of interest on obligations and of dividends on shares of the capital stock of other corporations; also to assume the whole or any part of the liabilities, existing or prospective, of any person, corporation, firm or association; and to aid in any manner any other person or corporation with which it has business dealings, or whose stocks, bonds, or other obligations are held or are in any manner guaranteed by the Company, and to do any other acts and things for the preservation, protection, improvement, or enhancements of the values of such stocks, bonds, or other obligations.

(i) Without in any particular limiting any of the objects and powers of the Company, it is hereby expressly declared and provided that the Company shall have power to do all things hereinbefore enumerated, and also to issue or exchange stocks, bonds and other obligations in payment for property purchased or acquired by it, or for any other object in or about its business; to borrow money without limit; to mortgage or pledge its franchises, real or personal property, income and profits accruing to it, any stocks, bonds or other obligations, or any property which may be acquired by it, and to secure any bonds or other obligations by it issued or incurred.

(j) To carry on any business whatsoever which the Company may deem proper or convenient in connection with any of the foregoing purposes or otherwise, or which may be calculated, directly or indirectly, to promote the interests of the Company or to enhance the value of its property; to conduct its business in this State, in other States, in the District of Columbia, in the Territories and Colonies of the United States, and in foreign countries; and to hold, purchase, mortgage and convey real and personal property, either in or out of the State of Delaware, and to have and to exercise all the powers conferred by the laws of Delaware upon corporations formed under the act pursuant to and under which this Company is formed.

The objects and purposes specified in the foregoing clauses shall, except when otherwise expressed, be in no wise limited or restricted by reference to, or inference from, the terms of any other clause in this Certificate, but the objects and purposes specified in each of the foregoing clauses of this Article shall be regarded as independent objects and purposes.

ARTICLE IV

The number of shares into which the authorized Capital Stock is divided is 6,000,000 shares of Common Stock of the par value of $1 each.

The holders of shares of the Company's stock shall at all times have the right to subscribe, ratably, to any and all shares of stock (whether now or hereafter authorized) which may at any time be issued, and to any bonds, debentures, notes or other securities convertible into shares of stock which may be issued.

ARTICLE V

The minimum amount of capital with which the Company will commence business is $1,000.00.

ARTICLE VI

The name and place of residence of each of the incorporators are as follows:

Name	Residence
H. K. Webb	Wilmington, Delaware
H. C. Broadt	Wilmington, Delaware
S. E. Manuel	Wilmington, Delaware

ARTICLE VII

The Company is to have perpetual existence.

ARTICLE VIII

The private property of the stockholders shall not be subject to the payment of corporate debts to any extent whatever.

ARTICLE IX

At all elections of directors of the Company, each stockholder entitled to vote shall be entitled to as many votes as shall equal the number of shares held by him multiplied by the number of directors to be elected, and may cast all of such votes for a single director or may distribute them among the number to be voted for, or any two or more of them as he may see fit.

The number of the directors of the Company shall be fixed from time to time by the By-Laws and the number may be increased or decreased as therein provided. Directors need not be stockholders.

In furtherance, and not in limitation of the powers conferred by law, the Board of Directors is expressly authorized:

(a) To make, alter, amend or repeal the By-Laws of the Company.

(b) To remove at any time any officer elected or appointed by the Board of Directors but only by the affirmative vote of a majority of the whole Board of Directors.

(c) To designate, by resolution passed by a majority of the whole Board, two or more of their number to constitute an Executive Committee, which, to the extent provided in said resolution or in the By-Laws of the Company, shall have and exercise the powers of the Board of Directors in the management of the business and affairs of the Company, and shall have power to authorize the seal of the Company to be affixed to all papers which may require it.

To designate any other standing committees by the affirmative vote of a majority of the whole Board, and such standing committees shall have and may exercise such powers as shall be conferred or authorized by the By-Laws, including the power to cause the seal of the Company to be affixed to any paper which may require it.

(d) From time to time to fix and to vary the sum to be reserved over and above its Capital Stock paid in before declaring any dividends; to direct and determine the use and disposition of any surplus or net profits over and above the Capital Stock paid in; to fix the time of declaring and paying any dividend, and, unless otherwise provided in this Certificate or in the By-Laws, to determine the amount of any dividend. All sums reserved as working capital or otherwise may be applied from time to time to the acquisition or purchase of its bonds or other obligations or shares of its own Capital Stock or other property to such extent and in such manner and upon such terms as the Board of Directors shall deem expedient and neither the stocks, bonds or other property so acquired shall be regarded as accumulated profits for the purpose of declaring or paying dividends unless otherwise determined by the Board of Directors, but shares of such Capital Stock so purchased or acquired may be resold, unless such shares shall have been retired for the purpose of decreasing the Company's Capital Stock as provided by law.

(e) To authorize, and cause to be executed, mortgages and liens upon the real and personal property of the Company.

ARTICLE X

No contract or other transaction between the Company and one or more of its directors, officers or stockholders, or between the Company and any other corporation, firm or association, in which one or more of its directors, officers or stockholders are officers, directors or stockholders, shall be either void or voidable (1) if at a meeting of the Board of Directors or committee authorizing or ratifying the contract or transaction there is a quorum of persons not so interested in the contract or other transaction, and such contract or other transaction is approved by a majority of such quorum, or (2) if the contract or other transaction is ratified at an annual or special meeting of stockholders, or (3) if the contract or other transaction is just and reasonable to the Company at the time it is made, authorized or ratified.

ARTICLE XI

Each officer, director, or member of any committee designated by the Board of Directors shall, in the performance of his duties, be fully protected in relying in good faith upon the books of account or reports made to the Company by any of its officials or by an independent public accountant or by an appraiser selected with reasonable care by the Board of Directors or by any such committee or in relying in good faith upon other records of the Company.

ARTICLE XII

Each director and each officer (and his heirs executors and administrators) shall be indemnified by the Company against expenses reasonably incurred by him in connection with any action, suit or proceeding to which he may be made a party by reason of his being or having been a director or officer of the Company or, at its request, of any other corporation of which it is a stockholder or creditor and from which he is not entitled to be indemnified (whether or not he continues to be a director or officer at the time of incurring such expenses), except in respect of matters as to which he shall be finally adjudged in such action, suit or proceeding to be liable for negligence or misconduct; in the event of a settlement of any such action, suit or proceeding, indemnification shall be provided only in connection with such matters covered by the settlement as to which the Company is advised by counsel that the person to be indemnified did not commit a breach of duty. The foregoing right of indemnification shall not be exclusive of other rights to which he may be entitled.

ARTICLE XIII

Both the stockholders and the directors of the Company may hold their meetings and the Company may have an office or offices in such place or places outside of the State of Delaware as the By-Laws may provide and the Company may keep its books outside of the State of Delaware except as otherwise provided by law.

ARTICLE XIV

The Company hereby reserves the right to amend, alter, change or repeal any provision contained in its Certificate of Incorporation in the manner now or hereafter prescribed by the laws of the State of Delaware and all rights conferred on stockholders therein are granted subject to this reservation.

IN WITNESS WHEREOF, we, the undersigned incorporators, have hereunto set our hands and seals this 16th day of May, 1958.

In the presence of:

M. Ruth Mannering

M. Ruth Mannering

S. E. Manuel

M. Ruth Mannering

STATE OF DELAWARE)
) SS
COUNTY OF NEW CASTLE)

BE IT REMEMBERED, that on the 16th day of May, 1958, personally came before me, M. Ruth Mannering, a notary public in and for the State and County aforesaid, H. K. Webb, H. C. Broadt and S. E. Manuel, being all of the parties to the foregoing Certificate of Incorporation, known to me personally to be such, and severally acknowledged the Certificate of Incorporation to be the act and deed of the signers, respectively, and that the facts therein stated are truly set forth.

GIVEN under my hand and seal of office the day and year aforesaid.

M. Ruth Mannering
Notary Public