

SANFORD J. LEWIS, ATTORNEY

January 29, 2004

Office of the Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
450 Fifth St., N.W.
Washington, D.C. 20549

Re: Shareholder Proposal Submitted to Dow Chemical Regarding the Bhopal Chemical Disaster On Behalf of Church of the Brethren Benefit Trust, Sisters of the Holy Cross of Notre Dame and Sisters of Mercy of the Americas

Dear Sir/Madam:

The above-named proponents (the proponents) are a beneficial owner of common stock of Dow Chemical Corporation who have submitted a shareholder proposal to Dow Chemical Corporation (the company) regarding the Bhopal chemical disaster. I have been asked by the proponents to respond to the letter dated December 30, 2003, sent to the Securities and Exchange Commission by Gibson, Dunn & Crutcher, LLP, on behalf of the company. In that letter, Dow contends that the proponent's shareholder proposal may be excluded from the company's 2004 proxy statement by virtue of Rules 14a-8(i)(7), 14a-8(i)(10) and 14a-8(i)(3).

I have reviewed the Proponent's shareholder proposal, as well as the letter sent by the company, and based upon the foregoing, as well as a review of the relevant rules, it is my opinion that the Proponent's shareholder proposal must be included in Dow Chemical's 2004 proxy statement and that it is not excludable by virtue of said rules.

BACKGROUND

In February 2001, Dow Chemical acquired Union Carbide Corporation as a wholly owned subsidiary. The 1984 Union Carbide gas disaster in Bhopal, India, exposed 500,000 people and killed as many as 8,000 people in its immediate aftermath.

The Bhopal disaster, though it happened nearly twenty years ago, poses a continuing crisis for the city of Bhopal. Many of the survivors and their children continue to suffer serious health effects. It is estimated that of the over half a million people exposed to Union Carbide's toxic gases, close to 150,000 people continue to suffer from exposure induced chronic illnesses. Breathlessness, persistent cough, diminished vision, early age cataracts, loss of appetite, menstrual irregularities, recurrent fever, back and body aches, loss of sensation in limbs, fatigue, weakness, anxiety and depression are the most common symptoms among survivors. There is also allegedly a rise in cancers, tuberculosis, reproductive system problems and other problems such as growth retardation among children born after the disaster. The International Medical Commission on Bhopal (an independent group of 15 doctors from 11 countries) estimated in 1994 that, among adults between age 18 and 60, about 50,000 were permanently damaged.

In the aftermath of the Bhopal disaster, the chemical industry as a whole instituted a reputation management program known as Responsible Care®. The program was geared to improvement of the industry's reputation after the Bhopal disaster. Dow's own ethics web page notes that the Chemical Industry adopted the Responsible Care program as a public relations response to the Bhopal disaster. www.dowethics.com/r/environment/care_info.html. A more detailed description of this history appeared in Chemical and Engineering News at pubs.acs.org/hotartcl/cenear/980112/responsible.html

Yet today, Dow Chemical has come full circle by acquiring Union Carbide. The management hopes to paint for shareholders and the world a picture of Bhopal as a tragic bygone that is just about finished in the courts, and then will be entirely a matter of the distant past. It has gone to lengths to say that when it acquired Union Carbide it thoroughly investigated the matter and did not buy with it any of the liabilities. Yet, the management is adopting a posture in which it is unwilling or unable to grasp the full impact that the acquisition is having on the company – making it an international target of protest, political interventions and media scrutiny.

The environmental contamination of the site – much of it created prior to the chemical disaster, has rendered the city a dangerous place to live. Thousands of tons of toxic wastes, including obsolete pesticides such as the persistent and bioaccumulative poison HCH and persistent metals such as mercury, have been abandoned at the factory site. Mercury levels in some areas are 6 million times the background values. The groundwater carries high loads of heavy metals, persistent chemicals and solvents, and chlorinated chemicals. Although a portion of the residents have access to overhead tanks of clean water, many of the nearly 20,000 people living in the vicinity are routinely exposed to these chemicals in their drinking water from local wells. The economy, environment and public health of the city of Bhopal remains devastated by the chemical disaster.

The case has been subject to litigation – some in the past, and some continuing or looming at present. The civil case filed by the Indian government on behalf of the survivors was settled for \$470 million in 1989. The 470 million dollars, according to survivors' organizations today, was based on estimations that have proved far too low, whether quantifying the dead, the injured or the property lost. It also never accounted for future medical claims. As a result, the 470 million dollars has proved to be extremely inadequate even to satisfy the claims of the acknowledged victims of the disaster. The balance of the amount remaining in the fund is committed to compensation of victims, and cannot be used for the many other needs of the community – not the public health and economic devastation resulting from the disaster, and not for remediation of the contamination left behind by Union Carbide.

A civil suit for remediation of the ongoing contamination was filed in the US against Union Carbide and former Chairman Warren Anderson, and is currently pending on appeal in New York. Union Carbide is one of twelve named defendants in the criminal case resulting from the Bhopal disaster, still pending in the courts in India. Since the company and its former CEO have never filed an appearance in the criminal case, they have been declared absconders

from justice by the Bhopal Chief Judicial Magistrate, and the court has ordered the government to seek extradition of Anderson.

Although Union Carbide Corp. attempted to transfer its shares in Union Carbide India Ltd. in order to evade liability in this matter, the chief judicial magistrate of Bhopal declared the transfer of Union Carbide Corp. shares as "malafide" (invalid) because it was done with the intent to evade its potential criminal liabilities arising out of the case in the Bhopal court. On October 14, 1994, the Supreme Court declared that despite allowing liquidation of the Carbide Corp. shares in Union Carbide India Ltd. to fund the setting up of a hospital in Bhopal, its order does not alter the validity of the Bhopal court's order declaring that a Union Carbide Corp. share transfer was not bona fide.

Further, the court ordered all Union Carbide assets in India to be attached, with \$74 million of those assets held for purpose of securing the company's appearance in the criminal case. As far as we know, those assets remain attached to date.¹

Bhopal survivors and their supporters are actively pressing the courts and government to implead Dow in the criminal case and to pursue Dow Chemical's assets in India. There is also reportedly an effort underway to pursue litigation against Dow Chemical for remediation of the Bhopal site. See Appendix 5.

In addition, since the purchase of Union Carbide in 2001, Dow has been subjected to escalating public scrutiny and demands for action. These include:

- In 2001 and 2002, survivors of the Bhopal disaster and their representatives met with the management of Dow regarding its completed acquisition of Union Carbide. The discussion ended inconclusively after Dow Chemical's CEO was replaced and the discussions were brought to a standstill. With growing dissatisfaction of the survivors as to Dow's responses, protests have escalated rather than subsiding.
- Survivors appeared at the 2003 Dow Chemical shareholder meeting, where CEO William Stavropoulis repeatedly stated that there was nothing the company could do to answer the victims' pleas for help – that the company had neither liability nor responsibility for the prior disaster nor its continuing after effects.
- In December 2003, the 19th anniversary of the Bhopal disaster, protests erupted at Dow

¹ The order of the Chief Judicial Magistrate, Bhopal, of April 30, 1992 concluded "accused No. 10 Union Carbide Corporation, USA, wants to transfer its 50.9% properties by any means to evade criminal action against it in this case in India and in these circumstances there is no other option but to attach its properties situated in India so that it can be compelled to be present in Court. In such a situation, the application of the State regarding attachment of properties situated in India of accused No. 10, Union Carbide Corporation, USA, is accepted. Shri Prasad has also stated that shares in UCIL have been pledged to the Hospital Trust but no actual transfer has taken place hence properties should immediately be attached and Union Carbide India Limited be directed not to register any charges regarding pledged shares. Accordingly movable and immovable properties of accused No. 10, Union Carbide Corporation, USA, situated in India is being attached under Section 83 of Cr. PC.

facilities worldwide. This included the first organized student protest of Dow Chemical since Viet Nam, on 25 American campuses. A total of 65 activities worldwide protested against Dow and demanded justice for Bhopal.

- A large coalition of organizations met in Bhopal in January 2004 and announced an escalating campaign against Dow in the coming months, culminating with this year's 20th anniversary of the Bhopal disaster, December 2004. See Press Release, Appendix 3.
- On January 19, 2004, more than 500 people including Bhopal survivors, and representatives from Dow-impacted communities in Vietnam (Agent Orange) and Saginaw, Michigan demonstrated outside the Dow Chemical India headquarters in Chembur, Mumbai. An 8-member delegation, including an Agent Orange victim and a former parliamentarian from Belgium, presented a memorandum to Dow Chief Ravi Muthukrishnan. Among other things, the memo urged Dow to present itself to the court in the ongoing criminal proceedings in Bhopal.
- Eighteen members of Congress sent a letter to Dow management urging the company to provide medical rehabilitation and economic reparations for the victims of the tragedy, clean up contamination in and around the former factory site in Bhopal, provide alternative supplies of fresh water to the affected communities, and ensure that the Union Carbide Corporation appears before the Chief Judicial Magistrate's court in Bhopal where it faces criminal charges of culpable homicide. Appendix 2. Similar declarations have also been proffered by parliamentarians in the UK, and European Union.

In light of these developments, the resolution filed by a group of three religious shareholder organizations speaks to the company's moral responsibility to the survivors, and financial responsibilities to its shareholders. It requests that the company "prepare a report to shareholders by October 2004, at reasonable cost and excluding confidential information, describing new initiatives instituted by the management to address the specific health, environmental and social concerns of the survivors." In the supporting statement, the resolution states that the proponents believe that such report should also assess the impacts that the Bhopal matter may reasonably pose on the company, its reputation, its finances and its expansion in Asia and elsewhere.

ANALYSIS

I. The resolution does not address ordinary business, but rather focuses on profound public issues facing the company as a result of the largest chemical disaster in history.

The company asserts that the resolution relates to the ordinary business of the corporation, alleging that it either relates to existing litigation regarding Bhopal, or it attempts to direct the charitable giving of the corporation.

Examination of the matter at hand demonstrates, however, that the resolution neither requests

reporting or action on existing litigation, nor attempts to direct the company's charitable giving. Instead, the resolution asks the company to report on and take action to address a major public controversy facing the corporation.

A. The resolution does not attempt to address or require reporting on litigation, but instead addresses major public issues facing the corporation.

The shareholders do not request and do not intend for the company to report on the Bhopal litigation in the requested report. Instead, the plainly stated purpose of the resolution is to address the continuing humanitarian crisis in Bhopal, and the impacts on Dow as a result of public campaigns and assertions of injustice. The request of the resolution is for the company to prepare a report describing new initiatives instituted by the management to address the specific health, environmental and social concerns of the survivors. By contrast, the resolution does not ask for the company to force Union Carbide to appear in the criminal case, does not ask for settlement, or explanation of the civil case in the US, or any other action in relation to litigation strategy or settlement.

Despite the ongoing litigation, the resolution does not relate to or ask for responses to any of these matters. Instead, the company is asked primarily to report on "new initiatives" to resolve the ongoing demands posed by the survivors of the disaster. These demands have been expressed in letters to the management, and are backed by an extensive international campaign of public protest, independent of the litigation. For instance in a letter to Dow management of March 11, 2002 (Appendix 4), the survivors wrote in follow-up to conversations with the management requesting that the company address the following issue areas:

1. Ensuring that people in the communities next to the Union Carbide factory are not exposed to toxic chemicals...we request The Dow Chemical Company to take urgent action to decontaminate the soil and ground water in and around the abandoned Union Carbide factory.

2. Medical research on present health status of survivors of the disaster...Since 1994 when the International Medical Commission on Bhopal published its report on the health status of the exposed people there has been no full scale study to document the long term health impact of exposure to Carbide's chemicals. There is a great need for a large scale epidemiological study to make an assessment of the current health status of the survivors and their children so that helpful directions for health care providers can emerge.

3. Economic rehabilitation to those unable to do their usual work
Close to 80% of the exposed people are toiling people, or used to. Involved in carrying loads, pushing hand carts, vending vegetables, construction, and such physically demanding work.The compensation money they have received has been too meagre and most if not all of it spent in repaying debts and paying for medical treatment. Thousands of families are on the brink of starvation.... ...On humanitarian

grounds we request Dow to provide gainful employment to the persons who have lost the capacity to do their usual work.

4. Social support to widows, orphans and disabled people

Close to 10,000 persons widowed or orphaned due to the Union Carbide disaster and about 40,000 severely disabled survivors are in need of social security in the form of monthly pension or as free and regular supply of basic needs. Given the governments abandoning this vital and life saving task we request Dow to provide the means for such support.

A proposal cannot be excluded by Rule 14a-8(i)(7) if it focuses on significant policy issues. As explained in *Roosevelt v. E.I. DuPont de Nemours & Company*, 958 F. 2d 416, (DC Cir. 1992) a proposal may not be excluded under clause (c)(7) if it has "significant policy, economic or other implications". *Id.* at 426. Interpreting that standard, the court spoke of actions which are "extraordinary, i.e., one involving 'fundamental business strategy' or 'long term goals.'" *Id.* at 427. As we will explain below, in this instance the items requested in the proposed report are at a level of summarization needed to illuminate trends related to the public policy issues facing the company. Therefore the proposal may not be excluded, because it deals exclusively with major policy matters.

Although the Commission has stated in Exchange Act Release No. 40018 (May 21, 1998) that a central consideration for the ordinary business operations exclusion is whether the resolution probes too deeply into the questions at hand, the proposal does not cross the line into that level of depth.

In RJ Reynolds (March 7, 2000) the resolution called for RJR Nabisco to create an independent committee to investigate retail placement of tobacco products, in an effort to prevent theft by minors. The company argued that due to two current lawsuits (against FDA and the state of Massachusetts) the Proposal, if implemented, would interfere with litigation strategy by asking the company to take voluntary action in opposition to its position in the lawsuits. The proponent prevailed by arguing significant policy issue (tobacco and children) and that the Proposal is unrelated to litigation. "Litigation strategy has been interpreted to encompass matters ranging from the decision whether to institute legal proceedings, to the conduct of a lawsuit, to the decision whether to settle a claim or appeal a judgment." That Proposal, as the one in the present case, dealt with none of those factors.

To decide that the existence of litigation on the subject matter would be enough to bar resolutions would mean that the most substantial issues facing corporations would not be discussable in shareholder resolutions. This would be a flawed response to the major policy issues that confront corporations.

Since nothing in the Proponents' shareholder proposal deals with the questions of whether the Company should institute a lawsuit, how it will conduct a lawsuit or whether to settle a lawsuit, it does not attempt to micro-manage the Company in an excludible manner.

In Philip Morris (Feb. 14, 2000), the resolution called for management to develop a report for shareholders describing how Philip Morris intends to address "sicknesses" caused by the company's products and correct the defects in the products that cause these sicknesses. The company argued that the Proposal requested the Company to issue a report on matters that are prominently at issue in numerous lawsuits. The proponent prevailed by arguing that the Proposal neither requests information about litigation nor tells the Company how to handle the litigation. Due to statements on PM's web site, essentially admitting to cigarettes causing "sickness," the Proposal asking how the company will address that "sickness" will not likely interfere with any litigation strategy.

In Bristol-Meyers (Feb. 21, 2000), the resolution called for implementation of a policy of price restraint on pharmaceutical products for individual customers and institutional purchasers to keep drug prices at reasonable levels and report to shareholders on any changes in its current pricing policy by 9/2000. The company argued that the Proposal seeks to have the company take action in an area of its business currently subject to litigation: its pricing practices. The resolution was found by the staff to be not excludible, due to the large policy issues at stake.

The mere mention of lawsuit in a shareholder resolution does not render the resolution excludible as ordinary business. In RJR Nabisco (Feb. 13, 1998), the resolution called for the company to implement in developing countries the same programs for prevention of smoking by youths as voluntarily proposed and adopted in US. The company mentioned that proponents refer to lawsuits against subsidiaries in France and Philippines dealing with alleged violations of marketing regulations as a basis for extending the US policy abroad. The company argued that if implemented, the proposal may interfere with efforts to litigate the legality of certain regulations regarding tobacco products and free speech, as well as efforts to propose and lobby for alternative proposals. Still, because of the focus on voluntary measures, the staff rejected the ordinary business argument.

Finally, this issue is not excludible ordinary business because it relates to a major ecological and environmental matter—the continuing crisis in the aftermath of the largest chemical disaster in history. In Maxxam Inc. (available March 26, 1998) the Staff concluded that a proposal requesting the company to prepare a report on strategies for ending all operations that cut, damage, remove, mill or otherwise involve old growth trees was not ordinary business. The staff noted that it was not ordinary business because it related to the adoption of a policy "designed to address a major ecological and environmental matter."

B. The voluntary actions sought by the proponents are not requests to direct the charitable donations of Dow Chemical, but rather are a flexible call for the company to undertake action responsive to the continuing crisis of Bhopal.

While denying any liability, the management does acknowledge in its internet publication that there is "an entirely separate humanitarian question—that is : can Dow, in its role as a corporate citizen, help to address any of the present-day needs which are apparent in India?"

It states that this is why "for some time, Dow has been exploring various initiatives which might address some of those needs--just as we do in other parts of the world where we have business interests. "

But this situation in Bhopal is not just like any other situation in the world. It is in fact the site of the worst chemical disaster in history, and a tragic legacy of Dow's subsidiary, Union Carbide.

The management's position suggests that any effort to ask a company to voluntarily redress an enormous public policy challenge in a specific geographic region amounts to an attempt to direct its charitable giving.

There is no attempt in this resolution to dictate how the company's charitable giving programs are directed, since there is no attempt to say what initiatives the company should, in fact take. Rather, the focus of the resolution is to urge the management to take some *new* initiatives, and to report on them. By way of example, the following is a recitation of just a few of the diverse initiatives that management could take that would not amount to "charitable giving:"

- Dispatch Dow environmental staff and equipment to Bhopal to undertake or supervise remedial efforts;
- Disclose all information held by Union Carbide regarding the health impacts of MIC;
- Conduct and disclose health studies or testing of MIC to assist in meeting the continuing medical needs of the survivors;
- Conduct meetings in Bhopal with survivors' organizations;
- etc...

II. The management has not "substantially implemented" the proposal.

The company asserts that because it believes there is no Bhopal liability associated with the acquisition of Union Carbide, and because it has described its arguments to that effect on its website, it has substantially implemented the proposal requesting a report on the status of new company initiatives regarding Bhopal.

However, the proposal requests that the company to take *new* initiatives. The proposal also asks for reporting on the impacts of this major issue on the company. Neither are accomplished by the company's current reporting or actions.

Bhopal is not an issue that lies only in the past. As described above, there are mounting efforts and calls for action by Dow outside of the litigation. It is apparent to the proponents that to address its moral responsibilities, protect the company's reputation and address the public issues and campaigns facing the company, new initiatives will be needed.

The shareholder proponents are aware that the company has so far declined to take any specific actions to assist the people of Bhopal. The resolution calls for new action and reporting and examination of future impacts. The focus is not on past cases and impacts, but

rather what is happening now and what is likely to happen in the future. That is why the proposal asks for a report on "new" initiatives.

The request made in the resolution is therefore not substantially implemented by the company because what is requested is a response to the current developments – the protests, the congressional intervention, and the continuing media scrutiny. It is a request to respond and report in the coming year regarding what is happening now, and what is anticipated to happen over the coming months in the lead up to the 20th anniversary of the Bhopal disaster.

In addition, when reporting is requested of a company, the reporting cannot “substantially implement” the request, if the reporting that is done is materially misleading. Proponents believe that in very important aspects, the reporting that has been done by the company so far is quite misleading, and materially so.

In the company's online statement regarding the Bhopal tragedy, Dow Chemical notes that the Bhopal plant was operated at the time of the disaster by Union Carbide India Ltd., a 51% affiliate of Union Carbide Corp. It notes further that when Dow acquired Union Carbide's shares in February of 2001, “the company conducted an exhaustive assessment to ensure that there was absolutely no outstanding liability in relation to Bhopal. There was none; the company that Dow acquired retained absolutely no responsibility for either the tragedy or for the Bhopal site.” The company cites a number of issues and developments to back up this claim.

This statement – though a clear statement of position by the management – is factually misleading given the actual occurrences in Bhopal. Union Carbide remains a named accused in the criminal case in India, and all of its assets in India have been and remain attached for that purpose. Appendix 8. The Indian government is reportedly processing a request to sue Dow to engage in remediation of the site.² Appendix 5.

The Dow website also states “On February 14, 1989, a settlement agreement was reached between Union Carbide, Union Carbide India Limited and the Indian government through which Union Carbide paid \$470 million in compensation, covering all claims relating to the incident.”

This is misleading because it can be read as resolving the criminal actions, which are not resolved.

The website states “In November 1994 – more than six years before Dow acquired Union Carbide – Union Carbide sold its interest in Union Carbide India Limited (later renamed

² Members of the Indian government and survivor organizations assert that Union Carbide was bound under the terms of their site lease to return the land to the Indian government in usable and habitable condition. Instead, the company undertook some cosmetic remediation work, which community residents assert did nothing to diminish the danger of contamination to local aquifers, before requesting local government departments to take back the lease. Though the government took the site back from Carbide, currently the government is working to sue Dow as current owner of Union Carbide, asserting a failure of the company to abide by the lease terms.

Eveready Industries India Ltd. – or EIIL) to MacLeod Russell (India) Ltd. of Calcutta. As a consequence of that sale, Union Carbide retained no interest in or liability for the Bhopal site. EIIL took exclusive possession of the land under lease from the government of Madhya Pradesh. The money from this transaction was used to fund a hospital in Bhopal which now provides specialist care to victims of the tragedy.“

This statement is HIGHLY misleading in light of the subsequent judicial decisions in India. The Chief Judicial Magistrate for Bhopal has held that Union Carbide Corp.'s transfer of shares was not bona fide because it was done to evade potential liabilities arising out of the ongoing criminal case in Bhopal. As a result, \$74 million in Union Carbide assets were attached pending appearance in the criminal case. See Appendix 8.

Rejecting the claim of substantial implementation is consistent with other precedents in which companies have argued that the limited reporting that they have done is substantial implementation, and SEC staff has concluded it was not. In ExxonMobil (March 24, 2003) the proposal asked the board to report on the effect of the health pandemic on Exxon's operations in Sub-Saharan Africa and its response to the pandemic. Exxon claimed it had reported extensively on the topic, including reports to shareholders as well as others. SEC staff disagreed that the reporting amount to substantial implementation.

In ExxonMobil (March 17, 2003) the proposal requested Exxon to prepare a report describing any operating, financial and reputational risks to it associated with climate change and explaining how Exxon will mitigate those risks. Exxon argued its extensive previous reporting to shareholders and the public on climate change issues and the Company's approach to these issues more than satisfies the Proponent's request. SEC staff disagreed.

In Johnson and Johnson (Feb. 25, 2003) the proposal requested J&J's Compensation Committee to consider advances in the areas of equal employment opportunity and work place diversity when determining compensation for senior executives, and report to shareholders on implementation of this policy. J&J argued that it already considers progress toward meeting goals for equal opportunity in employment, development and advancement in its executive compensation and has already made this information publicly available to shareholders through information in its 2002 proxy statement. The SEC staff disagreed.

A proposal to American Electric Power (Feb. 18, 2003) required the board to issue a report disclosing: (a) the economic risks associated with the company's past, present, and future emissions of carbon dioxide, sulfur dioxide, nitrogen oxide and mercury emissions, and the public stance of the company regarding efforts to reduce these emissions; and (b) the economic benefits of committing to a substantial reduction of those emissions related to its current business activities. AEP argued that by complying with its federally mandated disclosure obligations by substantially duplicating its disclosure required by Items 303 and 101(c)(xii) of Regulation S-K and including it in its Annual Report on Form 10-K in Appendix A to the Proxy Statement, AEP already substantially implemented the Proposal. Furthermore, AEP had much of the information available on its website. The proponent prevailed, arguing that a review of the Company's public filings, including its annual report

filed on Form 10-K and its proxy statements, shows that the Company has in fact not provided the information requested in the Proposal.

Similarly, in Kohl's (March 31, 2000) the proposal requested the board report on Kohl's vendor standards and compliance mechanisms in the countries where it sources. Kohl's argued that because it responds to inquiries from customers, shareholders and others explaining the Policy and the Company's inspections and evaluation procedures of its Vendor Partners, it substantially implements the Proposal's request for a report to shareholders. The proponent prevailed by asserting that assurances of "paper guidelines" are insufficient when "the Proposal is addressed to the question of whether those guidelines are being implemented and enforced as opposed to being mere pieces of paper." Also, claiming that the information is available to shareholders without informing them of this possibility "is no report at all."

III. The proponents are willing to revise the resolution to the extent that SEC staff finds potentially false or misleading statements.

The proponents drafted the resolution in a good faith belief that it does not contain false or misleading statements; however we are willing to make corrections to clarify any points of concern to the SEC staff. As shareholders we do not want to include any statements in the resolution that may serve to increase the liability exposure of the company, and so we want to ensure that the language contained therein will state the situation simply and accurately without misleadingly downplaying the actual risk and exposure of the company.

The company asserts first that the heading of the proposal "Dow Chemical resolution regarding Bhopal" is misleading because it implies that it is the company's resolution. It is hard to imagine that anybody would mistake this for a resolution filed by the management. Nevertheless, we would gladly delete the reference to Dow Chemical in this header and replace it with "Stockholder."

Secondly, the company notes that it has only acquired the stock of Union Carbide and not its assets and liabilities. Although the company's statement that it has not acquired assets or liabilities of Union Carbide may be technically true under US law, as a practical matter the wholly owned subsidiary Union Carbide itself has a pending criminal case against it in India, and its assets in India amounting to \$74 million have been seized by the Indian government pending the outcome of the case.³ So Dow has acquired the subsidiary subject to some

³ In its Form 10K Annual Report for the year ended December 31, 1994, filed with the SEC on March 10, 1995, Union Carbide stated:

"Litigation -- The corporation's stock in Union Carbide India Ltd (UCIL) has been sold for the Indian rupee equivalent of \$92 million. Of that amount, the equivalent of approximately \$15 million went to The Bhopal Hospital Trust, which, with other funding from unremitted dividends and UCIL, discharged the corporation's and UCIL's commitment for funding, in the amount of approximately \$19 million, a hospital to be built in Bhopal by the Government of India. **The remainder of the proceeds of the sale of the stock, after payment of certain expenses of the transaction, is subject to attachment in the pending criminal proceedings against the corporation in Bhopal, in which the corporation has not appeared.** The corporation had earlier reduced the carrying value of its stock in UCIL to zero. In the opinion of counsel for the corporation, under generally

substantial liabilities and limits on the assets.

Also, as a matter of the law of India, the statement in the resolution as drafted appears to be accurate. Under the Indian Company Law, a company that buys the shares of another company and acquires the 'controlling interest' of the latter company automatically has the power to alienate its stocks and assets which it does in exercise of powers under the Companies Act, 1956. The company that takes over is thereafter answerable to the shareholders as well as to the Central Government for anything and everything that happens to its assets and liabilities. It is not even theoretically possible under the Indian Companies Act that only the shares of a company (controlling interest) will be taken over but the assets and liabilities will not be under the control of the company or entity that acquires those shares. That UCC held a controlling interest (51%) in UCIL is not in dispute.

Proponents have reason to believe that Dow Chemical itself may under certain circumstances also be subject to liabilities related to its holdings. The inherited liabilities of Union Carbide are, of course, of major relevance to Dow Chemical. For instance, more than two years after the acquisition, Dow reported the liabilities associated with asbestos of Union Carbide. Dow Chemical management finally reported at the end of 2002 that the liability – unreported at the time of the merger – is projected as \$2.2 billion over the next seventeen years, and the company took a \$828 million write off against assets to reflect the portion of those costs believed to be uninsured.

The degree to which Union Carbide and/ or Dow Chemical may be held liable for Bhopal related liabilities as a result of the acquisition of Dow hinges in part upon whether the Indian courts will pierce the corporate veil after finding, for instance, inadequate capitalization combined with effective control of Union Carbide India Ltd. (UCIL) by the parent corporation, Union Carbide. There are reportedly numerous bases upon which India's lawyers or private plaintiffs may argue that UCC maintained effective control of UCIL. (See Appendix 6. This will surely be a hotly contested issue in the ongoing litigation. Therefore, the proponents would gladly amend the resolution to state, for instance, that:

"proponents believe that when Dow Chemical acquired the stock of Union Carbide and thereby connected itself to the legacy of Bhopal, it also may have assumed reputational and market risks, or even liabilities as may be determined under US or Indian law."

recognised legal principles, the criminal proceedings in India should not have adverse financial consequences for the corporation outside of India." Emphasis added.

Notably, Union Carbide reported in its SEC filing that it was the advice of counsel that the criminal case "should not have adverse financial consequences for the company outside of India." By implication, the case could be expected to have adverse consequences within India for Carbide, and now that Dow Chemical is the owner of Carbide, this Carbide counsel's comment begs a follow-up evaluation as to whether, for instance, Dow's assets in India may be subject to seizure as the criminal case moves forward.

Thirdly, the company questions the second paragraph of the resolution which states, "Union Carbide has failed to appear in court to face continuing criminal charges in the Indian courts for 'culpable homicide not amounting to murder' in the Bhopal disaster." The company asserts that neither its former chief executive officer nor Union Carbide corporation are subject to the jurisdiction of the court, and therefore they are not proper parties to the proceeding. As with the previous issue above, this is a question that may yet be resolved unfavorably to the company in litigation. The Indian government has not agreed that those parties are outside of their jurisdiction. Union Carbide and Warren Anderson have been declared absconders from justice by the Indian courts, and an extradition order has reportedly been issued by India for Warren Anderson. Appendix 7. Further, Union Carbide Corp. assets remain attached and in the control of the Chief Judicial Magistrate, Bhopal. The CJM's court has held that Union Carbide Corp.'s transfer of shares to the Bhopal hospital trust were not bona fide and were done to evade potential liabilities arising out of the ongoing criminal case in Bhopal.

To better address management's position, proponents would be willing to substitute language such as the following:

The management has asserted that neither Union Carbide nor Warren Anderson are subject to the jurisdiction of the Indian courts. However, the Indian government has not agreed, and has reportedly filed a request for the extradition of Warren Anderson and attached Carbide Corp's assets in India.

The company further notes that other parties to the proceeding have had their charges reduced to a lesser charge of "causing death by negligence," and implies that if Union Carbide or Warren Anderson were to appear in Indian courts, they would be eligible for the same reduction in charges.

It should be noted that there is some basis for believing that the company Union Carbide, and its CEO Warren Anderson, would not be subject to the same reduced charges if they appeared before the Indian courts. In reaching its 1996 judgment, the Supreme Court had accepted the defense plea by the Indian accused that they "did not know that an ultra-hazardous poison like MIC could kill human beings and animals and harm the environment." By contrast, such an argument may not be persuasively argued by UCC or its officials – so this and other parts of the 1996 Supreme Court judgment would not necessarily be valid precedent to apply to the non-Indian parties. Appendix 8.

Therefore, we do not believe the current language would be misleading. However proponents are willing to revise the language to note the lowering of charges against other defendants.

The 4th paragraph of the shareholder proposal states that "Dow, through its wholly-owned subsidiary Union Carbide, has become implicated in the continuing controversy over the Bhopal criminal case, as well as remediation of the contamination at the site and redress of health and economic concerns of the community and survivors and their supporters have refocus their efforts upon Dow."

The company's letter asserts that this is misleading because it implies that Dow has been drawn into the criminal case and further that there is a connection between the criminal case and remediation and redress of environmental health claims.

Proponents did not intend the referenced paragraph to imply that the criminal case had actually added Dow Chemical as a defendant, but rather that there are continuing charges against Dow subsidiary Union Carbide. The proponents would gladly amend this statement to clarify this point. In addition, the proponents would be glad to amend the paragraph if needed to segregate the issues of criminal liability from the other issues stated in the paragraph.

In conclusion, we request the Staff to inform the Company that the SEC proxy rules require denial of the Company's no-action request. In the event that the Staff concludes that certain parts of the document may require revision, please be advised of the willingness of the proponent to make needed modifications.

Please call me at 781 894-0709 with respect to any questions, or needs for added documentation or further information.

Sincerely,

Sanford Lewis
Attorney at Law

Cc:
Ronald O. Mueller, Esq. Gibson, Dunn & Crutcher
Tina S. Van Dam, Corporate Secretary, The Dow Chemical Company

Church of the Brethren Benefit Trust
Sisters of the Holy Cross of Notre Dame
Sisters of Mercy of the Americas
Geeta Aiyer, Boston Common Asset Management

RESPONSE OF PROPONENTS REGARDING
NO ACTION REQUEST OF DOW CHEMICAL ON
2004 SHAREHOLDER PROPOSAL ON BHOPAL

APPENDICES (omitted)

1. 2004 Shareholder resolution regarding Bhopal
2. Letter from US Congressmen to Dow Chemical
3. January 2004 Press release regarding International Dow Chemical campaign
4. March 11, 2002 Letter to Dow management from Bhopal survivor organizations
5. News Clip: MP Wants to Sue Dow
6. Examples of Union Carbide's Alleged Control of UCIL Facility from the website Bhopal.net
7. Article: Request for Anderson's Extradition
8. Attachment of Assets of Union Carbide

DOW CHEMICAL RESOLUTION REGARDING BHOPAL

Whereas:

Dow Chemical has acquired Union Carbide, its assets and its liabilities.

Union Carbide has failed to appear in court to face continuing criminal charges in the Indian Courts for "culpable homicide, not amounting to murder" in the Bhopal disaster and has, therefore, been proclaimed an absconder from justice by the Bhopal Chief Judicial Magistrate.

By law in India the liability of Union Carbide for the offense of culpable homicide is wholly in the discretion of the courts and limited only by the company's total assets.

Dow, through its wholly owned subsidiary Union Carbide, has become implicated in the continued controversy over the Bhopal criminal case, as well as remediation of contamination at the site and redress of health and economic concerns of the community, and the survivors and their supporters have refocused their efforts upon Dow.

Dow's Chairman and CEO, William Stavropoulos, was quoted as saying "Companies that don't meet their responsibilities to all their constituencies will have a difficult time. Responsible customers won't want to buy their products... Enlightened communities won't want them as neighbors, and wise investors won't entrust them with their economic futures" (The Business of Business Managing Corporate Social Responsibility: What Business Leaders are Saying and Doing 2002-2007).

Dow's Chief Operating Officer Andrew Liveris was quoted as saying "We also are very committed to a concept termed sustainable development... Sustainable development is the new way to think about economic viability, environmental integrity and social equity as an integrated whole.... We want our critics to track our results and hold us accountable as we continuously improve our performance." (Improving What's Essential to Human Progress: An Inside Look at Engineers in the Chemical Industry).

Eighteen members of Congress have sent a letter to Dow management urging the company to provide medical rehabilitation and economic reparations for the victims of the tragedy, clean up contamination in and around the former factory site in Bhopal, provide alternative supplies of fresh water to the affected communities, and ensure that the Union Carbide Corporation appears before the Chief Judicial Magistrate's court in Bhopal where it faces criminal charges of culpable homicide.

Dow has noted in its Global Public Report that sales and operations in Asia account for \$3.3 billion in revenues and that performance businesses comprise 60% of that.

The Bhopal disaster may continue to damage Dow's reputation which, in the opinion of the proponents, may reasonably be expected to affect growth prospects in Asia and beyond.

Resolved, that shareholders request the management of Dow Chemical to prepare a report to shareholders by October 2004, at reasonable cost and excluding confidential information, describing new initiatives instituted by the management to address the specific health, environmental and social concerns of the survivors.

Supporting Statement

The proponents believe that such report should also assess the impacts that the Bhopal matter may reasonably pose on the company, its reputation, its finances and its expansion in Asia and elsewhere.