05-1760-CV

05-1509-CV, 05-1693-CV, 05-1694-CV, 05-1695-CV, 05-1696-CV, 05-1698-CV, 05-1700-CV, 05-1737-CV, 05-1771-CV, 05-1810-CV, 05-1813-CV, 05-1817-CV, 05-1820-CV, 05-2450-CV, 05-2451-CV

United States Court of Appeals
for the Second Circuit

IN RE "AGENT ORANGE" PRODUCTS LIABILITY LITIGATION
DANIEL RAYMOND STEPHENSON, SUSAN STEPHENSON,
DANIEL ANTHONY STEPHENSON, AND EMILY ELIZABETH STEPHENSON,

Plaintiffs-Appellants,

v.

DOW CHEMICAL COMPANY; MONSANTO COMPANY; HERCULES INC.; OCCIDENTAL CHEMICAL CORPORATION; ULTRAMAR DIAMOND; MAXUS ENERGY CORP.; CHEMICAL LAND HOLDINGS, INC.; T-H AGRICULTURE & NUTRITION CO.; THOMPSON HAYWARD CHEMICAL CO.; HARCROS CHEMICALS, INC.; UNIROYAL, INC.; C.D.U. HOLDING, INC.; AND UNIROYAL CHEMICAL CORP.,

Defendants-Appellees.

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

SUPPLEMENTAL BRIEF OF DEFENDANTS-APPELLEES

MAYER, BROWN, ROWE & MAW LLP
ANDREW L. FREY
CHARLES A. ROTHFELD
LAUREN R. GOLDMAN
CHRISTOPHER J. HOUPT
1675 Broadway
New York, New York 10019-5820
(212) 506-2500

Attorneys for Defendant-Appellee
The Dow Chemical Company

Additional Counsel Listed on Inside Cover

JOHN C. SABETTA
ANDREW T. HAHN, SR.
SEYFARTH SHAW LLP
1270 Avenue of the Americas
New York, New York 10020

SETH P. WAXMAN
PAUL R.Q. WOLFSON
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Avenue NW
Washington, DC 20006
(202) 663-6800

RICHARD P. BRESS
LATHAM & WATKINS
555 Eleventh Street, NW, Suite 1000
Washington, D.C. 20004-1304
(202) 637-2137

JAMES E. TYRRELL, JR.
PATTON BOGGS LLP
One Riverfront Plaza, 6th Floor
Newark, New Jersey 07102

Attorneys for Defendant
Monsanto Company

JAMES L. STENGEL
LAURIE STRAUCH WEISS
ORRICK, HERRINGTON & SUTCLIFFE LLP
666 Fifth Avenue
New York, New York 10103-0001

STEVEN BROCK
BERKMAN, HENOCH, PETERSON & PEDDY, P.C.
100 Garden City Plaza
Garden City, NY 11530
(516) 222-6200

JAMES V. AIOSA
RICHARD S. FELDMAN
RIVKIN RADLER LLP
926 Reckson Plaza
Uniondale, New York 11556-0926
(516) 357-3000

Attorneys for Defendant
The Dow Chemical Company

MICHAEL M. GORDON
MCKEE NELSON LLP
One Battery Park Plaza, 34th Floor
New York, New York 10004
(917) 777-4567

Attorneys for Defendants Occidental Chemical Corporation, as successor by merger to Diamond Shamrock Chemicals Company; Maxus Energy Corporation; Tierra Solutions, Inc., formerly known as Chemical Land Holdings, Inc.; and Valero Energy Corporation, as successor by merger to Ultramar Diamond Shamrock Corporation

LAWRENCE D'ALOISE, JR.
CLARK, GAGLIARDI & MILLER
The Inns of Court
99 Court Street
White Plains, New York 10601
(914) 946-8900

Attorneys for Defendants
T.H. Agriculture & Nutrition Co., Inc., Thompson-Hayward Chemical Co., and Harcros Chemical, Inc.

MYRON KALISH
50 East 79th Street
New York, New York 10021

Attorney for Defendants
Uniroyal, Inc., Uniroyal Chemical Co., and CDU Holdings, Inc.

WILLIAM A. KROHLEY
WILLIAM C. HECK
KELLEY DRYE & WARREN LLP
101 Park Avenue
New York, New York 10178
(212) 808-7800

Attorneys for Defendant
Hercules Incorporated

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

Page

Cases (cont'd)

TABLE OF AUTHORITIES
(continued)

Page

Cases (cont'd)

TABLE OF AUTHORITIES
(continued)

Page

Cases (cont'd)

TABLE OF AUTHORITIES
(continued)

Page

Cases (cont'd)

Rules

Other Authorities

TABLE OF AUTHORITIES
(continued)

Page

Other Authorities (cont'd)

ARGUMENT

At oral argument, the parties were asked to file supplemental briefing on the question whether the Court should adhere to the result in *Stephenson I*. We submit that it should not. The decision to allow collateral attack gravely undermines the predictability of class action settlements; the opinion rests on ill-founded distinctions among class members; and absent class members' due process rights already were amply protected by the strictures of Rule 23 (in which regard, *Amchem* and *Ortiz* are inapplicable because they arose on direct review of the settlement, not on collateral attack decades later). The panel also erred in finding that representation was inadequate: plaintiffs failed to meet the heightened standard required on collateral review, and, even had the issue arisen on direct review, and after *Amchem* and *Ortiz* were decided, the settlement still would have passed muster because any intraclass conflict was purely theoretical.

Finally, as discussed below, this Court has the power—which it should exercise—to revisit its 2001 decision.

I. *STEPHENSON I* WAS WRONGLY DECIDED.

The Agent Orange class was certified more than 20 years ago. At the time, the district and circuit courts confronted the question whether class members, especially exposed but not yet ill veterans, were adequately represented. This specific issue was vigorously contested by class objectors. Two district judges and

this Court, keenly aware of the judicial obligation to guard against intraclass conflicts, found the representation adequate. See *In re "Agent Orange" Prod. Liab. Litig.*, 506 F. Supp. 762 (E.D.N.Y. 1980); 100 F.R.D. 718 (E.D.N.Y. 1983); 818 F.2d 145 (2d Cir. 1987) ("*Agent Orange I*").

Faced with a certified class, defendants settled the suit, making an unallocated $180 million payment on the express condition that all class members—including "persons who have not yet manifested injury"—were barred from initiating future Agent Orange litigation. *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 864-65 (E.D.N.Y. 1984). After an eleven-day hearing, Judge Weinstein found the settlement fair and the representation adequate, and affirmed the settlement.

Judge Weinstein then held a public hearing—in which the defendants did not participate—to determine how the funds should be distributed. The plan ultimately provided that 75 percent of the $180 million settlement fund would go directly to the survivors of deceased veterans and to veterans who became totally disabled before January 1, 1995—ten years beyond the settlement date and more than 20 years after Agent Orange exposure ceased. *Ryan* v. *Dow Chem. Co.*, 611 F. Supp. 1396, 1410-12 (E.D.N.Y. 1985). The balance of the fund was committed to programs that benefited the entire class, including the present plaintiffs. Judge Weinstein recognized that this formula did not compensate those

who would manifest illness after 1994 but decided that the later-developing ailments would "have a relatively diminished connection with Agent Orange exposure in terms of both public perception and the likelihood of intervening or contributing causes," and that keeping the compensation portion of the fund open indefinitely would preclude meaningful payments to acutely ill veterans who were most in need of assistance. *Id.* at 1418. Judge Weinstein then entered judgment dismissing, "on the merits, with prejudice," the claims of all class members. *Ryan* v. *Dow Chem. Co.*, 618 F. Supp. 623, 624 (E.D.N.Y. 1985).

Objecting class members appealed, arguing that "[t]he 'injured' class representatives failed to protect the substantive rights of all of those 'not yet manifested injury' class members who will manifest injury after the year 1995 when the settlement fund is projected to be depleted." No. 84-6273, *In re "Agent Orange" Prod. Liab. Litig.*, Reply Br. of Appellants 16 (2d Cir.) (objectors' brief). This Court rejected that argument and upheld the settlement. *Agent Orange I*, 818 F.2d at 167.

This Court again upheld the judgment in 1993, this time against a collateral attack by veterans who claimed inadequate representation because their injuries manifested after the settlement date. Judge Weinstein dismissed the claims, explaining that "[a]ll of the courts which considered the Agent Orange Settlement were fully cognizant of the conflict arguments now hypothesized by the plaintiffs

and took steps to minimize the problem in the way they arranged for long-term administration of the Settlement Fund." *Ryan* v. *Dow Chem. Co.*, 781 F. Supp. 902, 918-19 (E.D.N.Y. 1991). This Court affirmed, holding that "the fundamental fairness of the *Agent Orange I* settlement remains unshaken." *In re "Agent Orange" Prod. Liab. Litig.*, 996 F.2d 1425, 1437 (2d Cir. 1993) ("*Ivy/Hartman*").

In both *Agent Orange I* and *Ivy/Hartman*, this Court found that notice of the class action and of the settlement were adequate. 996 F.2d at 1435 (citing 818 F.2d at 167-70). The present plaintiffs neither opted out nor objected to the settlement prior to defendants' $180 million payment. Moreover, they benefited from the class assistance foundation that was funded by a quarter of the settlement proceeds. Nevertheless, plaintiffs sought to avoid the settlement bar on the ground that they fell ill after direct cash payments had ceased, which, without more, assertedly demonstrated inadequate representation.

This Court held that plaintiffs were not precluded from relitigating the issue of adequate representation, primarily because it believed that *Amchem Products, Inc.* v. *Windsor*, 521 U.S. 591 (1997), and *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815 (1999), "prevent applying res judicata to bar plaintiffs' claim." *Stephenson* v. *Dow Chem. Co.*, 273 F.3d 249, 251 (2d Cir. 2001) ("*Stephenson I*"). The panel read those decisions, which were handed down long after the settlement and should therefore have been inapplicable on collateral attack, to hold that a court generally

should not certify "a class which purports to represent both present and future claimants." *Id.* at 261. The panel observed that "the prior litigation purported to settle all future claims, but only provided for recovery for those whose death or disability was discovered prior to 1994." *Id.* at 260. It interpreted *Amchem* and *Ortiz* to indicate that class members who first manifested illness after 1994—who at the time of settlement could not have been distinguished from those who would fall ill between 1984 and 1994—"were not adequately represented in the prior *Agent Orange* litigation" and should have been subclassed (or excluded altogether) because they were disadvantaged by the settlement relative to those who developed symptoms earlier. *Id.* at 261. And, because the panel understood *Amchem* and *Ortiz* to state a constitutional rule, it held that binding the plaintiffs by the settlement would violate due process. *Id.*

A. Collateral Attack on the Settlement Is Impermissible.

1. The Representation Was Deemed Adequate at the Time of the Settlement.

The preclusion of collateral litigation is a "rule of fundamental and substantial justice, of public policy and of private peace" (*Federated Dep't Stores* v. *Moitie*, 452 U.S. 394, 401 (1981)) that applies with full force in class action litigation. *Cooper* v. *Fed. Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984); *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 379 (1996). Plaintiffs here concededly are members of the Agent Orange class and would therefore normally

be bound by the class judgment. Moreover, the adequacy of class representation of veterans who had not manifested illness at the time of the settlement was litigated and resolved at the time of preliminary certification, again at final certification, and again in *Agent Orange I*. Accordingly, that issue should have been "considered forever settled between the parties." *Durfee* v. *Duke*, 375 U.S. 106, 111 (1963) (quotation marks omitted); see also, *e.g.*, *In Re: Diet Drugs Prod. Liab. Litig.*, 431 F.2d 141, 146 (3d Cir. 2005) (adequacy of representation, once decided, "may not be relitigated.").

Plaintiffs' collateral attack on the long-final judgment is wholly unjustified. Allowing such an attack "would result in creating elements of uncertainty and confusion and in undermining the conclusive character of judgments, consequences which it was the very purpose of the doctrine of *res judicata* to avert." *Moitie*, 452 U.S. at 398-99.

2. Plaintiffs' Specific Claim of Inadequacy Was Again Rejected in *Ivy/Hartman*.

Plaintiffs' collateral attack is foreclosed not only by *Agent Orange I*, but by *Ivy/Hartman*—with which *Stephenson I* cannot be reconciled. The *Stephenson I* panel did ***not*** rule that ***all*** asymptomatic class members had been inadequately represented. Instead, it accepted the holding in *Ivy/Hartman* that class members who first developed symptoms between 1984 and 1994 ***had*** been adequately represented and ***were*** bound by the judgment. 273 F.3d at 257-58. Yet at the time

of certification and settlement, all asymptomatic class members were in precisely the same position: it was neither known nor knowable when, if ever, any particular veteran would fall ill. At that time, therefore, the current plaintiffs were situated identically to all other "future claimants": each operated behind a "veil of ignorance," not knowing "where [he or she] would end up." *Uhl* v. *Thoroughbred Tech. & Telecomms., Inc.*, 309 F.3d 978, 986 (7th Cir. 2002). If then-asymptomatic veterans could properly have been in the class, as this Court has consistently held, then there is no basis for distinguishing between those whose illnesses manifested before and after 1994.

3. Barring Plaintiffs From Relitigating Adequacy of Representation Is Consistent With Due Process.

a. The processes mandated by Rule 23 adequately protect absent class members' interests.

Under *Stephenson I*, absent class members always may collaterally attack a class action settlement by asserting that they were not adequately represented when the original adequacy determination was made. The review thus remains perpetually open; any finding of adequacy is essentially advisory. This conclusion was unwarranted. Under Supreme Court precedent, procedures that "insure[] the protection of the interests of absent parties who are to be bound" by the judgment satisfy constitutional requirements. *Hansberry* v. *Lee*, 311 U.S. 32, 42 (1940); see also *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 812 (1985). Rule 23's

purpose is to provide the procedural safeguards that would justify both the certification of a class action ***and*** the imposition of a judgment binding all class members. *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974).

In particular, Rule 23(a)(4) requires the district court to consider all "matters that will bear upon proper representation of the absent plaintiffs' interest" (*Shutts*, 472 U.S. at 809, 810) and to make a "special effort to protect the interests of the [absent] plaintiffs." *S. Cent. Bell Tel. Co.* v. *Alabama*, 526 U.S. 160, 167 (1999) (internal quotation marks omitted). The district court must "evaluate carefully the legitimacy of the named plaintiff's plea that he is a proper class representative" and insist on "actual, not presumed, conformance with Rule 23(a)." *Gen. Tel. Co. of the Sw.* v. *Falcon*, 457 U.S. 147, 160 (1982).

It must be assumed that judges will faithfully fulfill this responsibility; accordingly, "[f]undamental fairness to class members does not require" that they be permitted to attack class judgments collaterally: a "class member in a Rule 23(b)(3) class action is afforded due process of law by the conscientious application by the court of the requirements of Rule 23." William T. Allen, *Finality of Judgments in Class Actions: A Comment on* Epstein v. MCA, Inc., 73 N.Y.U. L. REV. 1149, 1160 (1998). As the Ninth Circuit explained on remand in *Epstein*, *Shutts* plainly "implies that [collateral attack on the determination of adequacy] is unwarranted ****. [T]he absent class members' due process right to

adequate representation is protected not by collateral review, but by the certifying court initially, and thereafter by appeal." *Epstein* v. *MCA, Inc.*, 179 F.3d 641, 648 (1999).

Other Circuits, too, have rejected the approach to collateral attack adopted by *Stephenson I*. See, *e.g.*, *In Re: Diet Drugs*, 431 F.3d at 146 ("*Stephenson* *** is inconsistent with circuit case law by which this panel is bound.") (citing *Carlough* v. *Amchem Prods., Inc.*, 10 F.3d 189 (3d Cir. 1993) (notice and failure to opt out constitute consent to jurisdiction and bar collateral attack)); *Hospitality Mgmt. Assocs., Inc.* v. *Shell Oil Co.*, 591 S.E.2d 611, 659-60 (S.C. 2004) (noting irreconcilability of *Epstein* and *Stephenson* and adopting Ninth Circuit's rule); *Nottingham Partners* v. *Trans-Lux Corp.*, 925 F.2d 29, 33 (1st Cir. 1991) (adequacy is determined by certifying court, not on collateral review); *Fine* v. *Am. Online, Inc.*, 743 N.E.2d 416, 420 (Ohio Ct. App. 2000) (absent class members' due process rights are protected by procedures followed by certifying court and on direct review, not by collateral review). As one commentator observed, "[w]ithout such finality, there is a strong possibility that the Agent Orange settlement would never have occurred, and the chemical companies would likely have dealt with the afflicted veterans in a less satisfactory manner." Kevin Bernier, *The Inadequacy of the Broad Collateral Attack:* Stephenson v. Dow Chemical Company *and Its Effect on Class Action Settlements*, 84 B.U. L. REV. 1023, 1044 (2004).

In this case, the courts determined, in accordance with Rule 23, that the Agent Orange suit was properly maintained as a class action and that class representation was adequate. Judges Pratt and Weinstein engaged in the Rule 23(a)(4) analysis fully aware of their independent obligation to guard against intraclass conflicts. The adequacy of class representation and notice was then upheld on appeal by this Court, which closely analyzed and carefully applied the Rule 23 standards.

The case for preclusion is especially strong here because the issue was "actually litigated and adjudged" after being raised by persons who were situated identically to, and who had exactly the same interest as, the present plaintiffs. *Montana* v. *United States*, 440 U.S. 147, 157 (1979) (internal quotation marks omitted); see also pp. 5-7, *supra*. And, of course, *Amchem* and *Ortiz*, being cases on direct review, have no bearing on this question.

b. The balance of public and private interests militates against allowing a collateral attack.

Compliance with the Rule 23 procedures, standing alone, precludes collateral attack. But the public and private interests at stake here make the case for preclusion even stronger, as demonstrated by an analysis of the public and private interests at stake. See *Mullane* v. *Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313-14 (1950); *Mathews* v. *Eldridge*, 424 U.S. 319, 334-35 (1976).

Plaintiffs' interest in collateral attack is limited. Plaintiffs' interest in adequate representation is important, but it is accounted for by the Rule 23 protections themselves. Moreover, the history of Agent Orange litigation demonstrates that plaintiffs' ultimate prospect of success on the merits is very low (even if they could surpass the hurdle presented by the government contract defense).

The risk of error and the value of collateral attack are both low. Rule 23 substantially minimizes the risk that class representation will be inadequate, thus reducing the need for additional safeguards. Nor is there reason to believe that allowing ***re***litigation of the issue would add much value in protecting against error. The only new consideration relied upon by the *Stephenson I* panel—the fact that plaintiffs ultimately became ill after 1994—improperly takes into account facts ascertainable only by hindsight that are irrelevant to the adequacy of representation originally afforded class members. Moreover, *Stephenson I* ignored the fact that ***all*** class members, including plaintiffs, benefited from the settlement. In addition to the work of the class assistance foundation, every veteran who was asymptomatic in 1984 received a kind of "term insurance policy" providing direct benefits for a 10-year period. So far as could then be known, all unimpaired veterans stood precisely the same chance of collecting on that policy.

The interests of defendants and of society weigh heavily against relitigation. On the other side of the balance, defendants have a compelling interest in the finality of the settlement—"a distinct and personal interest in seeing the entire plaintiff class bound by *res judicata* just as [plaintiffs are] bound." *Shutts*, 472 U.S. at 805; see also *Peters* v. *Nat'l R.R. Passenger Corp.*, 966 F.2d 1483, 1487 (D.C. Cir. 1992). When the judgment became final, after years of litigation, defendants paid the class nearly $200 million. In the unlikely event that these plaintiffs ultimately prevail, are defendants then "to go around to all [the] class members whom they have paid and ask for their [money] back so that th[e] litigation can return to its starting point?" *In re Factor VII or IX Concentrate Blood Prods. Litig.*, 159 F.3d 1016, 1019 (7th Cir. 1998) (Posner, J.).

The public and societal costs of allowing unending challenges to the determination of adequacy would also be immense. "Public policy dictates that there be an end to litigation." *Moitie*, 452 U.S. at 401 (internal quotation marks omitted); see also FED. R. CIV. P. 60(b)(3). This is particularly true as to class action litigation: "the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23." *Falcon*, 457 U.S. at 155 (internal quotation marks omitted). In this case, reopening the litigation will place a particularly heavy burden on the judicial system—hundreds of thousands, even

millions, of veterans and their families would be eligible to bring individual suits, none of which would be likely to prevail.

The approach taken by *Stephenson I* makes the original courts' determination of adequate representation essentially advisory, "creat[ing] the potential for multiple and wasteful litigation on the issue of 'adequacy of representation,' and result[ing] in a new kind of forum shopping in the class action context," thus "undermin[ing] the very efficiencies sought to be achieved by the class action mechanism." Marcel Kahan & Linda Silberman, *The Inadequate Search for "Adequacy" in Class Actions: A Critique of* Epstein v. MCA, Inc., 73 N.Y.U. L. REV. 765, 766, 779 (1998). "'[A]t some point the benefit to individuals from an additional safeguard is substantially outweighed by the cost of providing such protection.'" *Walters* v. *Nat'l Assoc. of Radiation Survivors*, 473 U.S. 305, 321 n.1 (1985) (quoting Henry J. Friendly, "*Some Kind of Hearing*", 123 U. PA. L. REV. 1267, 1276 (1975)). That point has been reached in this case.

B. Even If Collateral Attack Were Permissible, Plaintiffs' Representation Was Not Inadequate.

In addition to erroneously permitting the collateral attack in the first place, the panel erred in reaching its determination of inadequate representation.

1. The Wrong Legal Standard Was Applied.

The panel assumed that the analysis used in resolving a collateral attack is identical to the one that governs on initial direct review of the adequacy

determination. 273 F.3d at 259. That is wrong: the due process balance is dramatically different in a collateral proceeding. The claimant who seeks to avoid the binding force of a final judgment and thereby upset settled reliance interests must make a far more powerful showing of prejudicial intraclass conflicts than does a class member challenging adequacy of representation in the initial litigation. Relief should be granted only if the claimants can demonstrate both (1) that the conflict caused them actual prejudice and (2) that contravening reliance interests in the judgment on the part of other affected parties are minimal. See *Hansberry*, 311 U.S. at 38-40, 44-46 (relying on those circumstances to allow collateral attack).

Plaintiffs made no such showing here. Any supposed intraclass conflict was wholly theoretical when the settlement was approved. At a minimum, all asymptomatic veterans were identically situated (and, per *Ivy/Hartman*, adequately represented). Indeed, the particular division of settlement proceeds that the *Stephenson I* panel identified as the source of conflict was devised, ***after the settlement, by the district judge***, who indicated repeatedly that he was looking out for the interests of all class members. Any unfairness in the resulting formula cannot be laid at defendants' feet. They negotiated a lump sum settlement with the entire class, and they negotiated with class representatives whose interest, held in common with all class members, lay in obtaining the largest possible payment to the class.

2. Post-Judgment Legal Developments Are Irrelevant.

Amchem and *Ortiz* provided no proper basis for reopening a judgment that had become final many years earlier. The *Stephenson I* panel emphasized the Supreme Court's observation in *Ortiz* that "'it is obvious ***after*** *Amchem* that a class divided between holders of present and future claims *** requires division into homogeneous subclasses.'" 273 F.3d at 260 (quoting *Ortiz*, 527 U.S. at 856) (emphasis added). *Amchem* and *Ortiz* thus established a "new rule": "the result was neither dictated nor compelled" by existing precedent. *Goeke* v. *Branch*, 514 U.S. 115, 120 (1995). Applying that new rule on collateral review was error. The preclusive effects of a final judgment are not "altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case." *Moitie*, 452 U.S. at 398; see also *Reynoldsville Casket Co.* v. *Hyde*, 514 U.S. 749, 758 (1995); *Harper* v. *Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993).

3. Representation Was Adequate Even Under the Standards and Law Applied by the *Stephenson I* Panel.

Even if the issue had arisen on direct review after *Amchem* and *Ortiz*, the settlement would have satisfied due process requirements. The Supreme Court's conclusions that present and future claimants should be divided into subclasses were specific to the facts of those cases. Among other material differences, in *Amchem* and *Ortiz* the critical source of the intraclass conflict was the allocation of

settlement funds—an allocation that, in contrast to that here, was worked out between the defendants and the class representatives—in which the goal of "generous immediate payments" to the currently ill class members was in tension with the goal of "ensuring an ample, inflation-protected fund" for future claimants. *Amchem*, 521 U.S. at 626.

Here, defendants negotiated a lump-sum settlement with the class. The plan for the allocation of proceeds among the class members was developed by the special master and adopted by the court, ***not*** negotiated by the parties. The interests of asymptomatic class members were ***not*** bargained away to increase the settlement value for those already ill. *Amchem* and *Ortiz* in no way suggest that this type of settlement violates due process. Indeed, this Court itself recently recognized that *Amchem* does not categorically bar a class that encompasses both present and future claimants. *Denney* v. *Deutsche Bank AG*, 443 F.3d 253, 269 (2d Cir. 2006) (distinguishing *Amchem* and upholding class that included both "class representatives, all of whom have already been assessed a penalty and know the full extent of their loss, and *** future-risk class members, who are awaiting the possible assessment of a penalty") (citing MCLAUGHLIN ON CLASS ACTIONS, LAW & PRACTICE § 4.02 ("There is no *per se* prohibition against certifying a single class including both presently injured and future claimants.")).

II. THIS COURT HAS THE POWER TO REVISIT *STEPHENSON I*.

Stephenson I was wrongly decided: the outcome was grossly unfair, inconsistent with decisions of this and other courts, and unnecessary to protect plaintiffs' due process rights. The question thus becomes whether this Court now has the authority to revisit that decision and, if so, whether it should. The answer to both of those questions is yes, because the Court can, and should, correct manifest injustice.

We discuss below four possible constraints on the power of the panel to reconsider *Stephenson I*: the Supreme Court's mandate, law of the case, collateral estoppel, and *stare decisis*. We note that, because only the Stephenson and Isaacson families were parties to the earlier proceedings, these doctrines have potentially different application to the various appellants.

A. The Supreme Court's Affirmance by an Equally Divided Court Does Not Bar Reconsideration.

A tie vote in the Supreme Court affirms the lower court's judgment but is non-precedential. The ruling has no binding force, beyond rendering final the decision disposing of the particular litigation. It is no different in effect from a denial of certiorari. "The rule is *** an application of a broader principle that applies generally in multimember bodies governed by majority rule: the body cannot take an affirmative action based on a tie." Edward A. Hartnett, *Ties in the*

Supreme Court of the United States, 44 WM. & MARY L. REV. 643, 652 & n.38 (2002).

In *Neil v. Biggers*, 409 U.S. 188 (1972), the Court explained that the lower court judgment continues to stand not because the Court affirmatively upholds it, but rather because the Court does not have a majority for changing the status quo:

> If the judges are divided, the reversal cannot be had, for no order can be made. The judgment of the court below, therefore, stands in full force. It is, indeed, the settled practice in such case to enter a judgment of affirmance; but this is only the most convenient mode of expressing the fact that the cause is finally disposed of in conformity with the action of the court below, and that that court can proceed to enforce its judgment. ***The legal effect would be the same if the appeal, or writ of error, were dismissed***.

409 U.S. at 192 (quoting *Durant* v. *Essex Co.*, 74 U.S. 107, 112 (1868)) (emphasis added).

Moreover, any controlling effect of the Supreme Court's mandate would be limited to Stephenson and his family. With respect to the Isaacsons, the Court vacated and remanded for reconsideration in light of *Syngenta Crop Protection, Inc*. v. *Henson*, 537 U.S. 28 (2002). The other 15 cases involved in the current appeals were not part of the earlier case.

B. Neither Law of the Case Nor Collateral Estoppel Bars Reconsideration.

Any application of law of the case would necessarily be limited to the two plaintiffs in this action—Stephenson and Isaacson—who were party to

Stephenson I.[1] In any event, law of the case is a discretionary principle, not a jurisdictional limitation on the court's power. *Arizona* v. *California*, 460 U.S. 605, 618 (1983). Judge Learned Hand declared that "'law of the case' does not rigidly bind a court to its former decisions, but is only addressed to its good sense." *Higgins* v. *California Prune & Apricot Grower, Inc.*, 3 F.2d 896, 898 (2d Cir. 1924); see also Wright & Miller, FEDERAL PRACTICE AND PROCEDURE 18B §4478.2.

This Court has the power to revisit any earlier decision "to correct a clear error or prevent manifest injustice." *United States* v. *Thorn*, 446 F.3d 378, 383 (2d Cir. 2006). Where a court is "convinced that [its earlier result in the case] is substantially erroneous," the "only sensible thing for [it] to do is to set itself right." *Brunswick Corp.* v. *Sheridan*, 582 F.2d 175, 177 (2d Cir. 1978) (Friendly, J.) (internal quotation marks omitted). We respectfully submit that this is such a circumstance and that forcing defendants to expend substantial money and effort to litigate claims that they paid hundreds of millions of dollars to settle nearly two

[1] Law of the case may apply to new parties whose cases are ***consolidated*** with the earlier litigation (*Zdanok* v. *Glidden Food Co.*, 327 F.2d 944 (2d Cir. 1964)), but that is not the case here.

decades ago constitutes the type of "manifest injustice" that requires correction. See Points I.A.1, I.A.2, *supra*.[2]

C. Neither Collateral Estoppel Nor *Stare Decisis* Bars Reconsideration.

To the extent the appellants whose cases were not before the Court in *Stephenson I* seek to rely on that precedent to justify their collateral attacks on the *Agent Orange* settlement, they would presumably invoke either collateral estoppel or *stare decisis*. But neither doctrine precludes the panel's application of the settlement bar to those plaintiffs, and neither would have any application at all if the Court exercises its power under law-of-the-case doctrine in the *Stephenson* case.

1. *Collateral estoppel*. The non-Stephenson plaintiffs cannot avail themselves of nonmutual, offensive collateral estoppel, which is inappropriate where the defendant lacked a full and fair opportunity to litigate the case in the first instance. Here, the fact that the Supreme Court granted certiorari to review *Stephenson I* but then was unable to reach a decision makes the use of collateral estoppel entirely inappropriate. See *Faulkner* v. *Nat'l Geographic Enters., Inc.*,

---

[2] Law of the case of course would not impede *en banc* reconsideration of *Stephenson I*. See *Van Gemert* v. *Boeing Co.*, 590 F.2d 433, 436 (2d Cir. 1978), aff'd on other grounds, 444 U.S. 472 (1980).

409 F.3d 26, 37 (2d Cir. 2005); Wright & Miller, *supra*, at 18A § 4465.2. The grant of certiorari cast a sufficient cloud over *Stephenson I* that it is plainly inequitable to foreclose reconsideration of that holding. Moreover, the great public importance of these cases—the potential consequences for not only the parties but the judicial system of allowing an onslaught of new Agent Orange cases—also militates against the application of collateral estoppel. *Envtl. Def.* v. *EPA*, 369 F.3d 193, 203 (2d Cir. 2004) (nonmutual, offensive collateral estoppel is inappropriate in case "which affects the public interest and is only one of a series of legal challenges across the country").

2. *Stare decisis*. This doctrine likewise does not apply where an intervening Supreme Court decision has "cast doubt" on the prior panel's decision. *Meacham* v. *Knolls Atomic Power Lab.*, 461 F.3d 134, 141 (2d Cir. 2006); *Sullivan* v. *Am. Airlines, Inc.*, 424 F.3d 267, 274 (2d Cir. 2005). By granting certiorari and subsequently failing to reach a decision, the Supreme Court cast sufficient doubt on *Stephenson I* to allow this Court to revisit that decision. See *Union of Needletrades* v. *United States Immigration & Naturalization Serv.*, 336 F.3d 200, 210 (2d Cir. 2003) ("[F]or this exception to apply, the intervening decision need not address the precise issue already decided by our Court."). And clearly, principles of *stare decisis* do not preclude this Court from overruling *Stephenson I* either by going *en banc* or through the circulation of a draft opinion to all active

judges before release. *United States* v. *Moore*, 949 F.2d 68, 71 (2d Cir. 1991); *Adeleke* v. *United States*, 355 F.3d 144, 155 n.9 (2d Cir. 2004); *United States* v. *Pujana-Mena*, 949 F.2d 24, 31 n.4 (2d Cir. 1991); *United States* v. *Reed*, 773 F.2d 477, 478 n.1 (2d Cir. 1985).

CONCLUSION

For all of the foregoing reasons, this Court should hold all plaintiffs' claims barred by the 1984 settlement.

August 3, 2007

Respectfully submitted,

Andrew L. Frey
Charles A. Rothfeld
Lauren R. Goldman
Christopher J. Houpt
MAYER, BROWN, ROWE & MAW LLP
1675 Broadway
New York, New York 10022
(212) 506-2500

John C. Sabetta
Andrew T. Hahn, Sr.
SEYFARTH SHAW LLP
1270 Avenue of the Americas
New York, New York 10020

Seth P. Waxman
Paul R.Q. Wolfson
WILMER, CUTLER, PICKERING,
HALE & DORR LLP
1875 Pennsylvania Avenue NW
Washington, D.C. 20006
(202) 663-6800

Richard P. Bress
LATHAM & WATKINS
555 Eleventh Street, NW, Suite 1000
Washington, D.C. 20004-1304
(202) 637-2137

James E. Tyrrell, Jr.
PATTON BOGGS LLP
One Riverfront Plaza, 6th Floor
Newark, New Jersey 07102

Attorneys for Defendant
Monsanto Company

William A. Krohley
William C. Heck
KELLEY DRYE & WARREN LLP
101 Park Avenue
New York, New York 10178
(212) 808-7800

Attorneys for Defendant
Hercules Incorporated

James L. Stengel
Laurie Strauch Weiss
ORRICK, HERRINGTON & SUTCLIFFE LLP
666 Fifth Avenue
New York, New York 10103-0001

Steven Brock
BERKMAN, HENOCH, PETERSON & PEDDY,
P.C.
100 Garden City Plaza
Garden City, NY 11530
(516) 222-6200

James V. Aiosa
Richard S. Feldman
RIVKIN RADLER LLP
926 Reckson Plaza
Uniondale, New York 11556-0926
(516) 357-3000

Attorneys for Defendant
The Dow Chemical Company

Myron Kalish
50 East 79th Street
New York, New York 10021

Attorney for Defendants
Uniroyal, Inc., Uniroyal Chemical Co.,
and CDU Holdings, Inc.

Michael M. Gordon
MCKEE NELSON LLP
One Battery Park Plaza, 34th Floor
New York, New York 10004
(917) 777-4567

Attorneys for Defendants Occidental Chemical Corporation, as successor by merger to Diamond Shamrock Chemicals Company; Maxus Energy Corporation; Tierra Solutions, Inc., formerly known as Chemical Land Holdings, Inc.; and Valero Energy Corporation, as successor by merger to Ultramar Diamond Shamrock Corporation

Lawrence D'Aloise, Jr.
CLARK, GAGLIARDI & MILLER
The Inns of Court
99 Court Street
White Plains, New York 10601
(914) 946-8900

Attorneys for Defendants T.H. Agriculture & Nutrition Co., Inc., Thompson-Hayward Chemical Co., and Harcros Chemical, Inc.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was produced in Times New Roman (a proportionally-spaced typeface), 14-point type and contains 4,983 words (based on the Microsoft Word word processing system word count function). This Court granted leave to file an brief of up to 5,000 words.

I further certify that the electronic copy of this brief filed with the Court is identical in all respects except the signature to the hard copy filed with the Court, and that a virus check was performed on the electronic version using the Norton Anti-Virus software program.

Andrew L. Frey
Mayer, Brown, Rowe & Maw LLP
Counsel to the Dow Chemical Company

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In re "Agent Orange" Product Liability Litigation	**MDL No. 381** Civil Action Nos. 05-1760; 05-1693; 05-1694; 05-1695; 05-1696; 05-1698; 05-1700; 05-1737; 05-1771; 05-1810; 05-1813; 05-1820; 05-2450; 05-2451; 05-1817

CERTIFICATE OF SERVICE

I, Andrew L. Frey, a member of the Bar of this Court, hereby certify that on Friday, August 3, 2007, I caused to be served upon each counsel of record for Appellants two copies of the Supplemental Brief of Defendants-Appellees via first-class mail to the addresses that appear on the following service list.

I further caused the document to be served today via electronic mail on each counsel of record for Appellants who has a functioning e-mail address, as identified in the following service list.

August 3, 2007

Respectfully submitted,

Andrew L. Frey
MAYER, BROWN, ROWE & MAW LLP
1675 Broadway
New York, New York 10022
(212) 506-2500

SERVICE LIST

COUNSEL FOR APPELLANTS

Mark R. Cuker **Williams, Cuker & Berezofsky** One Penn Center 1617 JFK Blvd. - Suite 800 Philadelphia, PA 19103 (215) 557-0099 (215) 557-0673 (fax) *mcuker@wcblegal.com* Ronald Simon **Simon & Associates** 1707 N Street, N.W. Washington, DC 20036 (202) 429-0094 (202) 429-0075 (fax) *ron@1707law.com* Gerson H. Smoger **Smoger & Associates, P.C.** 3175 Monterey Blvd. Oakland, CA 94602 (510) 531-4529 (510) 531-4377 (fax) *gersonsmoger@earthlink.net*	***Isaacson* v. *Dow Chemical Co. et al.*** **05-1820-CV**
Stephen B. Murray, Jr. **Murray Law Firm** 909 Poydras Street Suite 2550 New Orleans, LA 70112-4000 (504) 525-8100 (504) 584-5249 (fax) *smurrayjr@murray-lawfirm.com*	***Stephenson* v. *Dow Chemical Co. et al.*** **05-1760-CV**

James Boanerges **Lueders & Boanerges** 9432 Old Katy Road, Suite 100 Houston, TX 77055 (713) 464-3383 (713) 464-9467 (fax) *jb@csjblaw.com* Joan N. Harrop **Gomien & Harrop** First Midwest Bank Building – Suite 300 220 West Main Street P.O. Box 708 Morris, Illinois 60450-0708 (815) 942-0071 *gomienharroplaw@sbcglobal.net* William Fitzpatrick **Fitzpatrick & Fitzpatrick** 36 West Randall Street Chicago, Illinois 60601 (312) 553-2200 (312) 553-2217 (fax) **No email address available.**	***Garncarz* v. *Dow Chemical Co. et al.*** **05-2450-CV**
Douglas R. Kemp **Wilson, Elser, Moskowitz, Edelman & Dicker LLP** 677 Broadway Albany, NY 12207-2996 (518) 449-8893 (518) 449-8927 (fax) *douglas.kemp@wilsonelser.com*	***Twinam* v. *Dow Chemical Co. et al.*** **05-1509-CV**

Robert B. Evans, III **Burgos & Evans, L.L.C.** 3632 Canal Street New Orleans, LA 70119-6135 (504) 488-3722 (504) 482-8525 (fax) *revans@burgosevans.com*	***Sampey* v. *Dow Chemical Co. et al.*** **05-1771-CV**
Jeffrey D. Guerriero **Guerriero & Guerriero** P.O. Box 4092 Monroe, LA 71211-4092 (318) 325-4306 (318) 323-8406 (fax) *prosourcesports@aol.com* **For Fedex:** 2200 Forsythe Avenue Monroe, LA 71201 Morris E. Cohen **Law Office of Morris E. Cohen, P.C.** 1122 Coney Island Avenue Suites 216-217 Brooklyn, NY 11230 (718) 859-8009 (718) 859-3044 (fax) *mcohen@ipcases.com*	***Willie Williams, Jr. et al.* v. *Dow Chemical,et al.*** **05-1817-CV** ***Nelson et al.* v. *Dow Chemical Co. et al.*** **05-1810-CV** ***Kidd et al.* v. *Dow Chemical Co. et al.*** **05-1813-CV**
James Russell Tucker **Tucker & Ratcliffe, LLP** 5505 Celestial Road Dallas, TX 75240 (214)740-3000 *JRTuckerPC@aol.com* *deniselmarsh@yahoo.com*	***Patton* v. *Dow Chemical Co. et al.*** **05-2451-CV**

James Boanerges **Lueders & Boanerges** 9432 Old Katy Road Suite 100 Houston, TX 77055 (713) 464-3383 (713) 464-9467 (fax) *jb@csjblaw.com*	***Anderson* v. *Dow Chemical Co. et al.*** **05-1698-CV**
David E. Cherry **Campbell Cherry Harrison Davis & Dove** P.O. Drawer 21387 Waco, TX 76702-1387 (254) 761-3300 (254) 761-3301 (fax) *cherry@thetriallawyers.com* **For Fedex:** 5 Ritchie Road Waco, TX 76712	***Stearns* v. *Dow Chemical Co. et al.*** **05-1695-CV**
Mark I. Bronson **Newman Bronson & Wallis** 2300 West Port Plaza Drive St. Louis, MO 63146 (314) 878-8200 (314) 878-7839 (fax) *mbronson@newmanbronson.com*	***Bauer* v. *Dow Chemical Co. et al.*** **05-1693-CV** ***Walker* v. *Dow Chemical Co. et al.*** **05-1694-CV**
Nira T. Kermisch **Law Offices of Nira Kermisch** 36 West Main Street—Suite 405 Rochester, NY 14614 (585) 232-7280 (585) 232-2681 (fax) *ntkermisch@aol.com*	***Gallagher* v. *Dow Chemical Co. et al.*** **05-1737-CV**

John H. Pucheu **Pucheu, Pucheu & Robinson, L.L.P.** P.O. Box 1109 Eunice, LA 70535-1109 (337) 457-9075 (337) 457-4858 *john@pprlaw.com* **For Fedex:** 106 Park Avenue Eunice, LA 70535 Bernard F. Duhon **Bernard F. Duhon, Ltd.** P.O. Box 1169 Abbeville, LA 70511-1169 (337) 893-5066 (337) 893-0030 (fax) *bernard@bernardduhon.com* **For Fedex:** 111 Concord Street, Suite B Abbeville, LA 75011	***Breaux* v. *Dow Chemical Co. et al.*** **05-1700-CV** ***Plowden* v. *Dow Chemical Co. et al.*** **05-1696-CV**

Constantine P. Kokkoris, Esq. 225 Broadway Suite 612 New York, NY 10007 (212) 349-9340 (212) 587-8115 (fax) *cpk@kokkorislaw.com* William H. Goodman, Esq. Jonathan C. Moore, Esq. **Moore & Goodman, LLP** 99 Park Avenue, Suite 1600 New York, NY 10016 (212) 353-9587 (212) 557-0565 (fax) *bgoodman@ccr-ny.org* *jmoore@gis.net*	***Vietnam Ass'n for Victims of Agent Orange/Dioxin et al.* v. *Dow Chemical Co. et al.*** **05-1953-CV**