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NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE COMMISSIONER OF THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION and THE ADMINISTRATOR OF THE NEW JERSEY SPILL COMPENSATION FUND,	SUPERIOR COURT OF NEW JERSEY LAW DIVISION - ESSEX COUNTY
Plaintiffs,	DOCKET NO.: L-009868-05 (PASR)
v.	<u>Civil Action</u>
OCCIDENTAL CHEMICAL CORPORATION, TIERRA SOLUTIONS, INC., MAXUS ENERGY CORPORATION, MAXUS INTERNATIONAL ENERGY COMPANY, REPSOL YPF, S.A., YPF, S.A., YPF HOLDINGS, INC., YPF INTERNATIONAL S.A. (f/k/a YPF INTERNATIONAL LTD.) AND CLH HOLDINGS, INC.,	<b>DEFENDANT OCCIDENTAL CHEMICAL CORPORATION'S OBJECTIONS AND RESPONSES TO DEFENDANTS MAXUS ENERGY CORPORATION AND TIERRA SOLUTIONS, INC.'S INTERROGATORIES TO DEFENDANT OCCIDENTAL CHEMICAL CORPORATION REGARDING TRACK III TRIAL ISSUES</b>
Defendants.	

To: Defendant Maxus Energy Corporation by and through its counsel of record, William L. Warren, Drinker Biddle & Reath LLP, 105 College Road East, Suite 300, P.O. Box 627, Princeton, NJ 08652-0627; Thomas E. Starnes, Drinker Biddle & Reath LLP, 1500 K Street, N.W., Washington, D.C. 20005-1209.

Defendant Occidental Chemical Corporation (“OCC”) answers and objects to Defendants Maxus Energy Corporation and Tierra Solutions, Inc.’s Interrogatories to Defendant Occidental Chemical Corporation Regarding Track III Trial Issues.

ARCHER & GREINER  
A Professional Corporation  
Attorneys for Defendant  
Occidental Chemical Corporation

Dated: November 28, 2011

By: /s/ Robert T. Lehman  
ROBERT T. LEHMAN, ESQUIRE



**OCC'S OBJECTIONS AND RESPONSES TO DEFENDANTS MAXUS ENERGY CORPORATION AND TIERRA SOLUTIONS, INC.'S INTERROGATORIES  
REGARDING TRACK III TRIAL ISSUES**

OCC objects to any definitions, instructions and requests set forth in the discovery requests to the extent they are outside the scope of the Track III Trial Plan, impose obligations beyond those required by the New Jersey Rules, or seek information protected by any privilege or protection from discovery including without limitation the attorney-client privilege, common interest privilege, and/or attorney work product protection. Subject to the foregoing, OCC responds as follows.

**Interrogatory No. 1:**

If you contend Maxus is the successor to Diamond Alkali Company, DSC-I or DSCC with regard to Spill Act liability in this lawsuit, set forth in detail the factual basis for your contention, other than alleged statements in any SEC filings, and identify all potential witnesses and/or other persons with knowledge of any facts regarding same.

**Response: OCC adopts and incorporates by reference the facts set forth in OCC's Counterstatement of Material Facts in Opposition to Plaintiffs' Motion for Partial Summary Judgment (June 24, 2011), attached hereto as Exhibit A. OCC is continuing to review and evaluate documents recently produced by Maxus and/or Tierra, and will review and evaluate other documents Maxus and/or Tierra are obligated to produce related to this matter, if and when received, for additional facts supporting OCC's contentions. Potential witnesses and persons who may have knowledge of such facts, to the extent currently known (subject to identification of others based on review of documents Maxus and/or Tierra are yet to produce as required) are identified in the Track III witness lists of the parties, which are attached hereto as Exhibit B.**

**Interrogatory No. 2:**

If you contend that Maxus retained or acquired any Diamond Alkali Company, DSC-I or DSCC liabilities relating to the Lister Site that were not transferred in or as a result of the SPA, identify and describe in detail all facts that support your contention, including the specific terms of the SPA that you rely on, the liabilities that were retained, how those liabilities differ from liabilities that were transferred to OCC and for which Maxus allegedly agreed to indemnify OCC, and identify all potential witnesses and/or other persons with knowledge of any facts in your response.

**Response: OCC adopts and incorporates its response to Interrogatory No. 1 above.**

**Interrogatory No. 3:**

Identify and describe with particularity any Diamond Alkali, DSC-I or DSCC liabilities relating to the Lister Site that you contend were assumed or acquired by or transferred to Maxus

Corporate Company, and the manner in which those liabilities were transferred to or assumed or acquired by Maxus Corporate Company.

**Response: OCC adopts and incorporates its response to Interrogatory No. 1 above.**

**Interrogatory No. 4:**

Identify each communication made prior to the filing of this lawsuit to any person or entity in which you contended that Maxus was a successor to Diamond Alkali Company, DSC-I, or DSCC, or that Maxus succeeded to Diamond Alkali Company, DSC-I, or DSCC's liabilities relating to the Lister Site, and, with respect to each such communication, identify all documents and all persons with knowledge relating to your response.

**Response: OCC is currently unaware of any such communication by OCC, but notes that Maxus itself represented, prior to the filing of this lawsuit, that it is the successor to Diamond Alkali Company and DSC-I, and that Maxus retained any such liabilities relating to the Lister Site notwithstanding the sale of common stock of DSCC.**

**Interrogatory No. 5:**

If you contend that Maxus concealed or misrepresented its involvement with the environmental investigation or remediation of the Lister Site, set forth in detail the factual basis for your contention and identify all potential witnesses and/or other persons with knowledge of any facts relating to your response.

**Response: This question is improper. OCC objects that this interrogatory is ambiguous because "involvement" with the environmental investigation or remediation of the Lister Site is undefined and subject to various possible meanings and interpretations. OCC knows that Maxus, along with Tierra, has played some role in relation to environmental response actions at the Lister Site but does not have complete information about Maxus' "involvement" and does not know what it does not know or what was or may have been concealed or misrepresented.**

**Interrogatory No. 6:**

If you contend that Maxus concealed or misrepresented any of the corporate transactions involving itself and/or Tierra, set forth in detail the factual basis for your contention and identify all potential witnesses and/or other persons with knowledge of any facts relating to your response.

**Response: This question is improper. OCC objects that this interrogatory is ambiguous because the referenced "corporate transactions involving itself [Maxus] and/or Tierra" are not identified or defined. OCC does not have complete information about such "corporate transactions," and does not know what it does not know or what was or may have been concealed or misrepresented.**

**Interrogatory No. 7:**

If you contend that Tierra was not a valid and distinct corporate entity, set forth in detail the factual basis for your contention, identify all documents you rely on and identify all potential witnesses and/or other persons with knowledge of any facts relating to your response.

**Response: To the best of OCC's knowledge and belief, Tierra was a lawfully formed corporate entity.**

**Interrogatory No. 8:**

Identify and describe with particularity any instances in which you formed a separate corporation for the purpose of holding title to property, including, for each such instance, the name of the corporation, when it was formed and the properties or property to which it held title, the corporation from which title was transferred, the consideration paid, and the reasons for the transfer.

**Response: This question is improper. OCC objects because this interrogatory is neither relevant nor reasonably calculated to lead to discovery of any evidence admissible in respect of any issue to be determined in Track III.**

**Interrogatory No. 9:**

If you contend that OCC intended one or more of the Plaintiffs to be third party beneficiaries of the indemnity provisions of the SPA, set forth in detail the factual basis for your contention and identify all potential witnesses and/or other persons with knowledge of any facts relating to your response.

**Response: OCC was not a party to the September 4, 1986 Stock Purchase Agreement and has no knowledge of such intent by any party thereto. The Stock Purchase Agreement speaks for itself as to whether any one or more of the Plaintiffs was an intended third party beneficiary of its indemnity provisions.**

**Interrogatory No. 10:**

If you contend that Maxus intended Plaintiffs to be a third party beneficiary under the indemnity provisions of the SPA, set forth in detail the factual basis for your contention, and identify all potential witnesses and/or other persons with knowledge of any facts relating to your response.

**Response: OCC adopts and incorporates its response to Interrogatory No. 9 above.**

**Interrogatory No. 11:**

Identify and describe in detail any and all communications or discussions between and among OCC personnel or representatives, between OCC and Maxus, or between OCC and any representative of the State of New Jersey relating to the Plaintiffs' alleged or purported rights or interest as a third party beneficiary or otherwise under the indemnity provisions of the SPA.

**Response: This question is improper. OCC objects to this interrogatory because it is compound, ambiguous, overly broad, and invasive of the attorney-client privilege and work product protection insofar as it seeks disclosure of communications or discussions “between and among OCC personnel or representatives” including OCC’s counsel. Subject thereto, OCC further responds as follows. OCC is not aware of any such communications or discussions between OCC and Maxus, except possibly some general and casual common interest communications between or among their respective counsel in the context of this litigation, which OCC is unable to recall or describe in any detail and would be equally known to Maxus in any event. OCC is not aware of any such communications or discussions between OCC and any representative of the State of New Jersey, except possibly some general and casual communications between or among their respective counsel regarding the fact that Plaintiffs have claimed or may claim third party beneficiary status and have or may seek discovery from OCC relating thereto, which OCC is unable to recall or describe in any detail. OCC does not believe it or its counsel have had any communications or discussions with Plaintiffs or their counsel regarding the merits of any contention by Plaintiffs that Plaintiffs are third party beneficiaries of any provision(s) of the September 4, 1986 Stock Purchase Agreement.**

**Interrogatory No. 12:**

If you contend that Maxus is a person “in any way responsible” under the Spill Act for discharges of Hazardous Substances at or from the Lister Site, set forth in detail the factual basis for your contention, including actions taken by Maxus with respect to the Lister Site and the dates they were taken, and identify all potential witnesses and/or other persons with knowledge of any facts relating to your response.

**Response: OCC adopts and incorporates its response to Interrogatory No. 1 above.**

Dated: November 28, 2011

Respectfully Submitted,

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*Attorneys for Defendant  
Occidental Chemical Corporation*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that true and correct copies of Defendant Occidental Chemical Corporation's Objections and Responses to Defendants Maxus Energy Corporation and Tierra Solutions, Inc.'s Interrogatories to Defendant Occidental Chemical Corporation Regarding Track III Trial Issues, by email to the following counsel, and via CT Summation to all other known counsel of record, on November 28, 2011.

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Date: November 28, 2011

/s/ David L. Bryant \_\_\_\_\_  
David L. Bryant

**EXHIBIT A**

**TO DEFENDANT OCCIDENTAL CHEMICAL CORPORATION'S**

**OBJECTIONS AND RESPONSES TO DEFENDANTS MAXUS ENERGY**

**CORPORATION AND TIERRA SOLUTIONS, INC.'S INTERROGATORIES**

**REGARDING TRACK III TRIAL ISSUES**

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<p>NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE COMMISSIONER OF THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION and THE ADMINISTRATOR OF THE NEW JERSEY SPILL COMPENSATION FUND,</p>	<p>SUPERIOR COURT OF NEW JERSEY LAW DIVISION - ESSEX COUNTY</p>
<p>Plaintiffs,</p>	<p>DOCKET NO.: L-009868-05 (PASR)</p>
<p>v.</p>	<p><u>Civil Action</u></p>
<p>OCCIDENTAL CHEMICAL CORPORATION, TIERRA SOLUTIONS, INC., MAXUS ENERGY CORPORATION, MAXUS INTERNATIONAL ENERGY COMPANY, REPSOL YPF, S.A., YPF, S.A., YPF HOLDINGS, INC., YPF INTERNATIONAL S.A. (f/k/a YPF INTERNATIONAL LTD.) AND CLH HOLDINGS, INC.,</p>	<p><b>OCCIDENTAL CHEMICAL CORPORATION'S COUNTERSTATEMENT OF MATERIAL FACTS IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT</b></p>
<p>Defendants.</p>	



**OCCIDENTAL CHEMICAL CORPORATION'S GLOSSARY OF CORPORATIONS  
IN SUPPORT OF ITS OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL  
SUMMARY JUDGMENT**

For the convenience of the Court and all parties, Defendant Occidental Chemical Corporation ("OCC") sets forth herein the following Glossary of Corporations and associated abbreviations used in OCC's Opposition to Plaintiffs' Motion for Partial Summary Judgment and in OCC's Counterstatement of Material Facts:

- **"Old Diamond Shamrock" or "DSC-1"** refers to the corporation which was known as Diamond Shamrock Corporation prior to September 1983.
- **"Diamond Shamrock Corporation"** refers to the corporation which held that name beginning in September 1983, the corporation now known as Maxus Energy Corporation.
- **"Maxus"** refers to Maxus Energy Corporation, formerly known as Diamond Shamrock Corporation (September 1983 – March 1987) and originally known as New Diamond Corporation (July-August 1983).
- **"DSCC"** refers to the Maxus wholly-owned subsidiary known as Diamond Shamrock Chemicals Company when acquired by OCC in September 1986.
- **"DS Corporate"** refers to Diamond Shamrock Corporate Company, subsequently renamed Maxus Corporate Company and thereafter merged into Maxus.
- **"Tierra"** refers to Tierra Solutions, Inc., formerly known as Diamond Shamrock Chemical Land Holdings, Inc., formerly known as Chemical Land Holdings, Inc.

In support of its Opposition to Plaintiffs' Motion for Partial Summary Judgment, Occidental Chemical Corporation ("OCC") submits the following Counterstatement of Material Facts, supported by the referenced documentation. OCC notes that discovery is continuing in this action and remains substantially *incomplete* with respect to documents and evidence expected to be material to the matters currently before the Court. For example, despite OCC's long-standing requests for production, Maxus has informed OCC that it still has thirty or more boxes of documents it has not reviewed or produced, containing information about the subjects described below, including such things as the minutes of the meetings of Maxus' board of directors during critical time periods described below.<sup>1</sup>

**A. HISTORY OF OWNERSHIP OF 80 LISTER AVENUE AND AGRICULTURAL CHEMICALS MANUFACTURING OPERATIONS THERE<sup>2</sup>**

1. Between 1940 and 1951, Kolker Chemical Works, Inc. ("Kolker") acquired, through purchase or lease, an approximate 3.4 acre tract of land located at 80 Lister Avenue, in the Ironbound section of Newark, Essex County, New Jersey, for the production of DDT and phenoxy herbicides. (See Third Amended Complaint, ¶ 21, Bryant Cert., Exhibit 2; Answer and Separate Defenses of Maxus Energy Corporation and Tierra Solutions, Inc. to Third Amended Complaint, ¶ 21 [hereinafter Maxus' Answer to Third Amended Complaint], Bryant Cert., Exhibit 3.)

2. In 1951, Kolker was acquired by Diamond Alkali Company. (Answer and Separate Defenses of Defendants Maxus Energy Corporation and Tierra Solutions, Inc. to the

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<sup>1</sup> See the Certification of Scott R. Rowland, ¶¶ 3-7, attached as Exhibit 1 to the Certification of David L. Bryant [hereinafter "Bryant Cert."].

<sup>2</sup> All headings are intended as guideposts to help the reader follow the Counterstatement of Facts. They are not intended as undisputed facts requiring a response from Plaintiffs.

Amended Cross-Claims of OCC, ¶ 2 [hereinafter Maxus' Answer to Amended Cross-Claims], Bryant Cert., Exhibit 4.)

3. Diamond Alkali Company owned and operated the chemicals manufacturing facilities at 80 Lister Avenue, adjacent to 120 Lister Avenue (collectively the "Lister Site") in Newark, New Jersey, from 1951 until 1967. (See Third Amended Complaint, ¶ 22, Bryant Cert., Exhibit 2; Maxus' Answer to Third Amended Complaint, ¶ 22, Bryant Cert., Exhibit 3.)

4. From approximately 1955 until 1967, Diamond Alkali Company manufactured pesticides and herbicides at the Lister Site as a part of its agricultural chemicals ("Ag Chem") business. (See Maxus' Answer to Amended Cross-Claims, ¶ 2, Bryant Cert., Exhibit 4; Report on Lister Avenue Facility at MAXUS0331201, Bryant Cert., Exhibit 5; Transfer and Assumption Agreement by and among Diamond Shamrock Corporation and SDS Biotech Corporation, dated July 1, 1983 at OCCNJ0086946, § 1.1 ("DSC, through its Agricultural Chemicals and Animal Health Divisions, has engaged in (i) the manufacturing and marketing of animal health and agricultural chemical products . . ."), Bryant Cert., Exhibit 6.)

5. In 1967, Diamond Alkali Company merged with Shamrock Oil & Gas Company, and the company's name was changed to Diamond Shamrock Corporation ("DSC-1" or "Old Diamond Shamrock"). (See Maxus' Answer to Third Amended Complaint, ¶ 22, Bryant Cert., Exhibit 3.)

6. Old Diamond Shamrock continued to manufacture Ag Chem at the Lister Site until August 1969. (See Third Amended Complaint, ¶ 22, Bryant Cert., Exhibit 2; Maxus' Answer to Third Amended Complaint, ¶ 22, Bryant Cert., Exhibit 3.)

7. The Lister Site was operated by and carried on the books as an asset of Old Diamond Shamrock's Ag Chem Division. (See Occidental Chemical Corporation's Amended

Cross-Claims, ¶ 6 [hereinafter OCC's Amended Cross-Claims], Bryant Cert., Exhibit 7; Maxus' Answer to Amended Cross-Claims, ¶ 6, Bryant Cert., Exhibit 4; DSC-1 Journal Entry regarding Ag. Chem - Cleve. at OCCNJ0050544, Bryant Cert., Exhibit 8; DSC-1 Journal Entry regarding Agricultural Chemicals Div. at OCCNJ0050680, Bryant Cert., Exhibit 9.)

8. Prior to 1983, Old Diamond Shamrock discontinued Ag Chem manufacturing at the Lister Site and sold 80 Lister Avenue. (Maxus' Answer to Amended Cross-Claims, ¶ 3, Bryant Cert., Exhibit 4.)

9. More broadly, Old Diamond Shamrock discontinued its ownership, leasing, or operation of certain businesses, facilities, and plant sites, and its production of products (collectively, the "Discontinued Operations") that were unrelated to its then-ongoing chemicals business, including its Ag Chem business, which had owned, leased, or operated plants at the Lister Site and elsewhere. (See Sept. 4, 1986 Stock Purchase Agreement by and between Diamond Shamrock Corporation, Occidental Petroleum Corporation, Occidental Chemical Holding Corp. and Oxy-Diamond Alkali Corp. at § 9.03(a)(iv) ("SPA"), Pl. Exhibit 46; Schedule 9.03(a)(iv) of SPA, Bryant Cert., Exhibit 10; Schedule 2.23 of SPA, Bryant Cert., Exhibit 11.)

#### **B. THE 1983-1984 CORPORATE REORGANIZATION OF OLD DIAMOND SHAMROCK ("DSC-1 REORGANIZATION")**

10. Beginning in or about July 1983 and continuing through approximately January 26, 1984, the corporation then known as Diamond Shamrock Corporation (*i.e.*, Old Diamond Shamrock/DSC-1) underwent a complete corporate reorganization, implemented through a complex series of corporate transactions and events described below, including (i) the *sale* of Old Diamond Shamrock's Ag Chem business to a joint venture 50% owned by Old Diamond Shamrock (*see infra* ¶¶ 11-12); (ii) a Combination of Old Diamond Shamrock and Natomas Company reported as a "transaction of succession" (*see infra* ¶¶ 13-18); (iii) the creation of new



subsidiaries to hold assets and liabilities formerly held by Old Diamond Shamrock (*see infra* ¶¶ 19-25); and (iv) the transfer of those subsidiaries from Old Diamond Shamrock to the company now known as Maxus, and ultimate merger of one such subsidiary with and into Maxus (collectively, the “DSC-1 Reorganization”) (*see infra* ¶¶ 24-30). (*See also* OCC’s Amended Cross-Claims, ¶¶ 5-6, Bryant Cert., Exhibit 7; Maxus’ Answer to Amended Cross-Claims, ¶¶ 5-6, Bryant Cert., Exhibit 4; Diamond Shamrock Corporation Corporate Reorganization 1983-1984 at MAXUS61018-32 (general depiction of DSC-1 Reorganization in a series of corporate organization charts created by Maxus), Bryant Cert., Exhibit 12.)

**Step 1: Sale of Ag Chem Business**

11. On or about July 14, 1983, Old Diamond Shamrock sold its “former agricultural chemicals and animal health businesses” to SDS Biotech Corporation, a newly-formed joint venture. (Diamond Shamrock Corporation’s [Maxus] 1983 Form 10-K at OCCNJ0002513, Bryant Cert., Exhibit 13.)

12. Although it sold the former Ag Chem business to SDS Biotech Corporation, Old Diamond Shamrock retained a 50% ownership interest in that joint venture entity through 1985. (*See id.*; Diamond Shamrock Corporation’s [Maxus] 1985 Form 10-K at OCCNJ0003145, Bryant Cert., Exhibit 14.)

**Step 2: Combination of Old Diamond Shamrock and Natomas Company, Including Formation of New Diamond Corporation n/k/a Maxus**

13. Effective August 30, 1983, Old Diamond Corporation consummated a business combination transaction with Natomas Company (the “Combination”), pursuant to a May 30, 1983 Plan and Agreement of Reorganization. (*See* 1983 Joint Proxy Statement-Prospectus

between Diamond Shamrock Corporation and Natomas Company at MAXUS020153 and MAXUS020484, Bryant Cert., Exhibit 15.)

14. Pursuant to the May 30, 1983 Plan and Agreement of Reorganization, and to effect the Combination, Old Diamond Shamrock incorporated in Delaware, on July 19, 1983, a new entity originally named “New Diamond Corporation.” (*See id.*, Exhibit I thereto at MAXUS020484.)

15. Upon its consummation, the Combination was publicly reported as a “*transaction of succession.*” (*See* SEC Form 8-B dated Sept. 2, 1983 at MAXUS0224971, Item 2, Bryant Cert., Exhibit 16.)

16. Although the Combination was treated as a purchase of Natomas for accounting purposes, the substance of the transaction was said to be a “merger with Natomas.” (*See* Diamond Shamrock Corporation's [Maxus] Form 1983 10-K at OCCNJ0002768, 2775, 2790, 2796, Bryant Cert., Exhibit 13.)

17. On September 1, 1983, New Diamond Corporation changed its name to Diamond Shamrock Corporation. (*See* Third Amended Complaint, ¶ 28, Bryant Cert., Exhibit 2; Maxus' Answer to Third Amended Complaint, ¶ 28, Bryant Cert., Exhibit 3.) Later, Diamond Shamrock Corporation changed its name to Maxus Energy Corporation (“**Maxus**”).<sup>3</sup> (*See* Certificate of Amendment filed with the State of Delaware – Office of Secretary of State, dated July 22, 1987, Bryant Cert., Exhibit 17.)

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<sup>3</sup> Accordingly, for clarity that entity is hereafter referred to as Maxus even though it used the name Diamond Shamrock Corporation until 1987.

18. As a result of the Combination, the following occurred:

18.1 Maxus Acquired Old Diamond Shamrock for Stock. Through a 1-for-1 stock swap, the common stockholders of Old Diamond Shamrock became common stockholders of Maxus, and Maxus became the sole stockholder of Old Diamond Shamrock. Outstanding rights to acquire DSC-1 stock under employee stock option, incentive compensation and benefit plans of DSC-1 were also converted into rights to acquire common stock of Maxus. (See Diamond Shamrock Corporation's Form 8-K (Amendment No. 1), filed on Sept. 15, 1983, Bryant Cert., Exhibit 18; 1983 Joint Proxy Statement-Prospectus between Diamond Shamrock Corporation and Natomas Company at MAXUS020151, 20152, 20185, Bryant Cert., Exhibit 15.)

18.2 Maxus Reconstituted the Board of Old Diamond Shamrock. Maxus, as sole shareholder of Old Diamond Shamrock, removed all Old Diamond Shamrock board members and reconstituted its board of directors. (See September 15, 1983 Unanimous Written Consent of the Sole Stockholder (Maxus) of Diamond Chemicals Company (DSCC) at MAXUS0219219-20, Bryant Cert., Exhibit 19.)

18.3 Old Diamond Shamrock Directors and Officers Became Maxus Directors and Officers. Upon consummation of the Combination, all of Old Diamond Shamrock's directors became directors of Maxus, and Maxus' corporate officers consisted solely of "those persons who hold office in [Old Diamond Shamrock] immediately prior to the Effective Time" of the Combination. (See

1983 Joint Proxy Statement-Prospectus between Diamond Shamrock Corporation and Natomas Company at MAXUS020187, Bryant Cert., Exhibit 15.)

18.4 Maxus Occupied Old Diamond Shamrock's Offices. Maxus also occupied the corporate headquarters of Old Diamond Shamrock. (*See id.* at MAXUS020188.)

18.5 Old Diamond Shamrock Was Renamed. Once Maxus became the sole stockholder of Old Diamond Shamrock (DSC-1) and took the name "Diamond Shamrock Corporation" for itself, Old Diamond Shamrock's name was changed, first to Diamond Chemicals Company on September 1, 1983, and then to Diamond Shamrock Chemicals Company ("DSCC") on October 26, 1983. (*See* Third Amended Complaint, ¶ 28, Bryant Cert., Exhibit 2; Maxus' Answer to Third Amended Complaint, ¶ 28, Bryant Cert., Exhibit 3; Diamond Shamrock Corporation Corporate Reorganization 1983-1984 at MAXUS61018-32, Bryant Cert., Exhibit 12.)

18.6 Maxus Directed All Additional Steps in DSC-1 Reorganization. At all times following the Combination, Maxus established "the general policies, plans and goals for," and made the "fundamental business decisions affecting the operations and business formerly conducted by" DSC-1, including all of the subsequent steps and transactions involved in the DSC-1 Reorganization. (1983 Joint Proxy Statement-Prospectus between Diamond Shamrock Corporation and Natomas Company at MAXUS020188, Bryant Cert., Exhibit 15.)



**Step 3: Creation of Four New Drop-Down Subsidiaries to Hold Assets and Liabilities Formerly Held by Operating Divisions of Old Diamond Shamrock/DSC-1**

19. By direction of Maxus, on or before October 26, 1983, DSCC created three new wholly-owned subsidiaries known as Diamond Shamrock Exploration Company (“DS E&P”), Diamond Shamrock Refining and Marketing Company (“DS R&M”), and Diamond Shamrock Coal Company (“DS Coal”), to receive and carry on businesses theretofore conducted and operated as divisions of DSC-1. (See Diamond Shamrock Corporation Corporate Reorganization 1983-1984 at MAXUS61027-28, Bryant Cert., Exhibit 12; OCC’s Amended Cross-Claims, ¶ 7, Bryant Cert., Exhibit 7; Maxus’ Answer to the Amended Cross-Claims, ¶ 7, Bryant Cert., Exhibit 4.)

20. Then, on November 1, 1983, DSCC entered into separate Assignment and Assumption Agreements with each of its three new subsidiaries, pursuant to which:

20.1 DS E&P. DSCC assigned to DS E&P the exploration and production business assets of DSC-1, and DS E&P assumed the related liabilities. Those assets were said to have a net book value of \$1,051,493,377 of which \$262,874,000 was deemed to be a contribution to the capital of DS E&P, and the balance was transferred to DS E&P in consideration of DS E&P’s execution of an unsecured promissory note payable to DSCC in the principal amount of \$788,619,377. (See Nov. 1, 1983 Assignment and Assumption Agreement of Diamond Shamrock Exploration at MAXUS0061128, 61133, Bryant Cert., Exhibit 20.)

20.2 DS R&M. DSCC assigned to DS R&M the refining and marketing business assets of DSC-1, and DS R&M assumed the related liabilities. Those assets were said to have a net book value of \$482,645,928 of which \$120,662,157 was deemed to be a contribution to the capital of DS R&M and the balance was transferred to DS R&M in consideration of DS R&M's execution of an unsecured promissory note payable to DSCC in the principal amount of \$361,983,771. (*See* Nov. 1, 1983 Assignment and Assumption Agreement of Diamond Shamrock Refining and Marketing Company at MAXUS0061144, 61151, Bryant Cert., Exhibit 21.)

20.3 DS Coal. DSCC assigned to DS Coal the coal business assets of DSC-1, and DS Coal assumed the related liabilities. The value of the coal business assets transferred to DS Coal does not appear in the Assignment and Assumption Agreement. (*See* Nov. 1, 1983 Assignment and Assumption Agreement of Diamond Shamrock Coal Company at MAXUS022043, Bryant Cert., Exhibit 22.)

21. On November 28, 1983, DSCC created a fourth new wholly-owned subsidiary known as Diamond Shamrock Corporate Company (“**DS Corporate**”). (*See* Certificate of Incorporation of Diamond Shamrock Corporate Company, filed Nov. 28, 1983, Bryant Cert., Exhibit 23.)

22. On December 15, 1983, the DSCC Board of Directors approved resolutions authorizing specified DSCC officers, “subject to the approval of the Corporation’s sole stockholder [Maxus],” (i) to transfer to DS Corporate all of DSCC’s assets other than those comprising DSCC’s “industrial and process chemicals business” (*i.e.*, the Chemicals Business)

or the businesses previously transferred to DS E&P, DS R&M or DS Coal; and (ii) to assign and transfer to DS Corporate “all rights, *obligations and liabilities* of the Corporation [DSCC] of any nature whatsoever constituting a part of, secured by or *related to* the property, rights and other assets” to be transferred to DS Corporate. (See Dec. 15, 1983 DSCC Written Consent of Members of the Board of Directors at OCCNJ0009692, Bryant Cert., Exhibit 24.)<sup>4</sup>

23. The DSCC board also authorized the specified *officers to decide which DSCC assets would or would not be designated as “Corporate Property”* and included in the transfer of assets, “*including in instances where the question is not free from doubt.*” (*Id.* at OCCNJ0009693.)

24. Effective January 1, 1984, DSCC entered into an Assignment and Assumption Agreement with DS Corporate. (See Jan. 1, 1984 Assignment and Assumption Agreement at MAXUS0022692-701, Bryant Cert., Exhibit 25.)

25. Pursuant to DSCC’s Assignment and Assumption Agreement with DS Corporate:

25.1 DSCC transferred to DS Corporate all of the “*Corporate Property*” of *DSCC (DSC-1) defined as all remaining DSCC assets except* (i) the stock and notes of DS E&P, DS R&M and DS Coal, and (ii) DSCC’s “Chemicals Businesses,” defined as “all assets of whatsoever kind of the Company [DSCC] both real and personal, tangible and intangible, wherever situated, provided, however, that such assignment and transfer excludes all assets that are necessary for the operation of or used principally in connection with or related principally to the industrial and proprietary chemicals business of the Company.” (*Id.*)

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<sup>4</sup> All emphasis in material quoted from documents cited herein is by OCC.

25.2 Those “Corporate Property” assets had a net book value of at least \$108,872,500, of which \$27,235,750 was deemed to be a contribution to the capital of DS Corporate and the balance was transferred to DS Corporate in consideration of DS Corporate’s execution of an unsecured promissory note payable to DSCC in the principal amount of \$81,636,750. (*Id.*)

25.3 The “Corporate Property” transferred to DS Corporate expressly included without limitation:

25.3.1 All of DSCC’s stock ownership in and all advances shown on DSCC’s books and records to, a long list of subsidiary companies (excluding stock of the “Principal Subsidiaries,” DS E&P, DS R&M and DS Coal), *including DSCC’s stock (50%) in SDS Biotech Corporation* which held the “former agricultural chemicals [Ag Chem] and animal health businesses” of DSC-1 as noted above. (*Id.* at MAXUS022692-93.)

25.3.2 “All business operations and activities of the Company [DSCC] other than the Chemicals businesses or the business operations and activities of the Principal Subsidiaries [DS E&P, DS R&M and DS Coal]” (*Id.* at MAXUS022693.)

25.4 DS Corporate *expressly* assumed, among other things:

25.4.1 “All of the Company’s [DSCC’s] liabilities and obligations under any contract, agreement, license, lease, permit and commitment

relating to or based upon any of the assets or business activities assigned or transferred,” (*Id.* at MAXUS022694.);

25.4.2 “All current liabilities relating to or based upon any of the assets or business activities assigned and transferred,” (*Id.*);

25.4.3 “Any and all liabilities for all claims and causes of action which any third party has asserted or may assert against the Company [DSCC], as well as the liability for such claims and causes of action and judgments’ [sic] entered against the Company [DSCC], based upon an obligation or duty that the Company [DSCC] allegedly owed or owes to such third party in the Company’s [DSCC’s] capacity as the owner of any of the assets and business so assigned and transferred and which would not have arisen but for such ownership.” (*Id.* at MAXUS022695.)

25.5 It was agreed that “[t]he Subsidiary [DS Corporate] is authorized to defend against such claims and causes of action assigned to and assumed by it, at its own expense, *in the name of the Company* [DSCC].” (*Id.*)

25.6 The agreement provided for DS Corporate to indemnify DSCC with respect to any liability assumed by DS Corporate “if a consent to transfer any liability ... is required to relieve the [DSCC] from liability thereunder and such consent has not been received,” indicating that Maxus intended DS Corporate’s assumption of the legacy liabilities of DSCC (DSC-1) to reflect that DS Corporate



(later merged into Maxus) was the successor and sole obligor as to those liabilities. (*Id.*)

**Step 4: DSCC Transfer of Stock of Subsidiaries to Maxus, Maxus' Assumption of DSC-1 Debt, and DS Corporate Merger Into Maxus**

26. Effective on or about January 26, 1984, by direction of Maxus, DSCC transferred to Maxus all of DSCC's right, title and interest in and to (i) all of the capital stock of its four drop-down subsidiaries (DS Corporate, DS E&P, DS R&M, and DS Coal), and (ii) "cash, receivables and other assets," which "collectively comprised substantially all of [DSCC's] property and assets." (Jan. 26, 1984 Diamond Shamrock Chemicals Company's [Maxus] Form 8-K at MAXUS22731, (v), Bryant Cert., Exhibit 26.) The four drop-down subsidiaries of DSCC thus became direct, wholly-owned subsidiaries of Maxus.

27. The "cash, receivables and other assets" included the promissory notes from the drop-down subsidiaries including DS Corporate. (Dec. 15, 1983 DSCC Written Consent of Members of the Board of Directors at OCCNJ0009694, 9697, Bryant Cert., Exhibit 25.)

28. All told, Maxus received approximately ***\$1.643 billion (1983 net book value) of DSC-1's former assets***, constituting at least ***71% of DSC-1's former assets*** and accounting for at least ***80% of DSC-1's former net income***. (See Jan. 26, 1984 Officers Certificate of Diamond Shamrock Chemicals Company at OCCNJ0002484-85, Bryant Cert., Exhibit 27.)

29. In addition to receiving ownership of the drop-down subsidiaries, Maxus expressly assumed certain debt of DSC-1. Maxus' 1983 SEC Form 10-K described the movement to Maxus of DSC-1's former assets and liabilities as follows: "The Chemicals Company [DSC-1] transferred ownership of certain subsidiaries engaged in the exploration for and production of crude oil and natural gas, the refining of crude oil and the mining of coal to its

Parent [Maxus] as of January 26, 1984. Concurrent with such transfer the Chemicals Company [DSC-1] assigned to and its parent [Maxus] assumed liability for substantially all of the Chemical Company's then-outstanding domestic long-term debt." (Diamond Shamrock Corporation's [Maxus] 1983 Form 10-K at OCCNJ0002796, Bryant Cert., Exhibit 13.)

30. Maxus later changed the name of DS Corporate to Maxus Corporate Company, and merged the entity into Maxus pursuant to a Plan and Agreement of Merger. (See Third Amended Complaint, ¶¶ 32, Bryant Cert., Exhibit 2; Maxus' Answer to Third Amended Complaint, ¶¶ 32, Bryant Cert., Exhibit 3.)

#### **Summary of Multi-Step DSC-1 Reorganization**

31. Summarizing the DSC-1 Reorganization as described in ¶¶ 10-30, *supra*:

31.1 Maxus acquired 100% ownership of DSC-1 through a swap of Maxus' newly issued stock for the stock of DSC-1 and not for any cash consideration (*see supra* ¶ 18.1);

31.2 The executive officer and directors of DSC-1 became executive officers and directors of Maxus (*see supra* ¶¶ 18.2-18.3);

31.3 Maxus occupied the former headquarters of DSC-1 (*see supra* ¶¶ 18.4);

31.4 Maxus moved from DSC-1's balance sheet, onto Maxus' own balance sheet, over **\$1.643 billion** in assets, or approximately **71% of DSC-1's assets** -- what Maxus deemed to be "substantially all" of DSC-1's assets -- accounting for approximately **80% of DSC-1's income**, excepting *only* the assets comprising the

industrial and process Chemicals Business formerly owned by DSC-1 (*see supra* ¶ 28);

31.5 Maxus expressly assumed what it described as substantially all of the outstanding long-term debt of DSC-1 (*see supra* ¶ 29);

31.6 DS Corporate, a wholly-owned subsidiary of Maxus later merged into Maxus, held the “corporate” assets and the associated “corporate” liabilities formerly held by DSC-1, including any and all Lister-related environmental liabilities (*see supra* ¶¶ 25.3-25.4);

31.7 Although DS Corporate (later merged into Maxus) actually held the obligations and liabilities associated with DSC-1’s former Ag Chem business, including those associated with the Lister Site, Maxus “defended” those obligations and liabilities (its *own* obligations and liabilities) *using the name of DSCC* (*see supra* ¶ 25.5);

31.8 DSCC, the company later acquired by OCC’s affiliate, was a wholly-owned subsidiary of Maxus on par with Maxus’ wholly-owned E&P, R&M, and Coal subsidiaries, holding only what had been DSC-1’s industrial and process chemicals business and the related liabilities, not including any assets or related legacy liabilities of DSC-1’s former Ag Chem business (*see supra* ¶¶ 22, 25.3).



### C. ACQUISITION OF LISTER SITE TO FACILITATE REMEDIATION DIRECTED BY NJDEP

32. In December 1983, Maxus concluded that any legacy environmental liabilities associated with DSC-1's previously discontinued operations at the Lister Site – including both the “functional” and “funding” environmental responsibilities related to the Lister Site – rested with “Corporate” (*i.e.*, DS Corporate, subsequently merged into Maxus) not DSCC. (*See* Dec. 15, 1993 Hutton Mem. at MAXUS3065040, Bryant Cert., Exhibit 28.)

33. Despite the 1983 memorandum concluding that Maxus itself held any legacy environmental liability arising from DSC-1's Lister Site operations, Maxus caused the March 13, 1984 Administrative Consent Order with NJDEP to be executed *in the name of* DSCC, pursuant to the terms of the January 1, 1984 Assignment and Assumption Agreement between DSCC and DS Corporate referenced above. (*See id.*; Mar. 13, 1984 Consent Order, Pl. Exhibit 10.)

34. Even after Maxus caused the March 13, 1984 Administrative Consent Order to be executed in the name of DSCC, it continued to acknowledge, both internally and to the State of New Jersey, that responsibility for the Lister Site belonged to “Corporate” (Maxus) not its industrial and process chemicals operating subsidiary DSCC. (*See, e.g.*, June 25, 1984 Letter from William C. Hutton, Corporate Manager Environmental Affairs of Diamond Shamrock Corporation, to Richard Vasile, New Jersey Deputy Attorney General, Bryant Cert., Exhibit 29; Aug. 17, 1984 Mem. from Barry Christensen (Environmental) to L.R. Heble (Environmental) at OCCNJ0084769-70, Bryant Cert., Exhibit 30.)

35. All steps taken with respect to the Lister Site after execution of the March 13, 1984 Administrative Consent Order were taken under the direction and supervision of NJDEP and the U.S. Environmental Protection Agency, for the sole purpose of facilitating environmental response actions in compliance with regulatory directives. (*See* Third Amended Complaint, ¶ 32,

Bryant Cert., Exhibit 2; Maxus' Answer to Third Amended Complaint, ¶ 32, Bryant Cert., Exhibit 3.)

36. Maxus caused its wholly-owned and controlled subsidiary DSCC to acquire legal title to 120 Lister Avenue (1984) and legal title to 80 Lister Avenue (1986) for the benefit of Maxus, using DSCC as a mere nominee for Maxus pending a transfer of legal title to another entity within the Maxus corporate family. (*See supra* ¶¶ 32-35.)

37. In March 1986, Maxus caused Chemical Land Holdings, Inc., subsequently renamed Diamond Shamrock Chemical Land Holdings, Inc. and now known as Tierra, to be incorporated as an indirect subsidiary of Maxus, for the express purpose of holding title to the Lister Site so that it could conduct environmental response actions at the Lister Site and other environmental sites formerly owned and operated by DSC-1. (*See* Third Amended Complaint, ¶¶ 34-35, Bryant Cert., Exhibit 2; Maxus' Answer to Third Amended Complaint, ¶ 34-35, Bryant Cert., Exhibit 3; *see also* Aug. 12, 1987 Maxus Letter to NJDEP re Dioxin Research Supplemental Administrative Consent Order concerning the 80 Lister Avenue Site at MAXUS3061401, ¶ 1, Bryant Cert., Exhibit 31.)

38. In August 1986, prior to Maxus' sale of DSCC to an affiliate of OCC, Maxus directed and caused DSCC to transfer title to the entire Lister Site to Tierra for nominal consideration of \$10.00 as to each of 80 Lister and 120 Lister. (*See* Aug. 28, 1968 Deed from Diamond Shamrock Chemicals Company to Diamond Shamrock Chemical Land Holdings, conveying Lots 58 and 59 in Newark, New Jersey, Pl. Exhibit 65; Aug. 28, 1986 Deed from Diamond Shamrock Chemicals Company to Diamond Shamrock Chemical Land Holdings, conveying Lot 57 in Newark, New Jersey, Pl. Exhibit 66; *see also* Aug. 12, 1987 Maxus Letter to

NJDEP re Dioxin Research Supplemental Administrative Consent Order concerning the 80 Lister Avenue Site at MAXUS3061401, ¶ 1, Bryant Cert., Exhibit 31.)

39. By letter dated August 12, 1987, Maxus specifically informed NJDEP that this transfer of title to the Lister Site to Tierra was an “intra-holding company transfer of title” that occurred “as part of the reorganization” of DSC-1. (Aug. 12, 1987 Maxus Letter to NJDEP re Dioxin Research Supplemental Administrative Consent Order concerning the 80 Lister Avenue Site at MAXUS3061401, Bryant Cert., Exhibit 31.)

#### D. MAXUS' 1986 SALE OF DSCC

40. In 1986, Diamond Shamrock Corporation (*i.e.* Maxus) announced its intention to sell DSCC. (*See* Maxus' Answer to Third Amended Complaint, ¶ 12, Bryant Cert., Exhibit 3.)

41. On April 4, 1986, James F. Kelley, Vice President and General Counsel of Diamond Shamrock Corporation (*i.e.*, Maxus), wrote to prospective buyers of DSCC's business, representing that:

1. The closing of the sale of the DSCC shares will pass to the purchaser all liabilities of DSCC . . . , *except* those arising from operations of DSCC which have previously been sold or discontinued or products no longer manufactured or sold, as more fully described below.

2. *Liabilities for cleanup costs mandated by an environmental protection law or regulation are excluded* to the extent they arise out of or related to (a) any site now owned by Diamond Shamrock or DSCC at which manufacturing operations have been permanently abandoned and (b) any site not now owned by Diamond Shamrock or DSCC which has been or may within three years from the date of closing be designated a Superfund site as a result of activities of DSCC while owned by Diamond Shamrock, in each case only to the extent Diamond Shamrock or DSCC may be legally responsible for cleanup costs at such site.

3. Also *excluded* are damages, judgments and costs, including attorneys fees, which arise out of the following litigation against

Diamond Shamrock or DSCC (whether now pending or filed in the future); . . .

(b) *All litigation arising out of DSCC's manufacturing operations at 80 Lister Avenue, Newark, New Jersey, and other sites where manufacturing operations have been permanently abandoned, including claims for property damage and personal injury arising from the cleanup of such sites.*

\* \* \*

6. All liabilities and expenditures resulting from compliance with environmental protection laws or regulations with respect to the business of DSCC which become payable at any time during the three-year period immediately following closing of the transaction, *except for liabilities retained by Diamond Shamrock [Maxus] pursuant to paragraph 2 above*, will be shared by Diamond Shamrock and the purchaser (after application of available insurance proceeds) in accordance with the following formula . . . .

(Letter from James F. Kelley, Vice President and General Counsel of Diamond Shamrock, to Dr. Ray Irani, President of Occidental Petroleum Corp., dated Apr. 4, 1986 at OCCNJ027239- 40, Pl. Exhibit 56.)

42. On September 4, 1986, Diamond Shamrock Corporation (Maxus) sold all of the outstanding stock of DSCC to Oxy-Diamond Alkali Corporation, an affiliate of OCC, pursuant to the SPA. (See SPA at 1-2, Pl. Exhibit 46.)

43. The purchase price paid to Maxus for DSCC was \$411,132,672. (See SPA at 2, Pl. Exhibit 46.)

44. Pursuant to the SPA with Diamond Shamrock Corporation (Maxus), Oxy-Diamond Alkali Corporation acquired DSCC and its active, ongoing "Chemicals Business" which excluded the discontinued, former Ag Chem business of DSC-1. (See *id.*)



## E. MAXUS' ACKNOWLEDGEMENTS OF ITS STATUS AS SUCCESSOR TO DSC-1

45. In this litigation Maxus contends that despite what it accomplished through the DSC-1 Reorganization, *DSCC* was the entity which retained the legacy environmental liabilities arising from DSC-1's discontinued Ag Chem business. However, the facts thus far discovered by OCC reveal that Maxus knew the substance and effect of the DSC-1 Reorganization made *Maxus* the successor to DSC-1, its corporate predecessors and their environmental liabilities arising from or related to ownership or operation of the Lister Site, and thus the entity which actually "retained" those liabilities. (*See, e.g., infra* ¶¶ 46-53.)

46. In 1983, Maxus publicly reported the Combination as a "transaction of succession." (SEC Form 8-B dated Sept. 2, 1983 at MAXUS0224971, Item 2, Bryant Cert., Exhibit 16.)

47. In 1984, Maxus adopted DSC-1's 1975 Employee Shareholding and Investment Plan and continued that plan as its own. (*See* Jan. 10, 1984 Diamond Shamrock Corporation Form S-8 - Diamond Shamrock Corporation Employee Shareholding and Investment Plan at 5, Bryant Cert., Exhibit 32.)

48. In a January 9, 1984 letter to the SEC, Maxus relied on certain IRS determination letters the IRS had previously issued to DSC-1 and asserted that DSC-1 was "the predecessor to the Company (Maxus)." (*Id.* at 115.)

49. In 1984, Maxus publicly represented and held *itself* out to be the former owner/operator of the Lister Site. (*See* Diamond Shamrock Corporation's [Maxus] 1984 SEC Form 10-K at OCCNJ003098, Bryant Cert., Exhibit 33.)

50. For *five consecutive years* after completing the DSC-1 Reorganization – including periods before and *after* Maxus sold DSCC to OCC's affiliate – *Maxus publicly represented and*

*held itself out to be the successor to DSC-1* and its corporate predecessors including *Diamond Alkali Corporation*, the predecessor owner/operator of the Lister Site. (See Diamond Shamrock Corporation / Maxus 1983-1987 Form 10-Ks at OCCNJ0002502 (1983), OCCNJ0002844 (1984), OCCNJ0003134 (1985), OCCNJ0003256 (1986), OCCNJ0003423 (1987), Bryant Cert., Exhibits 13, 33, 14, 34, & 35, respectively; Maxus' Answer to Amended Cross-Claims, ¶ 2, Bryant Cert., Exhibit 4.)

51. As noted above, in 1986, some two years after completing the DSC-1 Reorganization, Maxus expressly and specifically represented to Occidental Petroleum Corporation and other potential purchasers of DSCC – which by then was a wholly-owned subsidiary of “Diamond Shamrock Corporation” (Maxus) owning *only* the industrial and process chemicals business – that “Diamond Shamrock Corporation” (*Maxus*) “*retained*” all Lister-related environmental liabilities, such that a purchase of the stock of this subsidiary would *not* “pass to the purchaser” any Lister-related environmental liabilities. (Apr. 4, 1986 Letter from James F. Kelley, Vice President and General Counsel of Diamond Shamrock, to Dr. Ray Irani, President of Occidental Petroleum Corp., Pl. Exhibit 56.)

52. In 1987, after selling the stock of DSCC to OCC's affiliate, Maxus publicly represented that certain liabilities were “retained by the Company after the sale of Chemicals [DSCC]” including “certain environmental costs and contingencies, the outcome of which is unknown at this time.” (Diamond Shamrock Corporation's [Maxus] 1986 Form 10-K at OCCNJ0003257, Bryant Cert., Exhibit 34.)

53. In 1987 (after it sold DSCC), in a federal lawsuit Kidder Peabody brought against Maxus relating to the 1983 Combination of Maxus, DSC-1 and Natomas (described above), Maxus represented to the court in a memorandum opposing Kidder Peabody's motion for

summary judgment, that “Maxus Energy Corporation (Maxus) submits this memorandum on behalf of itself and its wholly owned subsidiary, Diamond Shamrock Corporate Company, as the successor in interest to Diamond Shamrock Corporation (Old Diamond Shamrock).” (Supplemental Mem. of Def. Maxus in Opp’n. to Pending Motions for Summary Judgment or Judgment on the Pleadings in *Kidder, Peabody, & Co. Inc. v. Maxus Energy Corp., et al.*, No. 87 Civ. 8308 (MP), United States District Court, Southern District of New York at MAXUS0049826, Bryant Cert., Exhibit 36.)

54. Indeed, in this litigation Plaintiffs themselves allege that Maxus was created and incorporated “as the *corporate successor-in-interest* to certain operations and liabilities” of DSC-1. (Third Amended Complaint, ¶ 27, Bryant Cert., Exhibit 2.)

#### F. MAXUS’ INDEMNIFICATION OBLIGATIONS

55. In the SPA, Maxus agreed to indemnify OCC indefinitely and without financial limits for certain DSCC liabilities, including liabilities resulting from DSCC’s prior ownership and operation of the Lister Site. (See SPA, § 9.03(a), Pl. Exhibit 46.)

56. Specifically, the SPA required Maxus to indemnify OCC with respect to losses relating to, *inter alia*, “Superfund Sites,” “Inactive Sites,” and “Historical Obligations” of DSCC. (*Id.* at § 9.03(a)(iii), (iv), and (viii).)

57. The Lister Site falls within each of these categories:

57.1 The SPA lists the “Diamond Alkali (#488), Newark, New Jersey” site as a “Superfund Site.” (See Schedule 2.07(g) of SPA, Bryant Cert., Exhibit 37.) The EPA has deemed the “Diamond Alkali Superfund Site” to include the Lister

Site and the Lower Passaic River. (See EPA's Summary of the Diamond Alkali Superfund Site, Newark, New Jersey, available at <http://www.epa.gov.region2/superfund/npl/diamondalkali> (last visited May 5, 2011), Bryant Cert., Exhibit 38.)

57.2 The SPA defines "Inactive Sites" as, *inter alia*, "those former chemical plants and commercial waste disposal sites listed on Schedule 9.03(a)(iv) . . . ." (SPA § 9.03(a)(iv), Pl. Exhibit 46.) Among the sites listed on Schedule 9.03(a)(iv) is DSCC's former chemical plant site in "Newark, New Jersey," *i.e.* the Lister Site. (SPA Schedule § 9.03(a)(iv) at 1-2, Bryant Cert., Exhibit 10.)

57.3 The SPA includes as "Historical Obligations" of DSCC "[a]ll liabilities and obligations associated with the discontinued businesses of DSCC or any predecessor in interest . . . including . . . Ag Chem . . ." (SPA Schedule 2.23, at 5, ¶ 12, Bryant Cert., Exhibit 11.) The facility at the Lister Site had manufactured pesticides and herbicides as a part of the Ag Chem business of DSCC and its predecessors. (See Maxus' Answer to Amended Cross-Claims, ¶ 2, Bryant Cert., Exhibit 4.)

58. The SPA provides that Maxus will use its "best efforts . . . to obtain at the earliest practicable date . . . any amendments, novations, releases, waivers, consents or approvals necessary to have each of the DSCC companies released from its obligations and liabilities under the Historical Obligations" of DSCC. (SPA, § 12.11(a), Pl. Exhibit 46.)

59. Those "best efforts" were to include providing Maxus' own corporate guarantee in consideration for such a release. (*Id.* § 12.11(b).)



60. Because the Lister Site related to the “Historical Obligations” of DSCC, Section 12.11 of the SPA required Maxus to use its best efforts to have DSCC expressly released from any obligations relating to that site. (SPA Schedule 2.23 at 5, ¶ 12, Bryant Cert., Exhibit 11; SPA § 12.11 (a)-(b), Pl. Exhibit 46.)

#### G. THE *AETNA* LITIGATION

61. At the time the SPA was consummated, Maxus was prosecuting a civil action it had brought in New Jersey state court in 1984 in the name of DSCC, against various insurance companies that had provided insurance coverage to DSC-1, *i.e.*, *Diamond Shamrock Chemicals Co. v. Aetna Casualty & Surety Co.* (the “*Aetna*” litigation). (See Civil Action Complaint, filed Sept. 19, 1984 in the matter *Diamond Shamrock Chems. Co. v. Aetna Cas. & Sur. Co.*, Case No. A-694-89TI, New Jersey Superior Court, Ch. Div., Pl. Exhibit 11.)

62. In the *Aetna* litigation, the plaintiff sought indemnification for, *inter alia*, environmental cleanup costs associated with the Lister Site and losses arising from a number of claims that had been brought against DSC-1 by third parties who alleged that the release of dioxins and other hazardous substances from the Lister Site had caused environmental damage to surrounding properties.<sup>5</sup> (*Id.* at MAXUS032864, ¶ 4.)

63. The SPA contains provisions addressing the rights and responsibilities of Maxus and OCC with respect to the insurance proceeds and the *Aetna* litigation. Specifically:

63.1 Section 8.13(b) of the SPA states:

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<sup>5</sup> In the *Aetna* case, the plaintiff also sought indemnification relating to third-party actions which alleged that Agent Orange manufactured by DSC-1 at the Lister Site and elsewhere had injured Vietnam veterans who were exposed to that substance. This part of the *Aetna* litigation is not relevant to the instant Motion.

Whenever [Maxus] becomes aware that a claim against any Current Carrier under any of the Existing Policies exists, with respect to a matter for which [Maxus] has liability directly or pursuant to the provisions of this Agreement, then [Maxus] shall be entitled to pursue such claim in any reasonable manner which it deems expedient (including Litigation) in the name of any one or more of the parties, including any DSCC Company, which are provided coverage under such Existing Policy (“Insured Parties”), as [Maxus] may elect . . . .

(SPA § 8.13(b), Pl. Exhibit 46.)

63.2 Section 8.13(c) requires, *inter alia*, DSCC to “assign to [Maxus] the applicable claims under Existing Policies with respect to a matter for which [Maxus] has liability directly or pursuant to the provisions of this Agreement.”

(*Id.* at § 8.13(c).)

63.3 Section 8.14 of the SPA provides in pertinent part:

**Claims Against Current Carriers.** *[Maxus] shall have the right*, and DSCC shall cause . . . the appropriate DSCC Company to cooperate fully in the exercise of such right, *to continue or to settle pending Litigation or claims filed against any of the Current Carriers prior to the Closing (including, without limitation, Diamond Shamrock Chemicals Company vs. The Aetna Casualty and Surety Company*, now pending in the Superior Court of New Jersey, Chancery Division, Morris County, New Jersey) (“Existing Claims”) for the payment of amounts allegedly due to any Diamond Company on account of losses suffered by any Diamond Company as a result of its products or damage to the environment or persons caused by the operations of any DSCC Company’s production facilities prior to the Closing Date.

(*Id.* at § 8.14.)

64. Although Maxus was required to “keep [DSCC/OCC] apprised of the status of all settlement negotiations with respect to Existing Claims,” Maxus was fully empowered to “act in the name and on behalf of DSCC . . . in releasing such Existing Claims . . . .” (*Id.*)

65. Section 8.14 of the SPA also provides that the party who owes the duty of indemnification with respect to a specific third-party action is entitled to receive any insurance proceeds relating to that action, stating:

Any insurance proceeds paid in respect of the matters contemplated by Article IX hereof shall be distributed to the Indemnifying Party (as defined in Article IX) to the extent of the Indemnity Payment on account of any Indemnifiable Loss (as defined in Article IX) paid by such Indemnifying Party under and in accordance with Article IX.

(*Id.*)

66. The following definitions are provided by the SPA:

66.1 Section 9.03(i) of the SPA defines “Indemnifying Party” as “any Entity required to provide indemnification under this Agreement.” (*Id.* at § 9.03(i).)

66.2 Section 9.03(g) defines an “Indemnity Payment” as “any amounts of Indemnifiable Losses required to be paid pursuant to . . . Section 9.03.” (*Id.* at § 9.03(g).)

66.3 Section 9.03(a) defines “Indemnifiable Losses” to include “any and all claims, demands or suits . . . , losses, liabilities, damages, obligations, payments, costs and expenses, paid or incurred, whether or not relating to, resulting from or arising out of any Third Party Claim . . . .” (*Id.* at § 9.03(a).)

67. According to these provisions of the SPA, Maxus was the “Indemnifying Party” entitled to the insurance proceeds resulting from the *Aetna* litigation. (*See supra* ¶¶ 61-67.)

68. The SPA obligated Maxus to indemnify OCC in perpetuity with respect to any losses relating to the Lister Site. (*See* OCC’s Statement of Facts in support of its motion for summary judgment against Maxus, filed May 9, 2011, incorporated herein by reference)

69. Thus Maxus, not OCC, would have been entitled to the insurance proceeds in *Aetna* had Maxus received a favorable ruling. (*See* SPA § 8.14, Pl. Exhibit 46.)

70. In order to implement the SPA’s provisions regarding insurance, the SPA required OCC to furnish Maxus at the Closing with an executed copy of the form attached to the SPA as Exhibit 8.13. (*See id.* at § 8.13(c).)

71. Complying with this requirement, OCC executed the form on the Closing Date, appointing Maxus, “subject to the provisions of Sections 8.13 and 8.14” of the SPA, as the attorney-in-fact for OCC and DSCC for the following two limited purposes:

- (1) “for *in [OCC/DSCC’s] name, place and stead*, to perform all acts and to execute all documents relating to the maintenance and administration of the Existing [Insurance] Policies . . . “; and
- (2) “to *pursue in [OCC/DSCC’s] name* in any reasonable manner which [Maxus] deems expedient any claim, including without limitation, *any Existing Claim . . .*, against any Current Carrier . . . under any of the Existing Policies *with respect to a matter for which [Maxus] has liability* directly or *pursuant to the provisions of the [SPA].*”

(Exhibit 8.13 to SPA, Pl. Exhibit 58.)

72. OCC empowered Maxus only to act *in the name of DSCC* in pursuing the Existing claims, including the *Aetna* litigation. (*Id.*)

73. Pursuant to Exhibit 8.13 of the SPA, Maxus could pursue the *Aetna* claims in “any reasonable manner” that it “deem[ed] expedient.” (*Id.*)



74. This full power given to Maxus to act in its *own* “stead” in the *Aetna* litigation constitutes the complete assignment of the claims which was required by Sections 8.13 and 8.14 of the SPA. (*See supra* ¶¶ 63-73.)

75. Maxus continued to prosecute the *Aetna* litigation in the name of DSCC after the SPA closed on September 4, 1986. (*See, e.g., infra* ¶¶ 76-80.)

76. In an affidavit filed in support of a motion by DSCC, Robert D. Stauffer of Maxus informed the *Aetna* court and the parties of the SPA and its limited impact on the case, stating:

I am the Director of Corporate Insurance of Maxus Energy Corporation (formerly Diamond Shamrock Corporation), which is attorney-in-fact for Diamond Shamrock Chemicals Company (hereinafter “Diamond”). . . . On September 4, 1986, *Diamond Shamrock Corporation* sold all of the stock of Diamond to a subsidiary of Occidental Petroleum Corporation but *retained the power to prosecute the instant litigation in Diamond’s name*.

(Declaration of Robert D. Stauffer in Supp. of Pl.’s Mot. For Summ. Adjudication of the Number of Occurrences, dated July 7, 1989, ¶ 1, Bryant Cert., Exhibit 39.)

77. In “DSCC’s” proposed findings of fact, Maxus again stated:

In September 1986, Diamond Shamrock Corporation sold Diamond’s stock to a company owned by Occidental Petroleum Corporation. Under the sales agreement with Occidental, Diamond Shamrock Corporation (now *Maxus Energy Corporation . . .*) *has retained certain obligations and the right to prosecute the instant action in the name of Diamond*.

(Proposed Findings of Fact of Pl. Diamond Shamrock Chemicals Company in *Aetna*, filed on Dec. 5, 1988 at 1, n.1, Bryant Cert., Exhibit 40.)

78. The pleadings in the *Aetna* litigation reflect that James F. Kelley (*i.e.*, Maxus then-General Counsel), W.E. Notestine, and Edward J. Masek—all of “Maxus Energy Corporation”—were listed as “Of Counsel” for DSCC in that case. (*See, e.g.*, Second Amended & Supplemented Civil Action Complaint in *Aetna*, filed Aug. 25, 1987 at PA2451, Pl. Exhibit

14; Statement of Factual Premises of Diamond Shamrock Chemicals Company in *Aetna*, filed July 25, 1988 at MAXUS0964872, Bryant Cert. Exhibit 41.)

79. Mr. Masek appeared at a number of depositions in the *Aetna* litigation as an “Attorney for Diamond Shamrock” or as one of the “Attorneys for Plaintiff,” *i.e.*, DSCC. (*See, e.g.*, Dep. of Richard W. McBurney on Apr. 28, 1987 at MAXUS046657, Bryant Cert. Exhibit 42; Dep. of Stanley B. Honour on Apr. 2, 1987 at MAXUS043854, Bryant Cert. Exhibit 43.)

80. The *Aetna* trial transcripts reveal that Mr. Masek was also present for at least part of the trial. (*See, e.g.*, *Aetna* Trial Transcript for Oct. 11, 1988 at 130:22–131:5, Bryant Cert. Exhibit 44.)

81. These same documents cited in ¶¶ 76-80 *supra*, do not mention any participation in the *Aetna* litigation by a member of OCC’s legal department, any other OCC employee, or any counsel retained by OCC to represent it. (*See* Declaration of Robert D. Stauffer in Supp. of Pl.’s Mot. For Summ. Adjudication of the Number of Occurrences, dated July 7, 1989, ¶ 1, Bryant Cert., Exhibit 39; Proposed Findings of Fact of Pl. Diamond Shamrock Chemicals Company in *Aetna*, filed on Dec. 5, 1988 at 1, n.1, Bryant Cert., Exhibit 40; Second Amended & Supplemented Civil Action Complaint in *Aetna*, filed Aug. 25, 1987 at PA2451, Pl. Exhibit 14; Statement of Factual Premises of Diamond Shamrock Chemicals Company in *Aetna*, filed July 25, 1988 at MAXUS0964872, Bryant Cert. Exhibit 41; Dep. of Richard W. McBurney on Apr. 28, 1987 at MAXUS046657, Bryant Cert. Exhibit 42; Dep. of Stanley B. Honour on Apr. 2, 1987 at MAXUS043854, Bryant Cert. Exhibit 43; *Aetna* Trial Transcript for Oct. 11, 1988 at 130:22–131:5, Bryant Cert. Exhibit 44.)

82. Indeed, there is no evidence that OCC retained any attorney to represent OCC or DSCC in the *Aetna* case. Nor is there any evidence indicating that any member of OCC’s legal



department or any other OCC employee attended any deposition, hearing, or trial held in that case.

83. The Chancery Court issued its order in the *Aetna* case on April 12, 1989. (*Diamond Shamrock Chemicals Company v. Aetna Casualty & Surety Company, et al.*, No. C3939-84 (N.J. Super. Ch. Div. corrected Apr. 12, 1989), Pl. Exhibit 15.)

84. The next day, Maxus issued a press release titled "Maxus Responds to Ruling in Insurance Suit Involving Diamond Shamrock Chemicals." (Maxus Corporate Announcement dated Apr. 13, 1989 at MAXUS0460451, Bryant Cert. Exhibit 46.)

85. The press release stated in relevant part:

Maxus Energy Corporation said that adequate reserves have been established to cover costs of the environmental cleanup at a former chemicals plant in Newark, New Jersey.

When Diamond Shamrock Chemicals Company was sold to Occidental Petroleum Company in September of 1986, Diamond Shamrock Corporation agreed to indemnify Occidental for liabilities that occurred prior to the sales date. . . .

Earlier this week a New Jersey judge ruled that insurance policies issued by Aetna Life & Casualty Co. and other insurers cover Diamond Shamrock Chemicals \$23 million portion of a 1984 settlement regarding Agent Orange.

The company said it is considering appealing the other part of the judge's ruling that denied coverage for the operation of the Newark Plant.

(*Id.*)

86. On or about April 24, 1989, Maxus filed a SEC Form 8-K with the Securities and Exchange Commission regarding the *Aetna* ruling. (Letter from Robin Green, associate counsel for Maxus, to SEC dated Apr. 24, 1989 attaching Form 8-K, Bryant Cert. Exhibit 47.)

87. In its Form 8-K, Maxus stated:

As reported in Maxus Energy Corporation's Annual Report on Form 10-K for the fiscal year ended December 31, 1988, three lawsuits were brought by Maxus Energy Corporation or a predecessor (the "Company") against the Company's insurance carriers. On April 12, 1989, a judgment was rendered in one of these lawsuits, Docket No. C-3939-84 in the Superior Court of New Jersey, Chancery Division, Morris County, involving . . . personal injury and property damage claims related to the Newark plant. The judge concluded that there is no insurance coverage . . . with respect to any pending or future claims for property damage or personal injury asserted by residents, property owners or workers in the neighborhood of the Newark plant under any of the policies in question. . . .

The Company plans to appeal this judgment . . . .

(*Id.* at MAXUS0069734.)

88. In the letter transmitting the SEC Form 8-K, Maxus noted that it was reporting under "Item 5" of Form 8-K. (*Id.* at MAXUS0069732.)

89. At the time of this filing, Item 5 denoted disclosures of "Other Materially Important Events." (SEC News Digest dated May 5, 1989 at 3, Bryant Cert. Exhibit 40; *see id.* at 4 (reflecting Maxus 8-K filing).)

90. The Appellate Division affirmed Judge Stanton's ruling on April 6, 1992. *Diamond Shamrock Chemicals Co. v. Aetna Cas. & Sur. Co.*, 258 N.J. Super. 167 (App. Div. 1992).

91. Three days later Maxus issued another SEC Form 8-K disclosing that decision under "Item 5." (Maxus' Form 8-K signed Apr. 9, 1992, Bryant Cert., Exhibit 49.)

92. In its April 9, 1992 Form 8-K, Maxus stated:

In an opinion filed April 6, 1992, No. A-694-89T1, the Appellate Division of the Superior Court of New Jersey upheld the lower court ruling previously disclosed by Maxus Energy Corporation (the "Company") that there is no insurance coverage of the cost of environmental personal injury and property damage claims, including remedial activities, related to the Newark, New Jersey

agricultural chemicals plant formerly operated by the Company's chemical subsidiary which was sold in 1986. *The Company indemnified the buyer of that subsidiary against the liabilities involved.*

(*Id.*)

93. Maxus made the following disclosure regarding the *Aetna* litigation in its SEC Form 10-K for 1996:

The insurance companies that wrote [DSCC's] and [Maxus] primary and excess insurance during the relevant periods have to date refused to provide coverage for most of [DSCC's] or [Maxus] cost of the personal injury and property damage claims related to environmental claims, including remedial activities at chemical plant sites and disposal sites. In two actions filed in New Jersey state court, *[Maxus] has been conducting litigation against all of these insurers for declaratory judgments that it is entitled to coverage for certain of these claims.* In 1989, the trial judge in one of the New Jersey actions ruled that there is no insurance coverage with respect to the claims related to the Newark plant . . . . The trial court's decision was upheld on appeal and that action is now ended.

(Maxus' 1996 10-K at YPFH869, Bryant Cert. Exhibit 50.)

94. There is no evidence that OCC's parent company, Occidental Petroleum Corporation ("OPC"), issued any SEC Form 8-Ks regarding the *Aetna* ruling.

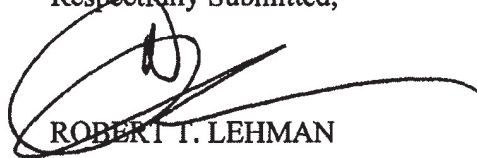
95. OPC's SEC Form 10-Ks for 1989 and 1992 do not mention the *Aetna* case. (*See* OPC 1989 SEC Form 10-K, Bryant Cert., Exhibit 47; OPC 1992 SEC Form 10-K, Bryant Cert., Exhibit 52.)

96. On August 10, 1989, Maxus entered into a letter agreement with Diamond Shamrock R&M, Inc. resolving a dispute between those parties (the subject of which is unrelated to the issues in this case). (Letter Agreement, dated Aug. 10, 1989, Bryant Cert., Exhibit 51.)

97. In that letter, Maxus described the *Aetna* litigation as "*Maxus' suit against its insurance carriers* involving Agent Orange (a Product Liability claim) and the Newark Cleanup

(not a Product Liability claim).” (*Id.* at YPF-AK-0012795, ¶ 7; *see also id.* at YPF-AK-0012797  
(invoice for legal services rendered in *Aetna*).

Respectfully Submitted,



ROBERT T. LEHMAN

June 24, 2011

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6863139v7

**EXHIBIT B**

**TO DEFENDANT OCCIDENTAL CHEMICAL CORPORATION'S**

**OBJECTIONS AND RESPONSES TO DEFENDANTS MAXUS ENERGY**

**CORPORATION AND TIERRA SOLUTIONS, INC.'S INTERROGATORIES**

**REGARDING TRACK III TRIAL ISSUES**



Plaintiffs' Track III Witness/Deposition List

No.	Name
1	Maxus Corporate Representative(s) Generally Regarding: <ul style="list-style-type: none"> <li>• 1983-1984 Corporate Restructuring;</li> <li>• 1986 Stock Purchase Agreement;</li> <li>• Alter Ego Relationship Between Maxus and Tierra;</li> <li>• Kolker-Era Corporate Transactions and Successorship; and</li> <li>• Kolker-Era Discharges.</li> </ul>
2	Tierra Corporate Representative(s) Generally Regarding the Alter Ego Relationship Between Maxus and Tierra.
3	OCC Corporate Representative(s) Generally Regarding: <ul style="list-style-type: none"> <li>• 1983-1984 Corporate Restructuring;</li> <li>• The 1986 Stock Purchase Agreement;</li> <li>• Kolker-Era Corporate Transactions and Successorship; and</li> <li>• Kolker-Era Discharges.</li> </ul>
4	James F. Kelley
5	Timothy J. Fretthold
6	Marcel J. Dumeny
7	J. W. McConnell
8	Witnesses identified by Maxus, Tierra, or OCC and deposed in Track III

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BY: OLIVER S. HOWARD, ESQUIRE  
DAVID L. BRYANT, ESQUIRE

Attorneys for Defendant Occidental Chemical Corporation

<p>NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE COMMISSIONER OF THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION and THE ADMINISTRATOR OF THE NEW JERSEY SPILL COMPENSATION FUND,</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">vs.</p> <p>OCCIDENTAL CHEMICAL CORPORATION, TIERRA SOLUTIONS, INC., MAXUS ENERGY CORPORATION, MAXUS INTERNATIONAL COMPANY, REPSOL YPF, S.A., YPF, S.A., YPF HOLDINGS, INC., YPF INTERNATIONAL S.A. (f/k/a YPF INTERNATIONAL LTD.) AND CLH HOLDINGS, INC.,</p> <p style="text-align: center;">Defendants.</p>	<p>SUPERIOR COURT OF NEW JERSEY LAW DIVISION - ESSEX COUNTY DOCKET NO.: L-009868-05 (PASR)</p> <p><u>Civil Action</u></p> <p><b>OCCIDENTAL CHEMICAL CORPORATION'S TRACK III WITNESS LIST DATED OCTOBER 28, 2011</b></p>
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Pursuant to the Consent Order on Track III Trial Plan, Defendant Occidental Chemical Corporation (“OCC”) identifies the following witnesses that it anticipates it may call to testify by deposition or at trial, if necessary, with respect to one or more issues to be determined in Track III. OCC reserves the right to call any witness identified by any other party to Track III.

1. **Ahlstrom, Richard M.** DSC VP Finance, DSCC VP and Director
2. **Corporate Representative of Maxus**
3. **Corporate Representative of Tierra**
4. **Corporate Representative of Plaintiffs**
5. **Christensen, Barry H.** DSC Environmental Services Manager
6. **Evans, W.L.** DSCC Assistant Treasurer
7. **Fish, George L.** DSC VP Technical Chemical Unit, Environmental Dept.
8. **Fretthold, Timothy J.** DSC Corporate Secretary and attorney
9. **Hemminghaus, Roger R.** DSC VP Planning and Development
10. **Hutton, William C.** DSC Corporate Manager Environmental Affairs
11. **Jackson, J.L.** DSC President, COO, and Director, DSCC Director
12. **Kelley, James F.** DSC VP and General Counsel, DSCC Director
13. **Laurance, Dale R.,** President, Occidental Petroleum Corporation
14. **Masek, Edward J.** Maxus Senior Counsel, DSC Assistant General Counsel
15. **Mielke, Donald C.** DSC Treasurer
16. **Rush, J. Avery, Jr.** DSC Director, Vice Chairman, DSCC Director
17. **Stern, Gerald M.** Senior General Counsel and Executive Vice President, Occidental Petroleum Corporation
18. **Stewart, Charles E.** DSC EVP and President of DSCC
19. **Tinkler, Timothy E.** DSC Assistant Secretary
20. **Worthington, James B.** DSC Director Environmental Affairs

Dated: October 28, 2011

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*Attorneys for Defendant Occidental  
Chemical Corporation*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of Defendant Occidental Chemical Corporation's Track III Witness List Dated October 28, 2011 was served by email to the following counsel of record on October 28, 2011:

William L. Warren, Esq.  
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Thomas E. Starnes, Esq.  
Drinker Biddle & Reath LLP  
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Washington, DC 20005  
*Counsel for Defendants Maxus Energy Corp. & Tierra Solutions, Inc.*

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William J. Jackson, Esq.  
Jackson Gilmour & Dobbs, P.C.  
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*Counsel for Plaintiffs New Jersey Department of Environmental Protection, et al.*

  
\_\_\_\_\_  
David L. Bryant



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**Attorneys for Defendants,  
Tierra Solutions, Inc. and Maxus Energy Corporation**

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NEW JERSEY DEPARTMENT OF  
ENVIRONMENTAL PROTECTION, THE  
COMMISSIONER OF THE NEW JERSEY  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION AND THE ADMINISTRATOR  
OF THE NEW JERSEY SPILL  
COMPENSATION FUND,

Plaintiffs,

vs.

OCCIDENTAL CHEMICAL CORPORATION,  
TIERRA SOLUTIONS, INC., MAXUS  
ENERGY CORPORATION, REPSOL YPF,  
S.A., YPF, S.A., YPF HOLDINGS, INC., AND  
CLH HOLDINGS,

Defendants.

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:  
: SUPERIOR COURT OF NEW JERSEY  
: LAW DIVISION -ESSEX COUNTY  
:  
: DOCKET NO. ESX-L-9868-05 (PASR)  
:  
:  
: **DEFENDANTS MAXUS ENERGY**  
: **CORPORATION AND TIERRA**  
: **SOLUTIONS, INC.'S WITNESS LIST**  
: **REGARDING TRACK III TRIAL**  
: **ISSUES**

Pursuant to the Court's Consent Order on Track III Trial Plan, Maxus Energy Corporation and Tierra Solutions, Inc. hereby identify all party and non-party witnesses that Maxus and Tierra currently anticipate calling as witnesses at the Track III trial:

1. Merton Skaggs;
2. James Kelley, Esq.;
3. Richard Hartline;

4. William C. Hutton;
5. David Wadsworth, Esq.;
6. David Rabbe;
7. One or more representatives of OCC with knowledge regarding
  - a. the factual basis for OCC's claims that Maxus is a successor, at law or in equity, to DSCC;
  - b. the factual basis for OCC's claims that Maxus is the alter ego of Tierra;
  - c. the factual basis for OCC's claims that one or more of the Plaintiffs are third-party beneficiaries of the SPA;
  - d. the factual basis for OCC's claims that Maxus is a person in any way responsible under the Spill Act for the hazardous substances discharged from the Lister Site;
  - e. the factual basis for OCC's claim that Diamond Shamrock Corporate Company acquired the corporate assets and liabilities formerly held by DSC-I, including the Lister-related environmental liabilities;
  - f. OCC's interactions with the State of New Jersey with regard to the Lister Site;<sup>1</sup>
  - g. OCC's execution of enforcement documents, including judicial consent decrees and consent orders, as the successor to DSCC's liabilities relating to the Lister Site;
  - h. OCC's response to Federal and State entities regarding environmental issues at the Lister Site;
  - i. the scope and formation of the indemnity provisions of the SPA;
  - j. intended beneficiaries of the the indemnity provisions of the SPA SPA;
  - k. OCC's responses to claims regarding the Lister Site;
  - l. OCC's responses to claims regarding DSCC liabilities subsequent to the execution of the SPA;
  - m. OCC's communications with Maxus with regard to rights and obligations under the the indemnity provisions of the SPA; OCC's communications with the State and other parties with regard to the SPA;
  - n. OCC's knowledge of Maxus and Tierra activities with regard to the Lister Site;
  - o. OCC's knowledge of corporate transactions involving Maxus and Tierra; and
  - p. OCC's intent that the indemnity provisions of the SPA benefit the State.
8. One or more representatives of Plaintiffs regarding
  - a. the factual basis for Plaintiffs' claims that Maxus is a successor, at law or in equity, to DSCC;
  - b. the factual basis for Plaintiffs' claims that Maxus is the alter ego of Tierra;

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<sup>1</sup> Maxus and Tierra hereby incorporate the definitions set forth in the Interrogatories to Plaintiffs Regarding Track III Trial Issues.

- c. the factual basis for Plaintiffs' claims that one or more of the Plaintiffs are third-party beneficiaries of the indemnity provisions of the SPA;
  - d. the factual basis for Plaintiffs' claims that Maxus is a person in any way responsible under the Spill Act for the hazardous substances discharged from the Lister Site;
  - e. Plaintiffs' communications with OCC and Maxus with regard to the Lister Site;
  - f. Plaintiffs' communications with Maxus Corporate Company, Maxus, and Tierra with regard to the Lister Site;
  - g. enforcement documents, including administrative consent orders, consent decrees and/or directives, with regard to the Lister Site;
  - h. Plaintiffs' knowledge regarding the SPA;
  - i. Plaintiffs' communications with Maxus between 1983 and 1995 relating to the environmental condition of Lister Site;
  - j. Plaintiffs' knowledge of Maxus and Tierra activities with regard to the Lister Site;
  - k. Plaintiffs' knowledge of corporate transactions involving Maxus and Tierra; and
  - l. Any other instances in which Plaintiffs sought to enforce an alleged right as a third party beneficiary under an indemnification agreement between two private parties relating to environmental claims.
9. One or more persons with knowledge of corporate transactions involving Kolker Chemical Works, Inc.

Maxus and Tierra reserve the right to supplement this witness list in accordance with the Court Rules and the Court's Consent Order on Track III Trial Plan and identify additional persons with knowledge whose testimony that Maxus and Tierra may rely upon at trial as additional witnesses that may be relied upon at trial are identified during the course of discovery, or as additional witnesses' testimony is required to refute evidence submitted by Plaintiffs and/or OCC. Maxus and Tierra also reserve the right to call any witnesses listed by Plaintiffs or OCC.

DRINKER BIDDLE & REATH LLP  
Attorneys for Defendants Tierra Solutions,  
Inc. and Maxus Energy Corporation

  
\_\_\_\_\_  
William L. Warren, Esq.

October 25, 2011