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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, v. 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, Defendants MAXUS ENERGY CORPORATION and TIERRA SOLUTIONS, INC., Third-Party Plaintiffs, v. 3M COMPANY, *et al.*, Third-Party Defendants.	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION - ESSEX COUNTY DOCKET NO. ESX-L9868-05 (PASR) <u>Civil Action</u> PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO APPROVE DEFENDANTS' SETTLEMENT AGREEMENT AND THIRD-PARTY CONSENT JUDGMENT AND ENTER ORDERS AND IN OPPOSITION TO CROSS-MOTION OF OCCIDENTAL CHEMICAL CORPORATION

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PRELIMINARY STATEMENT

Occidental Chemical Corporation's ("OCC") Response in Partial Opposition to Plaintiffs' Motion to Approve Defendants' Settlement Agreement and Third-Party Consent Judgment (OCC's "Opposition") is as inappropriate as it is misleading. OCC only "partially" opposes the settlements of 270 individual parties because OCC is willing to accept *One Hundred Sixty-Five Million Dollars ($165,000,000.00)* of benefits that the State and the Settling Parties have conferred upon OCC. With neither a nod to its indemnitor nor the third-party defendants that are substantially reducing OCC's exposure for decades of dumping dioxins into the Passaic River, OCC accepts that 270 settling parties have agreed to pay approximately $148 Million to retire the State's Past Cleanup and Removal Costs, including the fees and litigation costs sought by the State up to the time of the settlements,[1] and to pay an additional $17 million toward the restoration of the Passaic River. OCC also readily accepts the State's covenant not to sue OCC for the same Past Cleanup and Removal Costs recouped through these settlements.

Indeed, OCC boldly announces that it is "willing" to accept the fruits of fourteen months of settlement negotiations between the State and hundreds of other parties . . . with just two "minor" caveats. First, OCC would replace the Case Management Order that is an essential component of the Repsol/YPF Settlement with its own case management order (one that would hijack the State's case against OCC, allow OCC to immediately proceed with its now inchoate and largely contingent claims against Repsol and YPF, and simultaneously require that the State's claims against it continue to languish). Second, OCC would like to litigate the claims and past costs actually retired by the pending settlements at some later date, but not now, when the

[1] "Past Cleanup and Removal Costs" is a defined term in the Settlement Agreement and is used herein as defined by the parties to include all cleanup and removal costs incurred before July 1, 2013, and as subject to the claims for damages reserved against OCC in the Settlement Agreement.

settlements are properly before the Court for review and entry following statutory notice and consideration of comments (notably, including OCC's comments). Neither of OCC's positions can be justified or countenanced at law or in equity.

First, it is wholly misleading for OCC to suggest that the Court can isolate the Case Management Order attached to the Repsol/YPF Settlement (the "Proposed CMO") from the remainder of the essential settlement terms, documents, the Settlement Agreement, or the Consent Judgment now before the Court. The terms of that Proposed CMO were negotiated together with all of the other terms of the Settlement Agreement and expressly formed an essential element of the settlements. To be sure, the Court has the ability to reject the Proposed CMO, but to do so would be to remove part of the consideration of the settlements. Thus, while OCC does not tell the Court the ramifications of its seemingly innocuous request, there can be no question: OCC is asking the Court to remove a linchpin of the entire settlement structure, which would cause the State's proposed settlement with Repsol/YPF to fail, which would then force the State to reopen the administrative comment period for the Third-Party Consent Judgment, and thus potentially unravel the Third-Party settlement or, at the very least, delay that process for many months.

Second, it is inappropriate for OCC to argue that its claims should proceed first, while the State should continue to wait – *nine, ten or eleven years* – to put on its case against OCC. The State filed this suit in December 2005, almost precisely eight years ago, seeking recovery from OCC for the cleanup and removal costs it has been forced to expend *and* for the significant damages suffered as a result of decades of OCC's intentional pollution from the Lister Site. In a vacuum created by OCC, others have now agreed to step up and pay the State's Past Cleanup and Removal Costs. It is time that the State's remaining claims against OCC proceed to trial. It is

telling that OCC would so dismissively brush-off the damages it caused while the Passaic River remains full of OCC's dioxin and the Lister Site itself sits as a monument to the egregious contamination OCC bestowed upon the Ironbound community and this State. No matter what OCC may think of the countless injuries, impacts and damages it caused the people of New Jersey, the State is entitled to be made whole.[2] And, the State is entitled to go forward with its remaining claims against OCC now.

Finally, in its Response, OCC does not contest the amount or allocation of the $165 Million in settlement funds that are extinguishing the State's claims for Past Cleanup and Removal Costs and that are making a down-payment on the NRD/restoration of the Passaic River. During the administrative review of the pending settlements, OCC argued that the evaluation of settlement credits is key to the Court's fairness consideration, and the State considered and responded to those concerns fully. Now that the settlements are before the Court, OCC chose not to challenge that allocation in its Response and has thereby waived its opportunity to do so. The State has appropriately recognized and provided OCC with a dollar-for-dollar credit for such settlements. In fact, the State ensured that an essential term of the Repsol/YPF Settlement Agreement is that OCC – though paying precisely *zero* – receives from the State a covenant not to sue for the Past Cleanup and Removal Costs retired by the Settling Defendants and Third-Party Defendants. Apparently, OCC will take the benefit of that covenant not to sue but wants to avoid the resolution of settlement credits now pending before this Court.

[2] OCC states time and time again that since the settlements fully compensate the State for all of its past costs, there is less urgency for the State to recover its "non-out-of-pocket" damages. (See, e.g., OCC's Response pp. 19-20.) However, unless the Court re-orders the trial tracks and enters the Proposed CMO, there will be no settlement with Repsol/YPF and the State will not receive the $130 Million they agreed to pay. Likewise, OCC misses the point when it criticizes the State's position that the public would be forced back into the resource-intensive Track IV against Repsol and YPF if the Court did not stay Track IV while Track VIII proceeds. If the Proposed CMO is not entered, there will be no settlement with Repsol/YPF, and the State would have to litigate Track IV, the avoidance of which was a major consideration in the DEP's administrative approval of the Repsol/YPF Settlement Agreement.

Moreover, OCC seeks to inflate the issues to be tried in Track VIII by lumping the matters addressed in the settlements into the State's remaining claims. To be clear, the settlements before the Court resolved $148 Million in Past Cleanup and Removal Costs. There is absolutely no basis to litigate settled claims, and – when the State amends its pleadings per the Proposed CMO, if approved – those claims and costs will be dismissed against OCC.

After eight years of intense litigation and an enormous investment by the State, the State of New Jersey stands on the threshold of resolving a major portion of the Passaic River Litigation. It is the Court's role to evaluate the fairness of these settlements and to evaluate whether non-settling parties such as OCC are unduly prejudiced thereby. Given the enormous benefits provided OCC, it is not surprising that the only possible prejudice OCC could claim is time: that OCC has to wait to try its claims against Repsol and YPF for the State's damages (that have yet to be established) and the EPA's costs (for a remedy that has yet to be announced). For all the reasons discussed herein, the Proposed CMO is fair to all involved, comports with proper case management, conserves the public's resources and – given the $165 Million in benefits it is receiving under the pending settlements – is patently fair to OCC, too. Accordingly, in deference to agency discretion and a weighing of the interests of all of the defendants, third-party defendants and the State, the Plaintiffs respectfully request that the Court find that the proposed settlements are fair and reasonable, enter the Settlement Agreement, the Third-Party Consent Judgment, and grant the relief presented by the settling parties.

LEGAL ARGUMENT

POINT I

THE RE-ORDERING OF THE TRIAL TRACKS IS ESSENTIAL TO BOTH SETTLEMENTS.

A. The Repsol/YPF Settlement Is Void Without Approval of the Proposed CMO.

OCC's entire Response is predicated on the erroneous presumption that the Proposed CMO in the Repsol/YPF Settlement Agreement is optional and can simply be substituted with a CMO proposed by OCC. The Proposed CMO is an essential term of the Repsol/YPF Settlement Agreement, and without it, there is no settlement for the Court to approve. (Settlement Agreement ¶ 77.) Furthermore, if the Repsol/YPF Settlement Agreement is void, the Third-Party Consent Judgment cannot be entered and must be resubmitted for public comment. (Id. at ¶ 50.) Thereafter, Maxus and Tierra would be given an opportunity to provide comments and challenge the Third-Party Consent Judgment, including possibly requesting discovery. Even if Plaintiffs thereafter decide to move forward with the Third-Party Consent Judgment, such process could add six months to a year to the litigation, further delaying the resolution of Tracks IV and VIII.

Thus, by seeking to scuttle the Proposed CMO, OCC is actually seeking to sink both settlements and set this litigation back several years. By removing that one cornerstone of the settlements, both will fail to move forward, and no party will be any closer to resolving their disputes. Even OCC's own proposed CMO would be moot because Track IV would not be limited to OCC's claims against Repsol, YPF and Maxus, but would also include Plaintiffs' claims against those entities as well. The settlements simply cannot go forward with a simple substitution of the CMO as proposed by OCC. It is not an option of whether OCC's CMO is approved or the Proposed CMO in the Settlement Agreement is approved. Without the re-ordering of the trial tracks and entry of the CMO proposed in the Settlement Agreement, there

are no settlements for the Court to approve.

By including the Proposed CMO in the Repsol/YPF Settlement Agreement, Plaintiffs and the Settling Defendants are not seeking to remove the Court's discretion to manage this Litigation. The Court retains that inherent power, as expressly noted in the Proposed CMO, and the settling parties only seek to have the Court exercise that power to help resolve long-running claims and implement the goals of the State and both settlements.

B. The Proposed CMO is Essential to Plaintiffs' Approval of the Repsol/YPF Settlement.

Despite OCC's characterization of it as a term designed mainly to benefit Repsol, YPF and Maxus, the re-ordering of the trial tracks and advancement of Plaintiffs' remaining claims are essential elements of the settlement for Plaintiffs, without which a settlement may not be achieved. Re-ordering the trial tracks allows Plaintiffs to finally move forward to resolve the State's claims against an intentional polluter that has repeatedly avoided a final adjudication of its liability. The State's ability to expeditiously seek a final resolution of its remaining claims without further delay is central to any settlement for the State. It was the driving force behind the Third-Party Consent Judgment and is an essential element of the Repsol/YPF Settlement.

Plaintiffs do not wish to resolve their claims against Repsol and YPF only to wait on the sidelines while OCC pursues its cross-claims against those entities. Such a delay would be inconsistent with the well-settled law in New Jersey that a "cause of action for indemnification accrues when an indemnitee becomes responsible to pay on a claim." Harley Davidson Motor Co., Inc. v. Advance Die Casting, Inc., 292 N.J. Super. 62, 68 (App.Div. 1996), aff'd, 150 N.J. 489 (1997). That is why any settlement must provide a clear path to a full and final resolution of the State's case before reaching OCC's indemnity claim and further derivative claims against Repsol and YPF. The Proposed CMO properly orders that Plaintiffs' remaining claims proceed

now, unimpeded by OCC's dispute with Maxus, Repsol and YPF.

C. OCC's Cross-Claims Are Not More Urgent, and Plaintiffs Deserve to Have Their Claims Tried First.

OCC's Response argues that OCC's cross-claims are "much more urgent than the resolution of Plaintiffs' remaining claims," (OCC Response at pp. 19), forgetting that all of Plaintiffs' claims will be remaining if the Proposed CMO is not entered. OCC is seeking the ascendancy of its cross-claims to the detriment of the rights of the 270 parties who will be forced back into litigation, throwing out the heretofore successful efforts of the Court and Special Master to resolve this matter. OCC's argument that the Track VIII trial must be deferred because OCC's cross-claims deserve a higher priority than the significant damages that OCC inflicted upon the State of New Jersey is both unreasonable and inequitable.

In Track VIII, the Plaintiffs will prove the nexus between OCC's dioxins and the resulting damages and future costs the State has incurred and will incur. Plaintiffs' special damages and future costs are the inescapable result of decades of improper disposal of hazardous wastes at the Lister Site and into the Passaic River by OCC and its adjudicated predecessor, DSCC. Plaintiffs will establish substantial economic impacts and tax revenues that have been lost due to the dioxin contamination caused by OCC. Plaintiffs' evidence will show that the contamination negatively affected the redevelopment and revitalization of the dioxin-impacted areas. The intentional pollution, for which OCC is directly (not derivatively) liable, impeded commerce, created distressed properties, and reduced property values, resulting in vast economic losses to the State. Likewise, the State has had to pour substantial public resources into the dioxin-impacted areas for the generation since OCC's intentional contamination was discovered.

Moreover, the trial of Track VIII will allow Plaintiffs to present evidence that OCC's use of Plaintiffs' property without consent to dispose of their hazardous wastes enriched OCC by

saving the more expensive costs they would have incurred to dispose of or store the waste properly. Plaintiffs intend to prove that OCC's cost savings, realized at the expense of and harm to the State of New Jersey, resulted in greater business profits. OCC's disposal and storage of hazardous wastes into New Jersey's waters and submerged lands served no public purpose and provided no benefit to the State. Instead, the Track VIII evidence will show that the delays and avoidance by these Defendants of the costs of capital improvements, as well as proper operations and maintenance costs for environmental compliance, allowed OCC and DSCC to use those ill-begotten funds for other income-producing activities solely for their benefit, and at the expense of New Jersey's citizens and natural resources.[3] After eight years of litigation, approval of the settlements will at last give the State – the true injured party in this lawsuit – the opportunity to present its damages evidence.

Instead, as the intentional polluter of the dioxins, OCC is requesting that the Court put its interests above the interests of the State and every other party to the litigation. Judicial efficiency and economy warrant the establishment at trial of Plaintiffs' damages, if any, as the precursor to the determination of OCC's pass-through claims in Track IV. As the parties who have suffered the actual damages that would support OCC's cross-claims, Plaintiffs logically should take priority in going to trial first.

OCC also significantly overstates the urgency of its declaratory judgment claims against Repsol and YPF. Despite the fact that OCC believes it should still pursue a declaratory judgment against Repsol and YPF – even if Maxus never defaults on its indemnity obligation and/or Plaintiffs recover nothing in Track VIII – such a desire can hardly justify rejecting the

[3] Because OCC merged DSCC into itself, with OCC being the only surviving entity, OCC is DSCC as a matter of law. Thus, OCC reaped the benefits of these transactions as DSCC. Additionally, the evidence adduced to this point shows that, understanding the nature and extent of the environmental liabilities associated with the Passaic River, OCC negotiated a substantial discount for the price of DSCC and all of its chemical know-how when it purchased DSCC.

settlements. Likewise, the possibility of a remedy being selected soon for the Passaic River as part of the Focused Feasibility Study ("FFS") provides no basis for this Court to reject the settlements in favor of OCC's cross-claims. OCC is not subject to any impending suit by EPA to implement a yet-to-be-selected remedy. The FFS will take years to fully develop and implement, and it will be necessarily addressed in a federal forum under CERCLA, where OCC is free to have its claims against Maxus and others addressed. The Passaic River Litigation is about the State's claims, and the settlement should not be rejected based on what might occur between the non-settling party and EPA in a later federal action.

POINT II

THE PROPOSED CMO PROVIDES THE MOST REASONABLE SCHEDULE FOR RESOLUTION OF THIS LITIGATION.

A. Timeframes Set Forth in the Proposed CMO Are Reasonable.

OCC highlights that the Proposed CMO stays discovery between OCC and the Settling Defendants until after April 2014 or the resolution of Track VIII and sets a trial date after December 2015. However, OCC cannot dispute that those timeframes are reasonable and fit within the most realistic progression of the litigation. Plaintiffs believe that Track VIII can be tried within a year of approval of the settlements. (Pls.' Motion to Approve p. 38.) If the settlements are entered, Plaintiffs' claims will be significantly narrowed and only targeted discovery would be necessary. Based on the Court's September 11, 2012 Order on Track VIII Trial Plan, the trial for Track VIII was scheduled 16 months out when discovery was stayed in October 2012. (See September 11, 2012 Order on Track VIII Trial Plan.) Once Track VIII is narrowed by the settlements, a reasonable time for discovery and trial should be well within that timeframe, i.e. 12-16 months. Thereafter, OCC would be entitled to pursue its derivative cross-claims.

Even OCC's proposed CMO for Track IV fits within the timeframes proposed by Plaintiffs. OCC proposes that Track IV discovery can be completed and the claims tried in a year. The Proposed CMO provides that Track IV should proceed to trial at the conclusion of Plaintiffs' case against OCC and no earlier than December 2015. Considering that Track VIII will take a year to 16 months and OCC's own proposal has Track IV taking a year, the earliest that Track IV could proceed would be the December 2015 date Plaintiffs propose. Thus, the CMO included in the settlement agreement fits squarely within every party's estimation of the time necessary to resolve all remaining claims and issues. Accordingly, like all other aspects of the settlements, the Proposed CMO is fair and reasonable and should be approved by the Court.

B. The Proposed CMO Also Provides a More Typical Trial Schedule.

In addition to being a reasonable and practicable approach to case management, the Proposed CMO is supported by the Rules of Court. OCC incorrectly asserts that the Rules "contemplate that all related claims be brought in the same suit and undergo discovery at the same time." (OCC Response p. 10.) OCC's brief confusingly cites several Rules in support of this contention, but none of the cited Rules, read independently or in combination, actually limit discovery as OCC purports. The only Rule cited which addresses the schedule for discovery is R. 4:24-1, and it does not preclude the re-ordering of the trial tracks or staged discovery. R. 4:24-1(a) simply identifies the default discovery time limits, which are not applicable to this specially-managed case. As the last several years of litigation teach us, there is, in fact, nothing in the Rules which requires that all discovery for a case such as the current litigation be completed concurrently and conclude at the same time. The Rules allow for staging of discovery and trials in complex environmental litigations such as this, and the Court, with the assistance of the Special Master, has done exactly that for the last five or more years.

Through a series of 18 Case Management Orders, the Court has exercised its authority to manage this complex environmental case in keeping with the overriding principles set forth in R. 1:1-2(a):

> The rules in Part I through Part VIII, inclusive, shall be construed to secure a just determination, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay. Unless otherwise stated, any rule may be relaxed or dispensed with by the court in which the action is pending if adherence to it would result in an injustice. In the absence of rule, the court may proceed in any manner compatible with these purposes and, in civil cases, consistent with the case management/trial management guidelines set forth in Appendix XX of these rules.

This Court has exercised its discretion in managing discovery and entering CMOs for the purpose of moving this matter forward towards resolution, while at the same time encouraging the parties to reach the kinds of fair and reasonable settlements which are now being presented for approval. During oral argument on the Third-Party Defendant Motion to Sever and Stay, this Court noted the Herculean efforts of former Chief Judge Gerry in resolving the Kramer Landfill case, through the utilization of a carrot and stick approach to discovery and trial management in order to foster an equitable utilization of the parties' resources in fulfilling the judicial and statutory responsibilities of all involved. (Hearing Transcript, November 16, 2010, Page 73 ll. 12-25). While OCC cites to a disassociated string of rules in its effort to destroy the pending settlements, it ignores the fundamental authority this Court has to ensure a just resolution of controversies within its jurisdiction. "The right of a trial court to manage the orderly progression of cases before it has been recognized as inherent in its function." Casino Reinvestment Development Authority v. Lustgarten, 332 N.J. Super. 472, 489 (App.Div. 2000).

Likewise, the Manual for Complex Litigation (Fourth) §34.27 recognizes the wisdom of entering the Proposed CMO that allows the State to try its main case against the intentional polluter, while having trial of its cross-claims follow:

> Another approach is to postpone or stay joinder issues, contribution claims, and other cross-claims until the litigation against the initial defendants has been resolved. In cases with large numbers of PRPs, this keeps the organization relatively simple while a plan to remedy the site or to determine the costs of the remedy is devised. The primary PRPs may also be more inclined to reach out-of-court settlements with third parties without the expense of litigation. The disadvantage is that parties joined later may wish to relitigate those issues or reopen discovery. This phased approach is more feasible where the government has initiated the case, or in some contested consent decrees, but it does not work well where the government is not involved in the litigation and the primary PRP group has filed a separate action for contribution.

Now that the case management efforts of the Court and Special Master have successfully yielded a resolution of the third-party claims and the State's claims against the Settling Defendants, those resources can now be focused on the State's damages trial, unhampered by the drain on those resources that would result from simultaneous discovery of Track IV and Track VIII. Furthermore, a stay of discovery on the cross-claims is necessary in the event that OCC decides to appeal the rulings of this Court, if the settlements are approved. The upending of the settlements by the appellate courts would require the State to engage fully in Track IV discovery.

The State has pursued the Passaic River Litigation for eight years – and has spent over two years in settlement negotiations – yet OCC argues that its cross-claims for declaratory relief are more urgent. Without entry of the Proposed CMO, there will not be a resolution of any of Plaintiffs' claims. The last two years of settlement efforts will be moot, all for the sake of OCC's contingent and inchoate cross-claims. Although the Rules allowed OCC to file cross-claims, they do not allow those cross-claims to hijack the Plaintiffs' case or require that cross-claims be heard before the Plaintiffs' claims. OCC could have asserted its cross-claims in any other forum, federal or state, but it chose to have them brought here and centered around the damages claimed in this litigation. Those claims should await a resolution of Plaintiffs' remaining claims, as reasonably outlined in the Proposed CMO.

POINT III

ANY SETTLEMENT CREDITS AND THE SCOPE OF THE REMAINING CLAIMS MUST BE ADDRESSED NOW.

Plaintiffs' Motion to Approve and the administrative record developed for the settlements provide detailed support, not only for the fairness of the settlements, but also for how the settlement funds will be applied and credited to OCC. Instead of addressing any objections OCC may have with the application of the settlement funds, OCC's response casually announces that it "is not bound by any purported allocation" and such must wait discovery at a later time. (OCC's Response pp. 16-17.) OCC would have the parties litigate the settlement and the costs settled after the claims are dismissed and it has received a covenant not to sue; an absurd and indefensible proposition.

In its comments to DEP, OCC highlighted the allocation of the settlement funds and credits as primary considerations for determining whether the settlements were fair and reasonable. (See Ex. D to Pls.' Motion to Approve, Response to Comments, OCC's Comment No. 1.) After receiving DEP's Response to its comments, OCC chose not to address the issue, despite the fact that the allocation of settlement funds and credits is a fundamental subject of Plaintiffs' motion, the administrative process, and the fairness hearing before this Court. The Court's role is to ensure that the settlements are fair to the non-settling parties as a result of the settlement credit provided under the Spill Act and the contribution protection provided to the settling parties. United States v. Rohm & Haas Co., 721 F. Supp. 666, 679-680 (D.N.J. 1989). For this reason, Plaintiffs provided over 3,500 pages of documents supporting their resolved claims and provided additional certifications detailing the amount of past costs sought and resolved by the settlements. OCC has failed to offer any substantive opposition. As a result, the

issues should be considered uncontested and any objections by OCC at the hearing or otherwise are waived. R. 1:6-2.

After receiving the Plaintiffs' Response to OCC's Comments, if OCC had any remaining concerns with the allocation of the settlement funds and the credit Plaintiffs propose, its opportunity to raise such issues was now. OCC's decision to not address this issue in its Response – so that the Court would have the benefit of its arguments – must be viewed as a decision not to challenge the proposed allocation and credits, and OCC cannot be given a second bite at this apple after the claims are settled and dismissed. Otherwise, the State would be litigating its settlements for years to come at sites across the State. The allocation of the settlement funds, the scope of the remaining claims, and any settlement credit for OCC are key provisions of the settlements that must be decided by the Court as part of the settlement approval process.

A. Allocation of the Settlement Funds and Settlement Credit Are Integral to the Settlements and Settlement Approval Process.

A determination of the allocation of the settlement funds and any credit provided to OCC under the Spill Act are essential to the settlements.[4] First, they are key to determining whether the settlements are fair to non-settling parties, like OCC. Second, they determine the nature and extent of the remaining claims to be tried against OCC and ensure the cost savings sought by the settlements. Finally, OCC is receiving the benefits of a covenant not to sue for the claims and should not be permitted to later argue that the settlement funds should be applied to other claims. Accordingly, Plaintiffs' motion to approve clearly sets forth that the settlement funds are being used to retire Plaintiffs' Past Cleanup and Removal Costs and then to be applied to NRD, and the

[4] The allocation and settlement credit only apply to Plaintiffs' Spill Act claims. Common law claims are subject to a percentage allocation at trial and the amount of the settlement or allocation of the settlement funds is not relevant. Young v. Latta, 123 N.J. 584, 591 (1991).

orders accompanying the motion seek the Court's approval for such allocation. (Pls.' Motion to Approve pp. 39-40.)

The Spill Act provides that as part of a judicially approved settlement, "the potential liability" of any non-settling discharger will be "reduced" by the amount of the settlement. N.J.S.A. 58:10-23f. That ensures that the State will be fully compensated from non-settling parties and there will be no double recovery. Also, in the CERCLA context, what the government is being compensated for and what claims remain against the non-settling parties are key aspects of the fairness analysis. Rohm & Haas Co., supra, 721 F. Supp. at 679-680. The structure of the Repsol/YPF Settlement Agreement follows the Spill Act language and seeks to "reduce" to *zero* OCC's "potential liability" for claims and damages resolved by the settlements.

When analyzing its fairness, Courts must consider a settlement agreement's allocation of settlement proceeds where the allocation would result in a dollar-for-dollar credit. See Tyco Thermal Controls LLC v. Redwood Indus., 2010 WL 3211926, at *4 (N.D. Cal. 2010) (finding that it was required to make "an immediate determination as to the adequacy of the proposed settlements because the settlements would affect directly—dollar-for-dollar—the non-settling defendant's potential liability")[5]; State of New York v. Solvent Chemical Co., Inc., 984 F. Supp. 160, 166, 169 (W.D.N.Y. 1997) (rejecting argument that the court could wait to make a ruling on the methodology for allocating settlement credits until after the settlement agreement had already been approved). Settling parties are allowed to specifically allocate the settlement proceeds in their settlement agreements in order to set forth the methodology for determining the settlement credits available to a non-settling defendant. See Hess Oil Virgin Island Corp. v. UOP, Inc., 861 F.2d 1197, 1209 (10th Cir. 1988); United States v. Iron Mountain Mines, 724 F.Supp.2d 1086,

[5] Pursuant to R. 1:36-3, a copy of this opinion has been served upon all parties and the Court. Counsel is not aware of any contrary unpublished opinions.

1093 (E.D. Cal. 2010) (refusing to credit settlement funds towards past response costs under CERCLA because the terms of a consent decree allocated settlement funds to future costs); Tyco Thermal Controls LLC, supra, 2010 WL 3211926, **8-11 (noting that the parties to a settlement agreement can choose in their agreement which "method of allocating liability is applicable to CERCLA claims brought under § 113(f)(1)."); Friedland v. TIC-The Industrial Company, 2008 WL 185693, at *2 (D. Colo. 2008). The allocation can be accomplished by offering the written settlements as proof, which shifts the ultimate burden of proof to the non-settling defendant. Texas General Petroleum Corp. v. Leyh, 52 F.3d 1330, 1340 (5th Cir. 1995) (citing to Hess, supra, 861 F.2d at 1209). Likewise, the involvement of the non-settling party and the procedure for approval of the settlement support the allocation offered by the settling parties. For example, in the bankruptcy context where joint and several liability is applied to avoidance of transfers, courts have considered the procedure in approving the settlement to be a significant factor in allocation of the settlement funds to different claims. See Lendvest Mortgage, Inc. v. De Armond, 123 B.R. 623, 625-626 (N.D. Cal. 1991). Those courts have found that allocation of settlement funds subject to joint and several liability is fair when the non-settling party is given notice and an opportunity to object and seek a determination from the court.[6] Id. OCC received notice of the proposed allocation of credits six months ago, when the Settlement Agreement was posted on the DEP website, and has had ample opportunity to object.

The Repsol/YPF Settlement Agreement expressly provides the specific methodology for

[6] "The court accordingly holds that where a trustee seeks to compromise litigation which includes avoidance matters without prejudicing his rights against third parties who might be jointly liable for the avoided transfer, he must (1) as part of the settlement allocate that portion which is attributable to the avoidance action; (2) give all nonparties to the settlement who might be jointly liable fair notice of the settlement and how it might affect their rights; and (3) obtain a judicial determination that the allocation is made in good faith. This procedure, somewhat akin to the procedure for determining the good faith nature of tort settlements vis-a-vis non-settling joint tortfeasors under state law, would afford due process protection to persons who might be jointly liable with the settling party, and would encourage the resolution of all avoidance claims regarding the same transfer at the same time." Id.

allocating settlement credits to OCC. (Ex. B, Settlement Agreement ¶¶ 24 and 63(c).) The Third-Party Consent Judgment also generally provides what settlement credits will be provided to non-settling third parties, including OCC. (Ex. C, Consent Judgment ¶¶ 32(b), 43.) These methodologies were set forth in exacting detail in the DEP's Response to Comments, the Administrative Record, and Plaintiffs' Motion to Approve, including detailed certifications from DEP and DOT on the amount of past cleanup and removal costs. (See Pls.' Motion to Approve pp. 38-41.) In its Response, OCC states that it "disputes the self-serving calculations of past costs provided in the RYM Settlement Agreement," but fails to submit any substantive comment of the proposed allocation—instead making an ominous prediction of discovery in the future to bolster its claim that Track IV discovery is further along than Track VIII discovery. OCC has thus failed to directly challenge the fairness of the proposed allocation of $165,400,000 in settlement credits to OCC or the underlying calculations, which it had ample opportunity to do during the six-month long administrative and judicial settlement approval processes directed by the Court. As OCC has failed to object to or establish the unfairness of the express allocations, it will be bound thereby upon the Court's approval of the agreements.

In addition to fairness, the allocation of settlement funds is necessary given the unique context of the Repsol/YPF Settlement. Under the terms of the settlement, Plaintiffs are resolving some claims (e.g., past cleanup and removal costs) and reserving others against OCC (e.g., economic damages). The intent is that Plaintiffs' claims for Past Cleanup and Removal Costs are retired and that Plaintiffs will only have to try their remaining claims against OCC. Plaintiffs do not intend to put on evidence of the State's past costs at trial as OCC suggests, and the State gave OCC a covenant not to sue for these costs in the Settlement Agreement. Those claims are

resolved, and one of the many benefits of settling is not having to incur the costs of a trial on those resolved claims.

Thus, this Court's approval of the allocation of the settlement funds will limit the scope of the remaining claims and trial, benefiting both the State and OCC. This is further necessitated because Maxus, as OCC's indemnitor, has settled these claims on OCC's and Maxus's behalf. As the settling party, Maxus is free to agree to an allocation of the settlement funds paid on OCC's behalf and should not be subject to the possibility that the resolved claims will nevertheless be tried, and OCC would later seek indemnification of defense costs. As noted, this is further reinforced by the fact that OCC is receiving a covenant not to sue for the past cleanup and removal costs for which the settlement funds are being applied. This also follows the Spill Act's language by reducing OCC's "potential liability" for past cleanup and removal costs (to zero).

B. Any Objections to the Allocation of Settlement Funds and Settlement Credit Should Have Been Raised in OCC's Response.

In addition to being essential to the settlements and the fairness analysis, the allocation of the settlement funds must be ruled upon now pursuant to the briefing schedule set forth by the Court. As set forth above, the allocation of the settlement funds should be and is binding on OCC if the Court approves the settlements and enters the orders accompanying the settlements. The settlement approval process provided OCC the opportunity to challenge any aspect of the settlements. Plaintiffs' position on the allocations was clearly laid out in the settlement agreements, the Administrative Record, DEP's Response to Comments and the pending motion to approve. Plaintiffs, as required by law, have made every effort to compile all of the necessary documents and evidence to present these issues to the Court as part of the settlement approval process, and Plaintiffs will be substantially prejudiced should the Court refuse to rule on all

aspects of the settlements, including allocation of the settlement funds. In fact, the Repsol/YPF Settlement Agreement and the Administrative Record containing over 3,500 documents were made available to OCC over five months ago. (Pls.' Motion to Approve pp. 2.) OCC was given every opportunity to review the record, provide comments and seek additional information if necessary. During the administrative process, OCC even submitted several pages of comments directed at this very issue and requested a specific allocation of the settlement funds, which Plaintiffs provided in their Motion to Approve. (Ex. D to Pls.' Motion to Approve, Response to Comments, OCC's Comment No. 1.) OCC should have thus timely raised any objections to the allocations in its Response, and the Court should rule upon the approval of the settlements, including the allocations, as currently planned. It is just too late in the process for OCC to reverse course and attempt to raise any objections now in an unauthorized sur-reply or reply to its unrelated cross-motion. OCC's cross-motion concerns its application for an alternative CMO governing Track IV and does not concern any other issue raised by the settlements.

Also, OCC is receiving a covenant not to sue for past cleanup and removal costs for which the settlement funds are being allocated. Accordingly, Plaintiffs are not suing OCC for those damages at trial. As its indemnitor, Maxus could remain subject to any claims Plaintiffs continue to pursue against OCC. Thus, Maxus has sought to resolve certain claims on OCC's behalf and the settlement funds are allocated accordingly. However, it would be grossly inappropriate to allow OCC to take full advantage of that covenant and thereafter, once it is no longer subject to these claims, argue that the State was overpaid and that the funds should be applied to reduce other claims asserted against OCC. Clearly, this was one of OCC's strategic goals when it decided not to directly object to the fairness of the allocations during this proceeding. Such a dubious strategy should not be countenanced by this Court. Thus, any

objection to the settlements, including the allocation of settlement funds and credit, should have been addressed by OCC now, pursuant to the Court's current schedule, before OCC receives the benefits provided by the Repsol/YPF Settlement Agreement.

Finally, under R. 4:42-2, once the settlements and dismissal orders are entered, they will become final and subject to appeal. OCC's failure to oppose the allocation must be deemed a waiver and abandonment of its opposition. Thus, the proposition that OCC can wait to some future date, after taking discovery on its own schedule to address these issues, is infeasible, unfounded and incorrect. As set forth above and in Plaintiffs' Motion to Approve, a robust record supporting the allocation of settlement funds has been fully presented, is ripe for the Court's consideration, and shall be binding on OCC.

CONCLUSION

For the reasons set forth above and in Plaintiffs' Motion to Approve, Plaintiffs respectfully request that the Court approve the Repsol/YPF Settlement Agreement and the Third-Party Consent Judgment and enter the case management and dismissal orders attached thereto, including the Proposed CMO allowing Plaintiffs to proceed with their remaining claims against OCC. Plaintiffs also request that the Court approve the allocation of settlement funds and the settlement credits available to OCC as set forth in Plaintiffs' Motion to Approve.

Respectfully submitted,

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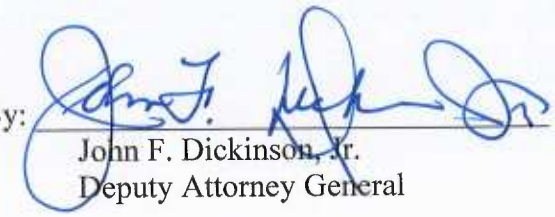
By: 
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Dated: December 2, 2013

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