

# **EXHIBIT 40**

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ASSIGNMENT AND ASSUMPTION AGREEMENT

KNOW ALL MEN BY THESE PRESENTS, That

WHEREAS, Diamond Shamrock Refining and Marketing Company, a Delaware corporation (the "Subsidiary"), the address of which is 3643 E. Commerce Street, San Antonio, Texas is a wholly owned subsidiary of Diamond Chemicals Company, a Delaware corporation, the address of which is 717 North Harwood Street, Dallas, Texas 75201 (the "Company"); and

WHEREAS, it is the desire of the Company to (1) transfer certain assets to the Subsidiary as a contribution of capital to the Subsidiary, (2) transfer the balance of such assets to the Subsidiary in consideration of the execution and delivery by the Subsidiary of an unsecured promissory note and (3) retain certain other assets in the Company;

NOW, THEREFORE, as a contribution to the capital of the Subsidiary in the amount of \$120,662,157.00 and in consideration of the execution and delivery by the Subsidiary of an unsecured promissory note in the form attached hereto as Exhibit A in principal amount equal to the net book value of the assets transferred less the amount contributed to the capital of the Subsidiary, the Company, subject to all of the terms, conditions, exceptions and reservations in this Agreement, grants, conveys, assigns, transfers and delivers to the subsidiary, its successors and assigns, and the Subsidiary accepts, all assets of whatsoever kind of the Company that are necessary for the operation of or used principally in connection with or related principally to the refining and marketing business of the company ("the R & M Business"), both real and personal, tangible and intangible, wherever situated, including but not limited to:

- (1) All of the assets included on the books and records of the Company and designated as assets of the R & M Business;
- (2) All of the Company's stock ownership in and all advances shown on the Company's books and records to:

Sigmor Corporation  
Emerald Corporation  
Diamond Shamrock Petroleum Corporation  
D-S Pipeline Corporation  
The Shamrock Pipe Line Corporation  
Diamond Reforming, Inc.

- (3) All business operations and activities of the R & M Business;
- (4) All rights and benefits of the Company under contracts which relate to the assets assigned or to the operations and business activities being transferred;

**DEPOSITION**  
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- (5) All claims, unsatisfied judgments and causes of action which the Company may have against any third party based upon rights which the Company has or had in its capacity as the owner of any of the assets and business activities being assigned and transferred, and which would not have arisen in favor of the Company but for such ownership;
- (6) All employment contracts with employees required to operate and service the assets and business activities being assigned and transferred; and
- (7) All of the Company's trade and other receivables and payables which relate to the assets and business activities assigned and transferred.

The Subsidiary is authorized to prosecute such claims and causes of action and to collect or otherwise enforce such judgments, at its own expense, in the name of the Company.

Provided, however, that if a consent, license or permit is required to transfer any assets of whatsoever kind or to carry out and business operation or activity then:

- (A) The Company will transfer to the Subsidiary only such interest (beneficial or other) in that asset that will not cause a loss of any part of that asset and will not ultimately result in the violation of any law or applicable regulation. All remaining interests in that asset are retained by the Company until the required consent, license or permit is obtained; and
- (B) Such business operation or activity will, to the extent it can be done lawfully, be continued and carried out for the benefit of the Subsidiary by the Company as trustee with all operating profits or losses being for the account of the Subsidiary until the required consent, license or permit is obtained, at which time the interests not previously transferred and all rights to carry out the business operation or activity will be vested in the Subsidiary under the terms of this Agreement.

The Company and the Subsidiary will use their best efforts to obtain any and all necessary consents, permits and licenses as soon as reasonably possible.

Further, the Company assigns to the Subsidiary and the Subsidiary assumes all the liabilities and obligations of the R & M Business, including, but not limited to:

- (i) All of the Company's obligations under the contracts, agreements, licenses, leases, permits and commitments relating to the R & M Business;

- (ii) All current liabilities relating to the R & M Business;
- (iii) All liabilities and obligations with respect to payrolls, pensions, employee benefits or expenses for the employees employed in the R & M business; and
- (iv) Any and all liabilities for all claims and causes of action which any third party has asserted or may assert against the Company, as well as the liability for such claims and causes of action and judgements entered against the Company, based upon an obligation or duty that the Company allegedly owed or owes to such third party in the Company'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.

The Subsidiary is authorized to defend against such claims and causes of action, at its own expense, in the name of the Company. Any information received by the Company to the effect that any such claim or cause of action is being asserted shall be delivered immediately by the company to the Subsidiary.

Provided, however, that if a consent to transfer any liability or obligation of whatsoever kind is required to relieve the company from liability thereunder and such consent has not been received, or if that consent is withheld or if the transfer of any liability or obligation would constitute a breach of any agreement, the Subsidiary will indemnify the Company for any loss, liability or expense incurred by the Company as a direct result of any such claims or causes of action.

Provided, further that the following assets are expressly excluded from this Agreement:

- (a) All assets that are covered by or the subject of any specific assignment or conveyance to the Subsidiary or to any other person;
- (b) All assets previously sold or contracted for sale and the receivables which have resulted from:
  - (i) purchases made with the use of credit cards issued by the Company; and
  - (ii) sales of refined hydrocarbon products by the Company (excluding receivables arising from the sale of irrigation gas, residue and raw gas); and
- (c) All assets owned or leased by the Company and used principally in connection with or related principally to the Company's flight operations, including airport hangar facilities, furnishings therein and improvements related thereto, aircraft, equipment, automobiles and other vehicles.

The Company and the Subsidiary each agree to execute such other instruments, assignments and conveyances as may be necessary to effect the intent of this Agreement.

The Company and the Subsidiary both intend that the provisions of the Bulk Sales Act will not be applicable to this Agreement.

This Assignment and Assumption Agreement shall be effective as of November 1, 1983 for all purposes.

Executed as of November 1, 1983.

DIAMOND CHEMICALS COMPANY

ATTEST:

*[Signature]*  
Assistant Secretary

By *[Signature]*

DIAMOND SHAMROCK  
REFINING AND MARKETING COMPANY

ATTEST:

*[Signature]*  
Secretary

By *[Signature]*  
President

STATE OF TEXAS )  
 )  
COUNTY OF DALLAS ) ss.

The foregoing instrument was acknowledged before me this \_\_\_\_\_ day of JANUARY, 1984, by T.J. FETTHOLD, known by me to have been on November 1, 1983, SECRETARY of Diamond Chemicals Company, a Delaware corporation, on behalf of the corporation.

*Shonda J. Crouch*  
Notary Public

My Commission Expires:  
8-31-86

STATE OF TEXAS )  
 )  
COUNTY OF Bexar ) ss.

The foregoing instrument was acknowledged before me this 16th day of January, 1984, by Riley H. Lane, known by me to have been on November 1, 1983, SALESMAN of Diamond Shamrock Refining and Marketing Company, a Delaware corporation, on behalf of the corporation.

*Riley H. Lane*  
Notary Public

My Commission Expires:  
2-17-85

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EXHIBIT "A"

\$361,983,771.00

November 1, 1983

PROMISSORY NOTE

FOR VALUE RECEIVED, the undersigned Diamond Shamrock Refining and Marketing Company, a Delaware corporation ("Maker") hereby promises to pay to Diamond Chemicals Company, a Delaware corporation, or order, ("Payee") on demand, at its office at 717 North Harwood Street, Dallas, Dallas County, Texas, the sum of Three Hundred Sixty-One Million, Nine Hundred Eighty-Three Thousand Seven Hundred Seventy One and no/100 Dollars (\$361,983,771.00) in lawful money of the United States of America, plus interest on the unpaid balance thereof, accruing on the last day of each month this Note remains outstanding and on the date of payment of all outstanding principal hereof at a daily rate computed by dividing an annual rate equal to 12% by 365 (or 366 in any leap year during which any principal hereof shall be outstanding).

1. (SCHEDULE OF PAYMENTS) Interest on this Note shall be repayable in equal installments on November 30, 1983 and on the last day of each succeeding month until the entire unpaid principal and accrued interest thereon shall be paid in full.

2. (WAIVERS) The Maker and all endorsers, sureties and guarantors of this Note hereby severally waive presentment for payment, protest, notice of protest, diligence in collecting, the bringing of any suit against any party and any notice of or defense on account of any extensions, renewals, partial payments or changes in any manner of or in this Note or in any of its terms, provisions and covenants, or any releases or substitutions of any security, or any delay, indulgence or other act of any trustee or any holder hereof, whether before or after demand for payment shall be made.

3. (PREPAYMENTS) Maker may prepay this Note in full or in part without premium or penalty, provided that Maker shall deliver to Payee at its address set out above 30 days' written notice specifying the amount and date of such prepayment.

4. (COVENANTS) Maker agrees to perform and observe each of the following:

4.1 (RECORDS) Maker will at all times maintain true and complete records and books of account.



4.2 (FINANCIAL STATEMENTS) Maker will furnish to Payee forthwith upon each written request of Payee, such information about Maker's financial condition, operation and properties as Payee may from time to time reasonably request, which information shall be submitted in form and detail satisfactory to Payee and certified by a financial officer of Maker.

4.3 (FEES AND COSTS) If this Note is placed in the hands of an attorney for collection after default, or if all or any part of the indebtedness represented hereby is proved, established or collected in any court or in any bankruptcy or receivership, Maker and all endorsers, sureties and guarantors of this Note jointly and severally agree to pay reasonable attorneys' fees and collection costs to the holder hereof in addition to the principal and interest payable hereunder.

5. (WARRANTIES) Maker hereby represents and warrants as follows:

5.1 (EXISTENCE) Maker is a corporation duly organized and validly existing under Delaware law and is in good standing in the office of the Delaware Secretary of State.

5.2 (RIGHT TO ACT) The execution and delivery of this Note confers a direct pecuniary benefit upon Maker and by executing and delivering this Note and all agreements securing same (together the "Documents") and by performing and observing the provisions thereof, Maker will not violate any existing provision of its articles of incorporation, code of regulations or bylaws or any applicable law or violate or otherwise become in default under any existing contract or other obligation binding upon Maker. The officer executing and delivering the Documents on behalf of Maker has been duly authorized to do so, and the Documents are legally binding upon Maker in every respect.

6. (DEFAULTS) Each of the following shall constitute an event of default hereunder:

6.1 (PAYMENTS) If any principal of or interest on this Note shall not be paid within ten (10) days after the same shall be due and payable.

6.2 (AGREEMENTS) If maker shall fail or omit to perform and observe any covenant, condition, restriction or agreement contained in the Documents or any other agreement between Maker and Payee.

- 6.3 (WARRANTIES) If any representation, warranty or certification made herein or pursuant hereto, or any other information furnished by Maker to Payee or to any other holder hereof, shall be in any material respect false or erroneous.
- 6.4 (MAKER'S SOLVENCY) If Maker shall (a) discontinue business; or (b) make a general assignment for the benefit of creditors; or (c) apply for or consent to the appointment of a receiver, a trustee or liquidator of itself or all or a substantial part of its assets; or (d) be adjudicated a bankrupt or insolvent; or (e) file a voluntary petition in bankruptcy or file a petition or an answer seeking reorganization or an arrangement with creditors or seeking to take advantage of any other law (whether federal or state) relating to relief of debtors, or admit (by answer, by default or otherwise) the material allegations of a petition filed against it in any bankruptcy, reorganization, insolvency or other proceeding (whether federal or state) relating to relief of debtors; or (f) suffer or permit to continue unstayed and in effect for sixty (60) consecutive days any judgement, decree or order, entered by a court of competent jurisdiction, which approves a petition seeking its reorganization or appoints a receiver, trustee or liquidator of itself or of all or a substantial part of its assets; or (g) take or omit any other action in order thereby to effect any of the foregoing.
7. (REMEDIES) Notwithstanding any contrary provision or inference herein or elsewhere, should any event of default referred to in Section 6 occur, then or at any time thereafter the holder of this Note may at its option declare this Note to be forthwith due and payable, and the principal of and interest on this Note shall thereupon become and thereafter be immediately due and payable in full without any presentment of this Note, demand for payment or notice of any kind, all of which Maker hereby waives.
8. (INTERPRETATION) Each right, power or privilege specified or referred to in this Note is in addition to any other rights, powers and privileges that Payee may otherwise have or acquire by operation of law, by other contract or otherwise. No course of dealing in respect of, nor any omission or delay in the exercise of, any right, power or privilege by Payee shall operate as a waiver thereof. Payee may from time to time grant Maker waivers and consents in respect of this Note, but no such waiver or

consent shall be binding upon Payee unless specifically granted in writing, which writing shall be strictly construed. It is of the essence of the financial accommodations evidenced by this Note that every representation, warranty or certification made in or pursuant to this Note by or on behalf of Maker be true and complete in every material respect and that Maker duly perform and observe every covenant, condition, restriction or agreement contained in this Note. All provisions of this Note shall bind Maker and its successors and assigns and shall benefit Payee and its successors and assigns, including each subsequent holder, if any, of this Note. The several captions to different sections and subsections of this Note are inserted for convenience only and shall be ignored in interpreting the provisions of this Note. If at any time one or more provisions of this Note, or any amendment or supplement thereto is or becomes invalid, illegal or unenforceable in whole or in part, the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby. This Note and all amendments or supplements thereto shall be governed by the Laws of the State of Texas.

**DIAMOND SHAMROCK REFINING AND MARKETING  
COMPANY**

By: \_\_\_\_\_

Title: \_\_\_\_\_

Pay to the order of Diamond Shamrock Corporation,  
(without recourse)

Diamond Chemicals Company

By: \_\_\_\_\_

Title: \_\_\_\_\_

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