

EXHIBIT 51

1 A P P E A R A N C E S:

2

3

GORDON & GORDON, P.C.

BY: MICHAEL GORDON, ESQ.

4

WAYNE GREENSTONE, ESQ.

505 Morris Avenue

5

Springfield, New Jersey 07081

973-467-2400

6

www.lawgordon.com

Attorneys for the Plaintiffs

7

8

JACKSON, GILMOUR & DOBBS, P.C.

BY: WILLIAM J. JACKSON, ESQ.

9

WILLIAM C. PETIT, ESQ.

3900 Essex

10

Suite 700

Houston, Texas 77027

11

713-355-5050

bjackson@jgdpc.com

12

wpetit@jgdpc.com

Attorneys for the Plaintiffs

13

14

DRINKER, BIDDLE & REATH, LLP

BY: THOMAS E. STARNES, ESQ.

15

1500 K. Street, N.W.

Washington, DC 20005-1209

16

202-230-5192

thomas.starnes@dbr.com

17

and

18

DRINKER BIDDLE & REATH, LLP

19

BY: ROSS A. LEWIN, ESQ.

WILLIAM L. WARREN

20

105 College Road East, P.O. Box 627

Princeton, New Jersey 08542-0627

21

609-716-6603

ross.lewin@dbr.com

22

william.warren@dbr.com

Attorneys for Defendant, Maxus Energy and Tierra

23

Solutions

24

25

1 A P P E A R A N C E S (continued):
2 ARCHER & GREINER, P.C.
3 BY: ROBERT T. LEHMAN, ESQ.
4 One Centennial Square
5 Haddonfield, New Jersey 08033
6 856-354-3052
7 rlehman@archerlaw.com
8 Attorneys for Defendant Occidental

9 GABLE GOTWALS, ESQS.
10 BY: OLIVER S. HOWARD, ESQ.
11 DAVID BRYANT, ESQ.
12 AMY FOGLEMAN, ESQ.
13 1100 ONEOK Plaza
14 100 West Fifth Street
15 Tulsa, Oklahoma 74103-4217
16 918-595-4800
17 ohoward@gablelaw.com
18 dbryant@gablelaw.com
19 afogleman@gablelaw.com
20 Attorneys for Defendant, Occidental

21 KIRKLAND & ELLIS, LLP
22 BY: JAMES N. NOWACKI, P.C.
23 300 North LaSalle Street
24 Chicago, IL 60654
25 312-862-2474
james.nowacki@kirkland.com

and
GREENBAUM, ROWE, SMITH & DAVIS LLP
BY: GREGG H. HILZER, ESQ.
75 Livingston Avenue, Suite 301
Roseland, New Jersey 07068-3701
973-535-1600
ghilzer@greenbaumlaw.com
Attorneys for Defendant, Repsol/Ypf and Ypf

1 A P P E A R A N C E S, continued

2 DAY PITNEY, LLP

BY: CAMILLE V. OTERO, ESQ.

3 WILLIAM HATFIELD, ESQ.

One Jefferson Road

4 Parsippany, New Jersey 07054-2891

cotero@daypitney.com

5 whatfield.daypitney.com

6 Attorneys for Defendant, The Dial Corporation and
Ashland, Inc., on behalf of itself and its wholly owned
subsidiary Ashland International Holdings, Inc.

7

8 COFFEY & ASSOCIATES, P.C.

BY: RICHARD J. DEWLAND, ESQ.

9 465 South Street

Morristown, New Jersey 07960

10 973-539-4500

rjd@coffeylaw.com

11 For the Defendant Hasbrouck Heights

12

WOLFF & SAMSON

13 BY: LEE HENIG-ELONA, ESQ.

One Boland Drive

14 West Orange, New Jersey 07052

973-325-1500

15 Lhenigelona@wolffsamson.com

16 Attorneys for 41 Defendant Liaison Parties and an
Associated Subgroup

17

Also attending: Hon. Marina Corodemus (Ret.)
Special Master

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1 (The proceedings commenced at 9:36 a.m.)

2 THE COURT: Good morning. All right.

3 First, I do know we have a court reporter.
4 I'll try to remember if you need a break. Raise your
5 hand.

6 Secondly, as I usually say when we have a
7 number of parties that just the first time you speak,
8 we're still on sound recording as part of doing this,
9 that you state your name and who you represent.

10 With that, the Court is ready to proceed
11 with the Plaintiffs' motion for partial summary judgment
12 as against Occidental and Maxus.

13 MR. JACKSON: Thank you, your Honor. Bill
14 Jackson here for the Plaintiffs.

15 This is the motion, your Honor, regarding
16 Occidental Chemical Corporation and the
17 successor-by-merger to Diamond Alkali, Diamond Shamrock,
18 Diamond Shamrock Chemicals, Occidental Electrochemicals,
19 and Occidental, as you know.

20 The State is seeking a partial summary
21 judgment against Occidental, and I will refer to
22 Occidental as "OCC" for the remainder of the argument.

23 The predecessors, the Diamond Alkali and
24 Diamond Shamrock Chemicals Corporations I will refer to
25 collectively as "DSCC" for you, as they were in the

1 briefs.

2 This is a motion where the State is seeking
3 a declaration that OCC is liable under the Spill Act for
4 discharging hazardous substances into the Passaic River.

5 As you know from the briefs, many of the
6 issues and factual disputes that were at issue in this
7 motion have collapsed. Many of the factual disputes have
8 been agreed to in one way, shape, or form. So at this
9 point, your Honor, I believe that the legal issues that
10 have -- will predominate today's discussion, and the
11 decision before the Court will be one, generally
12 speaking, is OCC responsible for DSCC's liabilities as
13 the successor-by-merger?

14 And two, is OCC/DSCC liable under the Spill
15 Act for discharging hazardous substances into the Passaic
16 River?

17 As we set forth in the briefs and all the
18 evidence before the Court, obviously we believe the
19 answer to these questions is unequivocally yes.

20 THE COURT: Okay. I will just stop you
21 there if you're laying out the legal issues.

22 Is it still -- as I understood the State's
23 position that you have joined on this motion for partial
24 summary judgment as against Maxus in their capacity as
25 the alleged indemnitor.

1 MR. JACKSON: To the extent of the
2 collateral estoppel piece only, your Honor. Maxus was
3 actually the party that tried the Aetna litigation. And
4 so only as to the collateral estoppel piece of our motion
5 is Maxus part of that motion. So we are not seeking at
6 this moment a Spill Act liability finding against Maxus
7 in this motion.

8 THE COURT: I think you've mentioned that
9 you may have a motion in the future. You still have a
10 cause of action as against Maxus that's not related to
11 their being indemnitor, and that's just not before me
12 today.

13 MR. JACKSON: That is correct, your Honor.

14 THE COURT: All right.

15 MR. JACKSON: The response of OCC that goes
16 through a lot of corporate machinations and
17 reorganizations, and the like, we believe, and previously
18 argued to your Honor that a lot of those transactions and
19 issues might suggest that under a Ventron-like analysis
20 that Maxus would be akin to Velscicol and would be liable
21 as in any way responsible under the Spill Act for the
22 interest that they had in the hazardous substances and
23 the profits from them, and the like.

24 We were convinced, and we had a 50-page
25 motion ready to go, as well, but there were enough fact

1 issues and enough discovery that needed to be conducted
2 with respect to Maxus, as OCC points out repeatedly, that
3 we didn't feel it appropriate to file that motion at this
4 time. We need discovery on Maxus as its in any way
5 responsible liability issues. So those issues we hope to
6 conduct a little bit of discovery. We hope to be back
7 before the Court at some point, either a trial or on
8 another summary judgment as to those issues, but they are
9 not before you today.

10 THE COURT: Okay. Thank you.

11 MR. JACKSON: You're welcome.

12 Before the Court now, and the motions that
13 have been filed, and all the summary judgment evidence
14 that is in, there is a mountain of evidence that DSCC
15 discharged a variety of hazardous substances into the
16 Passaic River. I'm not going to belabor the Court with
17 going through the voluminous record, but from time to
18 time I am going to hit a few of the high spots for the
19 record.

20 In its briefing and statements of facts,
21 OCC has actually admitted and agreed to the fact that it
22 is also the successor to Diamond Shamrock Chemicals
23 Corporation, DSCC.

24 These issues are now largely
25 uncontroverted; and therefore, as I said, your Honor, I

1 think these are going to turn primarily on two issues of
2 law.

3 As to OCC's liability, by admitting that it
4 is the successor-by-merger to Diamond Shamrock Chemicals
5 Corporation, DSCC, the State's position is that is the
6 end of the factual inquiry. The law is clear on this
7 issue under whatever law you want to apply. The
8 surviving entity shall be liable, quote unquote, for all
9 the obligations and liabilities of each of the
10 corporations so merged into it.

11 And so as we'll go through in just a
12 minute, under the laws of New Jersey, Delaware, or New
13 York, no matter how you want to look at this, there is no
14 conflict of laws and no choice-of-law issue to be had
15 here because all the laws are the same. It's black
16 letter law. When two companies merge together, the
17 surviving entity is responsible for the liabilities of
18 both in the past, part of the privilege -- corporate law
19 of having the privilege of personages and the fiction
20 that is maintained with corporate formalities.

21 Thus, in the motion before the Court now,
22 the real issue is can a corporation relieve itself of
23 those liabilities to a third-party by transferring them
24 to a subsidiary, affiliate, or to anyone else, as
25 Occidental has contested in its response to our motion.

1 that OCC was, you know, originally some other companies,
2 but you know, Oxy Diamond Alkali Corporation, eventually
3 the successor is OCC.

4 Now, arguments of the parties.

5 The first argument is that -- and I'll
6 state now on the record, the State brought two arguments
7 in seeking Spill Act liability as against Occidental and
8 they make allegations, they did in the pleadings, didn't
9 say today, that Maxus should also be determined to have
10 Spill Act liability based upon their status as an
11 indemnitor.

12 Now, I do think the State could probably
13 make out an argument that they were a third-party
14 beneficiary at the time of the contract concerning the
15 sale and indemnification because, admittedly, both
16 parties that we have, you know, Maxus and OCC, they were
17 aware at that time and they did discuss, and they did
18 incorporate, and they did determine under certain
19 sections where any liability for the Lister site would
20 be. So I think it can be said that they have some
21 third-party beneficiary interest, but it's this Court's
22 determination that I will decide the issue as to whether
23 as moved for by OCC, as whether to determine that there
24 is indemnification by Maxus for all the obligations or
25 all the damages claimed that can be, you know, proven to

1 A P P E A R A N C E S:

2 GORDON & GORDON, P.C.
3 BY: MICHAEL GORDON, ESQ.
4 WAYNE GREENSTONE, ESQ.
5 505 Morris Avenue
6 Springfield, New Jersey 07081
7 973-467-2400
8 www.lawgordon.com
9 Attorneys for the Plaintiffs

10 JACKSON, GILMOUR & DOBBS, P.C.
11 BY: WILLIAM J. JACKSON, ESQ.
12 3900 Essex
13 Suite 700
14 Houston, Texas 77027
15 713-355-5050
16 bjackson@jgdpc.com
17 Attorneys for the Plaintiffs
18 (Appearing Telephonically)

19 DRINKER, BIDDLE & REATH, LLP
20 BY: THOMAS E. STARNES, ESQ.
21 1500 K. Street, N.W.
22 Washington, DC 20005-1209
23 202-230-5192
24 thomas.starnes@dbr.com

25 -and-

DRINKER BIDDLE & REATH, LLP
BY: ROSS A. LEWIN, ESQ.
WILLIAM L. WARREN
105 College Road East, P.O. Box 627
Princeton, New Jersey 08542-0627
609-716-6603
ross.lewin@dbr.com
william.warren@dbr.com
Attorneys for Defendant, Maxus Energy and Tierra
Solutions

ARCHER & GREINER, P.C.
BY: ROBERT T. LEHMAN, ESQ. (Telephonically)
LINDSAY A. WAGNER, ESQ.
One Centennial Square
Haddonfield, New Jersey 08033
856-354-3052
rlehman@archerlaw.com
Attorneys for Defendant Occidental

1 A P P E A R A N C E S (continued):
2 KIRKLAND & ELLIS, LLP
BY: JAMES N. NOWACKI, ESQ.
3 300 North LaSalle Street
Chicago, IL 60654
4 312-862-2474
james.nowacki@kirkland.com
5 Attorneys for Defendant Repsol YPF
6 COFFEY & ASSOCIATES, P.C.
BY: RICHARD J. DEWLAND, ESQ.
7 465 South Street
Morristown, New Jersey 07960
8 973-539-4500
rjd@coffeylaw.com
9 For the Defendant Hasbrouck Heights
10 WEINER, LESNIAK, LLP
BY: JULIA DONOHUE, ESQ.
11 629 Parsippany Road
Parsippany, New Jersey 07054
12 973-403-1100
jdonohue@weinerlesniak.com
13 Attorneys for Defendants Linden Roselle Sewerage
Authority and Rahway Valley Sewerage Authority
14
SCARINCI & HOLLENBECK, LLC
15 BY: JOHN M. SCAGNELLI, ESQ.
1100 Valley Brook Avenue
16 P.O. Box 790
Lyndhurst, New Jersey 07071-0790
17 201-896-4100
jscagnelli@njlegalink.com
18 Liaison Counsel for Defendant Municipalities
19
20
21
22
23
24
25

1 THE COURT: Good afternoon. Everybody
2 be seated.

3 A VOICE: Good afternoon. We have
4 three parties on the line. We have Robert Lehman,
5 we have William Jackson, and William Matike
6 (phonetic.)

7 THE COURT: All right. As long as you
8 can hear, we are going to proceed.

9 Let me ask counsel who is present, is
10 there any basis for you to put your appearances on
11 the record in regard to my rendering the rest of my
12 decision concerning the State's motions?

13 MR. LEWIN: No, your Honor.

14 THE COURT: Very good then.

15 When we adjourned on Friday, I had
16 rendered my decision regarding Spill Act liability,
17 and the next issue that is raised is the Plaintiff
18 argues that, as a result of the 1986 Share Purchase
19 Agreement by the successor to OCC of DSCC, as the
20 direct legal successor, that they are then
21 considered under the law as liable as a discharger
22 under the Spill Act.

23 Now, the opposition by OCC is that
24 presently this motion is premature, because they
25 have developed a theory in which they still, you

1 know, proffer they need additional discovery that
2 the de facto successor of DSCC liabilities for the
3 Lister site is actually Maxus. And, admittedly,
4 they put on the record that they, for the last 25
5 years, have not realized that; but, at this point
6 now with the discovery in this case, they have such
7 a theory. And, in essence, they ask that the Court
8 not decide that OCC is the legal successor of DSCC
9 who -- it is not in dispute that DSCC was the legal
10 successor to -- let me -- I may not have the names
11 correct here, but it is the reorganization that
12 involved the Diamond Shamrock Corporation in
13 September '67, who was the successor to Diamond
14 Alkali Corporation during the period, you know, from
15 -- the period of discharge that nobody is arguing
16 today exact dates, from '51 to '69, that the Diamond
17 Shamrock Corporation created a reorganization
18 wherein, in doing so, liabilities were moved to
19 different wholly-owned subsidiaries of the new
20 Diamond Shamrock, which had been the Diamond
21 Shamrock Corporation, which then became Maxus. And
22 by doing so, at the time that DSCC did become, under
23 our law, the legal successor to the old Diamond
24 Shamrock Corporation, or the corporation at the time
25 that the liabilities of the Lister site is alleged

1 that the discharge occurred then, that Diamond
2 Shamrock Corporation by the reorganization moved the
3 liabilities around, and the present theory is that
4 they moved it to DS corporate, and then DS
5 corporate, at some point, there was a merger back
6 with Diamond Shamrock Corporation, which is Maxus.
7 And this occurred before DSCC was, you know, merged
8 into the OCC entities, and ultimately to OCC, which
9 is not in dispute.

10 And although there are factual
11 disputes, and the State pointed out what they say
12 was placing the liabilities of the Lister site at DS
13 corporate could not be, because if you read those
14 papers, corporate assets and liabilities, the
15 liabilities only fell under corporate assets, and,
16 at the time, the Lister liabilities, there were no
17 assets, so they couldn't have done it by that, you
18 know, reorganization, or by transferring it.

19 Essentially, also, I would point out
20 that I was given, you know, the nine pages showing
21 what was the reorganization that occurred over the
22 years when the old Diamond Shamrock decided to
23 reorganize and create its own parent, etcetera, as
24 placed on the record, that by page 9, the proffer
25 put forth that actually the Diamond Shamrock, which

1 is now Maxus, was incorporated as the successor to
2 DSC 1, which was the original Diamond Shamrock
3 Corporation, and then proceeded to have DSCC be the
4 legal successor, and then all the stock being bought
5 and the certificates of incorporation from -- that
6 had been from the original old Diamond Shamrock did
7 go to the OCC.

8 So accepting those kind of proffers,
9 that this Court could -- and it was asked that this
10 Court could equitably determine that Maxus
11 presently, by its own -- by the reorganization
12 started with Diamond Shamrock, the original Diamond
13 Shamrock, old Diamond Shamrock, results in Maxus
14 having the liability and not OCC being the direct
15 legal successor with the certificates of
16 incorporation. And, under our law, which is not
17 challenged by OCC, they are the legal successor.
18 They want the Court to say that I could possibly
19 conclude that Maxus has liability under some
20 equitable principles because of their reorganization
21 and how they placed their liabilities; and, as a
22 result, this Court would be able to hold that, under
23 these unusual circumstances, DSCC, although the
24 direct legal successor, should be found to be the
25 direct legal successor absent the liabilities of

1 the, you know, predecessor corporation and DSCC.

2 They don't cite any particular law as
3 to making the finding that it would result in no
4 liability, no legal liability; and they admit that
5 is how it was set up.

6 Understanding those arguments, it is
7 for this Court to determine whether there is a basis
8 whether or not liability is established because of
9 the reorganization as against Maxus, that this Court
10 should refrain from deciding, which is unchallenged
11 Hornbook law, that based on assuming all the stock
12 and the Certificate of Incorporation, OCC is the
13 legal successor of DSCC, which was the legal
14 successor of old Diamond Shamrock.

15 Now, there were some interim transfers,
16 but that is really what the Court is being
17 presented.

18 I think that, although there may be a
19 basis, on a de facto grounds or otherwise, to hold
20 liability for Maxus, and really you would be holding
21 liability for the original old Diamond Shamrock, who
22 is alleged to have been the polluter that is at
23 issue in this case, liable, I see no basis on which
24 to -- on an innocent third-party, to find that the
25 State cannot rely on and hold OCC as the direct

1 legal successor.

2 Essentially, it is saying that you're
3 direct legal successor to DSCC and old Diamond
4 Shamrock, but because of actions by those
5 corporations of placing liability somewhere else,
6 you shouldn't be considered direct legal successor.

7 I think it is and does apply the same
8 reasoning that was expressed, albeit in regard to
9 de facto successor corporations, because of buying
10 assets and the product line, and I think that the
11 reasoning of Nieves vs. Bruno Sherman Corporation,
12 86 N.J. 361 (1981), where they found that you could
13 have more than one corporate successor under the
14 theory of, if you buy the assets and have the
15 product line, it is appropriate that -- and if the
16 original corporation has no assets because they sold
17 everything, that you could have anyone -- you could
18 have more than one successor be responsible, but not
19 that the Plaintiff would have to prove that -- you
20 know, who was the successor if they were talking
21 about only one successor. They certainly left it
22 open that whether it is the last successor or some
23 successor that came in line.

24 Here the theory is that what happened
25 before DSCC became the legal successor, which is not

1 challenged under our law except for saying that,
2 well, they are the lead successor, but not all
3 liabilities because of the machinations of the
4 reorganization, that there could be a finding that
5 someone who was an earlier successor, whether the
6 original corporation and one of its wholly-own
7 created subsidiaries, or, you know, the new Diamond
8 Shamrock that became Maxus, if they kept the
9 liability, bought them back from the successor, or
10 whatever they did, that you may have another
11 successor in the line with OCC being the last
12 successor.

13 So I think that the reasoning in Nieves
14 is that you still may have liability by people in
15 the chain of how a corporate succession went, and
16 not that the last person won't be responsible
17 because you find somebody else in line before there
18 was OCC as the legal successor of DSCC, or if DSCC,
19 you know, as the legal successor, didn't have all
20 the liabilities because of the reorganization, which
21 started with Diamond Shamrock, the old Diamond
22 Shamrock Corporation, that you can have intermediate
23 successors and not just the last successor. And I
24 think that is the situation that has been proffered
25 here.

1 And, you know, that rationale in
2 Nieves, that a corporation can't pass its
3 liabilities to another corporation, and, you know,
4 if they do, it still means anybody else in the line
5 could also be.

6 So I don't see any basis under the law
7 to determine that, even if OCC, or the State who
8 says it is still premature, they need discovery,
9 they have other theories against Maxus, that even if
10 it was proven that -- under any theory, that Maxus
11 became responsible or a successor at some point in
12 time before there was the legal successor of DSCC
13 and OCC, they may very well stand in the line, and
14 the Court would deal with the issue as to whether
15 there is more than one successor. But not to just
16 -- I see no basis under the law to reach the
17 conclusion that this Court should just vitiate the
18 last successor, legal successor, because of what was
19 done by some intermediaries before they became the
20 legal successor.

21 Now, I absolutely accept by OCC that
22 the fact for 25 years, and it is in the record, that
23 at various times OCC has stated, you know, or
24 certified or made court statements, etcetera, that
25 they are the legal successor, and, you know, they