EXHIBIT 52

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

KIDDER, PEABODY & CO. INCORPORATED, a Delaware corporation,	)	
Plaintiff,	)	
v.	)	Civil Action No. 9424
MAXUS ENERGY CORPORATION, a Delaware corporation,	)	
Defendant.	)	

REPLY BRIEF OF MAXUS ENERGY CORPORATION IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT

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SUPPLEMENTAL STATEMENT OF FACTS

Kidder Peabody, Inc.'s ("Kidder") Answering Brief in Opposition to Defendant's Motion for Partial Summary Judgment ("Answ. Br.") refers in several places to the structure of the transaction by which Diamond Shamrock formed a new company (now known as Maxus Energy Corporation) and acquired Natomas Corporation ("Natomas"). To address these arguments, it may help the Court to understand fully how the transaction was structured.[1]

1. On May 23, 1983, Diamond Shamrock Corporation, acting on advice from Kidder, commenced an unsolicited tender offer to acquire a majority of Natomas' shares for $23.00 in cash, to be followed by a merger in which the remaining shares of Natomas would be converted into common stock of Diamond Shamrock Corporation.

2. On May 30, 1983, after negotiations, Diamond Shamrock Corporation ("Old Diamond Shamrock") and Natomas entered into a binding Plan and Agreement of Reorganization (Notestine Aff. Exh. 2) pursuant to which Old Diamond Shamrock would acquire Natomas through a new corporation which it created, New Diamond Corporation ("New Diamond Shamrock"). Following the acquisition, the officers of Old Diamond Shamrock would become the officers of New Diamond Shamrock,

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1 The facts set forth herein are contained in the Affidavit of W.E. Notestine ("Notestine Aff."), the Vice President and General Counsel of Maxus, filed herewith. A chart depicting steps 3-6 of the transaction is attached hereto as Exhibit A.

and the directors of Old Diamond Shamrock would become a majority of the board of New Diamond Shamrock.

3. On July 19, 1983 -- well after most of the wrongdoing which gives rise to the claims associated in the Texas action -- Old Diamond Shamrock formed New Diamond Shamrock. New Diamond Shamrock later changed its name to Diamond Shamrock Corporation and then to Maxus Energy Corporation ("Maxus").

4. Also on July 19, 1983, as part of its acquisition of Natomas, Old Diamond Shamrock caused New Diamond Shamrock/Maxus to form two new subsidiaries, D Sub, Inc. and N Sub, Inc. On August 31, 1983, D Sub, Inc. merged into Old Diamond Shamrock pursuant to a merger in which D Sub, Inc. disappeared, Maxus acquired all of the outstanding stock of Old Diamond Shamrock, and Old Diamond Shamrock stockholders received one share of New Diamond Shamrock (Maxus) stock for each share of old Diamond Shamrock stock held at the time of the merger. Also on August 31, 1983, N Sub, Inc. merged into Natomas in a merger in which N Sub, Inc. disappeared, New Diamond Shamrock received all of the stock of Natomas,[2] and Natomas stockholders received 1.05 shares of New Diamond Shamrock (Maxus) stock for each share of Natomas stock held at the time of the merger.

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2 Immediately before the merger, all of the stock of Natomas' American President Lines subsidiary was spun off to Natomas' stockholders.

5. Immediately following the mergers, former stockholders of Old Diamond Shamrock owned 54% of the stock of New Diamond Shamrock (Maxus) and former stockholders of Natomas owned the remaining 46%. New Diamond Shamrock's (Maxus') only assets were the stock of two wholly-owned subsidiaries, Old Diamond Shamrock and Natomas.

6. Immediately after the merger, the Old Diamond Shamrock subsidiary changed its name to "Diamond Chemicals Company," and thereafter to "Diamond Shamrock Chemicals Company."

7. In December of 1983 and January of 1984, pursuant to an internal reorganization, Old Diamond Shamrock (then called Diamond Shamrock Chemicals Company) assigned all of its non-chemical assets to four newly-formed subsidiaries. First, on November 1, 1983, Old Diamond Shamrock's oil exploration, refining and marketing and coal assets were assigned to three operating subsidiaries. Second, on January 1, 1984, all of Old Diamond Shamrock's administrative assets, including "all claims, unsatified judgments and causes of action which [Diamond Shamrock Chemicals Company] may have against any third party," other than those associated with the operating subsidiaries, were assigned to a fourth subsidiary -- Diamond Shamrock Corporate Company, the plaintiff in the Texas action. Diamond Shamrock Chemicals Company continued to own Old Diamond Shamrock's chemical assets.

8. Later, in January of 1984, Maxus' first-tier subsidiary, Diamond Shamrock Chemicals Company, transferred to

Maxus by dividend the stock of the four second-tier subsidiaries, including Diamond Shamrock Corporate Company. As a result, Diamond Shamrock Corporate Company and the operating companies each became wholly-owned subsidiaries of Maxus. Diamond Shamrock Chemicals Company continued as a wholly-owned subsidiary of Maxus owning Old Diamond Shamrock's chemical assets.

9. In September of 1986, all of the stock of Diamond Shamrock Chemicals Company was sold to Occidental Petroleum Corporation.

* * *

In short, it is plain that Old Diamond Shamrock agreed to acquire, and acquired, Natomas in 1983. As a result of the transactions effectuating that acquisition, and subsequent internal reorganizations, all of the claims that Old Diamond Shamrock ever had against Kidder arising from Kidder's wrongful acts were transferred to, and now belong to, Diamond Shamrock Corporate Company, which is the plaintiff in the Texas action. Cf. Answ. Br. at 17-18, n. 6. Accordingly, the sale to Occidental Petroleum Corporation of the stock of Diamond Shamrock Chemicals Company (which owned Old Diamond Shamrock's former chemical business but not the legal claims here in issue) in no way affected the standing of Diamond Shamrock Corporate Company to assert its claims against Kidder in the Texas action. Cf. Answ. Br. at 17-18, n.6.

ARGUMENT

DIAMOND SHAMROCK HAS STANDING TO ASSERT THE CLAIMS MADE IN THE TEXAS ACTION.

In its answering brief, Kidder argues first, that under some portion of the now-reversed District Court holding in FMC Corp. v. Boesky, infra, corporate recovery by Maxus or Diamond Shamrock Corporate Company for the wrongs here in issue is barred; second, that permitting Maxus' Diamond Shamrock Corporate Company subsidiary to recover for the wrongs alleged would contravene the Supreme Court's ruling in Bangor Punta, infra, and this Court's decision in Courtland Manor, infra; and, finally, that corporate injury has not been alleged. As shown herein, none of these arguments is correct.

More importantly, Kidder's arguments confirm that it misperceives the standing inquiry. The question before this Court is whether, in the Texas action, Diamond Shamrock Corporate Company (as successor to Old Diamond Shamrock's claims) has alleged injury to itself -- not the measure of damages for that injury. Under Delaware law, Maxus has alleged such injury and plainly has standing to bring the claims asserted in the Texas action.

A. The FMC Corp. v. Boesky Decision Supports Maxus' Position, Not Kidder's.

Kidder argues that the now-reversed District Court opinion in FMC Corp. v. Boesky, 673 F. Supp. 242 (N.D. Ill. 1987), rev'd, ____ F.2d ____, No. 87-1678 (7th Cir. July 21, 1988) (Exh. B hereto), continues to support its position.

While Maxus continues to assert that FMC is factually inapposite to this case, the Seventh Circuit's analysis plainly supports Maxus' position.

In FMC, it was alleged that misappropriation of FMC's confidential information by its investment banker contributed to a run-up in the price of FMC's stock, as a result of which FMC was required to pay an additional $220 million to its own stockholders to effect a planned recapitalization. Kidder claims that, although the District Court's opinion dismissing the FMC action was reversed, the portion of the District Court's opinion holding that FMC suffered no corporate injury by having to overpay in the recapitalization somehow retains vitality and is relevant to the present case. Answ. Br. at 12-17.

Kidder's analysis of FMC is simply incorrect. At issue in FMC was whether FMC Corporation had Article III standing to assert claims that its investment banker's misappropriation of its confidential information caused it to overpay $220 million to its own stockholders in the recapitalization transaction. Kidder appears to argue that the "narrow" question of Article III standing is different from the question of whether FMC suffered injury by virtue of having paid too much in the recapitalization. Ans. Br. at 14-15.

In fact, the Seventh Circuit stated that to have Article III standing the plaintiff must first allege "a personal injury." FMC Corp. v. Boesky, supra, slip op. at 13,

quoting Allen v. Wright, 468 U.S. 737, 751 (1984). As stated in the concurring opinion, "'In order to satisfy Art. III, the plaintiff must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.'" Id., slip op. at 29, quoting Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979).

The Seventh Circuit held that FMC alleged sufficient direct, personal injury to itself to satisfy the requirements of Article III, in that it alleged injury which:

> is both traceable to the defendants' putatively illegal conduct and is redressable by the requested relief -- damages. FMC's injury -- the loss of the exclusive use of its confidential business information -- was the result of the defendants' misappropriation of that information which, FMC alleges, violated several federal statutes as well as state common laws. It follows that FMC, if it can prove its allegations and satisfy the requirements of each specific cause of action it pursues, is entitled to recover in damages the best measure of the value of the denial of its exclusive use of the information. FMC, of course, has asserted a number of damage theories, but we need not comment upon any of them for purposes of this opinion. It suffices that FMC's alleged injury is traceable to the defendants' putatively illegal conduct and is redressable by the requested relief.

Slip op. at 27 (emphasis added).

Thus, the injury found in FMC was the misappropriation of confidential information that caused FMC to overpay when it recapitalized. The overpayment was not the injury complained of, but was rather one element of the damages

resulting from the injury. Slip op. at 25. See also Carpenter v. United States, ____ U.S. ____ 108 S. Ct. 316, 321 (1987).[3]

As stated by the concurring opinion:

> The appellees obfuscate the issue of injury by concentrating only on whether the FMC shareholders lost money. The alleged (and that is all that is necessary at this stage) injury to FMC for purposes of Article III standing, however, is that the structure of the corporation was changed as a result of illegal conduct on the part of the appellees. It is the corporation itself that is vitally affected by the change in its structure and, therefore, it is the proper plaintiff to bring this action because it has alleged "a 'personal stake in

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3 The Court in Carpenter (relied on in FMC) plainly distinguished between an injury amounting to a misappropriation of confidential business information and any monetary loss that may flow from the injury:

> Petitioners' arguments that they did not interfere with the Journal's use of the [confidential business] information or did not publicize it and deprive the Journal of the first public use of it, see Reply Brief for Petitioners 6, miss the point. The confidential information was generated from the business and the business had a right to decide how to use it prior to disclosing it to the public. Petitioners cannot successfully contend based on [International News Service v.] Associated Press [, 248 U.S. 215 (1918)] that a scheme to defraud requires a monetary loss, such as giving the information to a competitor; it is sufficient that the Journal has been deprived of its right to exclusive use of the information, for exclusivity is an important aspect of confidential business information and most private property for that matter.

Carpenter, 108 S.Ct. at 321.

> the outcome' in order to 'assure that concrete adverseness which sharpens the presentation of issues' necessary for the proper resolution of constitutional questions." City of Los Angeles v. Lyons, 461 U.S. 95, 101 (1983) (quoting Baker v. Carr, 369 U.S. 186, 204 (1964)).

Slip op. at 30-31 (emphasis added).

Diamond Shamrock alleges in its Texas petition that it was injured by: (1) breach of the confidentiality obligation owed to Old Diamond Shamrock by Kidder (Pet. ¶¶ 41-44),[4] (2) the breach of fiduciary duties owed by Kidder and Siegel to Old Diamond Shamrock (Pet. ¶¶ 45-49), (3) the fraudulent misrepresentation by Kidder and Siegel to Old Diamond Shamrock to induce Old Shamrock to act contrary to its best interests (Pet. ¶¶ 50-56, 61-65), (4) the negligent performance of contractual duties owed by Kidder to Old Diamond Shamrock (Pet. ¶¶ 57-60), and (5) the conversion of Old Diamond Shamrock's confidential business information to the personal benefit of Kidder, Siegel and Boesky (Pet. ¶¶ 66-70). Plainly, these are injuries suffered by Old Diamond Shamrock and not by Old Diamond Shamrock's shareholders. Thus, the Texas petition alleges claims belonging solely to Old Diamond Shamrock.[5]

Kidder mistakenly focuses solely on the claim of overpayment for Natomas, which is not the injury Diamond Shamrock complains of, but rather one aspect of the damage caused

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4 "Pet." refers to the Original Petition filed by Diamond in the Texas action, a copy of which is attached as Exhibit 1 to the Affidavit of James F. Kelley.

5 See pp. 18-25, infra.

by the above alleged injuries. Even as to that claim, to the extent that the District Court's opinion in FMC can be read to suggest that a corporation may not recover damages based on overpayment to its own stockholders, it is inapposite.[6] The crucial fact in the District Court's opinion in FMC was that there was a pro rata distribution of assets to FMC's stockholders (673 F. Supp. at 247-251) pursuant to which "all of the stockholders benefited." Id. at 251 (emphasis added). The lynchpin of the FMC District Court opinion is that, if stockholders are regarded as the alter ego of the corporation, there was no harm since assets were transferred from the corporation to its stockholders, and thus, to the extent FMC may have been harmed, all of its stockholders benefited.

The present case is plainly distinguishable. There was no pro rata distribution of assets here. Rather, as a result of wrongs done to Old Diamond Shamrock (the party with whom Kidder contracted and to whom Kidder owed fiduciary duties)[7], Old Diamond Shamrock entered into an improvident

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6 It is clear that the Seventh Circuit's opinion in FMC v. Boesky found that FMC's allegation that it paid an additional $220 million to its stockholders as a result of the defendants' misappropriation of its confidential information satisfied the Article III requirement that it allege personal injury. The Court further held that the question of the particular damages to which FMC would be entitled to recover would have to be determined based upon the proof at trial. Slip op. at 27. Thus, to the extent that the District Court opinion holds that FMC has no standing to recover for the alleged overpayment to its stockholders, it has no continued vitality in view of the Seventh Circuit's reversal.

7 See Pet. ¶¶ 13-15 and Exhs. A-C thereto.

acquisition transaction in which too much was paid to Natomas' stockholders. The "benefit", if there was any, was not bestowed upon Old Diamond Shamrock or its stockholders, but upon the former Natomas stockholders, who were in no way affiliated or in privity with either Old Diamond Shamrock or its stockholders at the time the alleged wrongs occured.

Thus, to the extent that the now-reversed District Court holding in FMC has any continuing vitality, it is inapposite here. The Seventh Circuit opinion, however, clearly supports Diamond Shamrock Corporate Company's standing to assert the claims alleged in the Texas action.

B. The Supreme Court's Ruling in Bangor Punta and this Court's Decision in Courtland Manor do not Preclude a Recovery by Maxus or Diamond Shamrock Corporate Company.

Kidder argues that, if Maxus or Diamond Shamrock Corporate Company is permitted to recover for wrongs done to it, the recovery would benefit all post-merger shareholders (or their successors in interest), including former Natomas shareholders who benefited from the alleged illegal price run-up and overpayment in the merger. Kidder contends that, therefore, Maxus and Diamond Shamrock Corporate Company lack standing to sue, since recovery would result in an unfair benefit "to some" of the shareholders, citing Bangor Punta Operations, Inc. v. Bangor and Aroostrook R.R. Co., 417 U.S. 703 (1974). Answ. Br. at 19.

In Bangor Punta, it was not merely "some" of the shareholders who would receive an unfair benefit. Rather, it was the holder of over 99% of the stock of Bangor and Aroostrook Railroad, who purchased had 98.3% of that stock from a wholly-owned subsidiary of defendant Bangor Punta Corp. at a price reflecting the diminished value of the Railroad as a result of Bangor Punta's mismanagement. Two years after purchasing this stock at a fair price reflecting the mismanagement, the Railroad -- at the behest of Amoskeag, its 99% stockholder -- filed an action against Bangor Punta Corp. and its subsidiary seeking to recover for the various acts of looting and mismanagement which had caused the value of the Railroad to be diminished (and had permitted Amoskeag to buy 98.3% of the stock at a discount).

The Supreme Court found that Amoskeag itself had suffered no injury since it had gotten what it paid for, and that any recovery by the Railroad would necessarily inure almost entirely to the benefit of its 99% shareholder, Amoskaeg, which would receive an unjust windfall. Accordingly, in a 5-to-4 decision, the Supreme Court barred recovery on the facts before it.

This Court followed Bangor Punta in Courtland Manor, Inc. v. Leeds, Del. Ch., 347 A.2d 144 (1975), where three stockholders, acting together, acquired "virtually all" of the stock of Courtland Manor at a price which, due to prior acts of mismanagement, was "a fraction" of its initial cost. The stockholders then attempted to recover, through the corpora-

tion, for the misconduct of a former officer of the company which lead to the diminished value for the stock. As this Court recognized, Bangor Punta barred recovery, since that case held:

> that where equity would preclude individual shareholders from maintaining an action in their own right for wrongs occurring to the corporation prior to the acquisition of their stock, it is also proper to disregard the corporate form so as to preclude after-acquiring shareholders from circumventing this rule by bringing the same action in the name of the corporation.

347 A.2d at 147.

Thus, in both Bangor Punta and Courtland Manor, a stockholder or small group of stockholders who purchased virtually all of the stock of the corporation at a discount reflecting defendants' wrongdoing were barred from seeking to assert claims on their own behalf since they had gotten exactly what they had paid for. In each case, the stockholders would receive a substantial windfall if they were able to utilize the corporation, which they controlled through ownership of almost all of its stock, to pursue such claims.

Kidder attempts to stretch the reasoning of Bangor Punta well beyond its breaking point by seeking to bar a corporation from pursuing a cause of action merely because "some" stockholders might receive a benefit. Indeed, there is no case in which Bangor Punta has been applied to preclude a corporate recovery because it would unjustly benefit a non-controlling minority of the corporation's shareholders. See

Bluth v. Bellow, Del. Ch., C.A. No. 6823, Berger, V.C., 3 slip op. at 10-11 (Apr. 9, 1987) (Exh. C hereto) (refusing to apply Bangor Punta where the stockholders who allegedly would receive a "windfall" if the corporation were permitted to pursue claims owned only "a minority interest" in the corporation). The other cases upon which Kidder relies are clearly inapposite. Atlantis Plastics Corp. v. Sammons, Del. Ch., C.A. No. 930 (Kent), Hartnett, V.C., (Mar. 30, 1988) (Answ. Br. Exh. C) (a 100% stockholder who was estopped to assert claims would not be permitted to cause the corporation which he owned to do so); Council of South Bethany v. Sandpiper Development Corp., Inc., Del. Ch., C.A. No. 935 (Sussex), Jacobs, V.C. (Sept. 4, 1986 and Dec. 8, 1986) (Answ. Br. Exhs. D and E) (where "principal shareholder" was estopped from challenging a certain statute, his corporation was similarly estopped); Darley Liquor Mart, Inc. v. Smith, Del. Ch., C.A. No. 5783, Brown, C. (June 22, 1981) (Answ. Br. Exh. B) (where a 75% shareholder acquired his shares from an alleged wrongdoer with knowledge of the alleged wrongs and was therefore estopped to recover, the corporation was similarly estopped).

For Bangor Punta estoppel to apply, at least a majority of stockholders must have participated or acquiesced in the alleged wrongdoing or have purchased stock with knowledge of the wrongdoing.[8] Here, there is no basis for an

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8 Texas courts have similarly limited Bangor Punta to bar only claims to "the extent necessary to prevent unjust enrichment, but no further." Advanced Business Communications, Inc. v. Myers, Tex. App., 695 S.W. 2d 601, 606 (1985).

estoppel, since there is no allegation that Maxus or any of its stockholders knew of or participated or acquiesced in Kidder's alleged wrongdoing. Maxus did not even exist at the time of most of the alleged wrongdoing, much less acquiesce or participate in that wrongdoing. The majority of Maxus stockholders are the Old Diamond Shamrock stockholders who, far from participating or acquiescing in the alleged wrongdoing, were innocent victims of that wrongdoing.[9] Finally, the remaining minority of Maxus stockholders, the former Natomas stockholders, are not alleged to be guilty, directly or indirectly, of any wrongdoing or of participation in any wrongdoing, nor did they have knowledge of Kidder's wrongful actions. Thus, as was recognized in the District Court opinion in FMC Corp. v. Boesky, supra, on which Kidder so heavily relies:

> [T]he "windfall" which the Supreme Court found repugnant in Bangor Punta, arose where [Amoskeag] sought to enhance the value of its bargain, i.e., when it tried to recover back from the defendants the consideration that [Amoskaeg] paid even though that consideration was fairly reflected in the value of the shares.
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> In contrast, we are not dealing here with a purchaser who seeks to recover the consideration it paid to its vendor; rather FMC seeks to recover from a third party for

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9 In sharp contrast to Bangor Punta, Courtland Manor and their progeny, where the corporation was estopped from asserting claims because controlling stockholders were barred from asserting those claims, Kidder here admits that holders of most of Maxus' stock can assert claims against Kidder. Answ. Br. at 36. This admission, while incorrect as a legal matter (see Argument D, infra) is nonetheless fatal to Kidder's Bangor Punta argument.

> wrongdoing done to it. Thus, none of the equitable principles which informed the Bangor Punta decision have any relevance here . . . .

673 F. Supp. at 247 (emphasis added; citation omitted).

Finally, the present case is controlled by the Delaware Supreme Court's decision in Lewis v. Anderson, Del. Supr., 477 A.2d 1040 (1984). There, Du Pont acquired Conoco in a merger. Plaintiff, a former stockholder of Conoco who received Du Pont stock in the merger, argued that, if he were not permitted to pursue claims that Conoco's former management had received excessive compensation, the alleged wrongs would go unremedied since allowing Conoco or Du Pont to pursue the claims would lead to an improper windfall under Bangor Punta. The Court squarely rejected this argument, labelling Bangor Punta "clearly inapposite," and holding:

> Defendant states: "In order for this case even to fit into the Bangor Punta framework, it would have to be supposed that Du Pont (as the purchaser) had purchased Old Conoco stock from the sellers (the thousands of Old Conoco public stockholders) in a transaction in which it got all that it bargained for and then turned around and caused New Conoco to sue all of the selling Old Conoco shareholders for mismanagement committed by them prior to the merger. That is the claim that was barred in Bangor Punta." We agree.

477 A.2d at 1050, n.20.

Since neither Old Diamond Shamrock nor Maxus purchased shares from Kidder, and since they clearly allege that they overpaid in the acquisition and therefore did not get what they bargained for, Bangor Punta is equally inapposite here. Accord Liberty National Bank & Trust Company of Louis-

ville v. Foster, Ky. App., 737 S.W.2d 704 (1987) ("clearly piercing the corporate veil and applying the contemporaneous ownership doctrine should only be resorted to in those cases where the new shareholders either purchased their shares directly from the wrongdoer, or where the purchasers pay a price reflecting the mismanagement and, having received full value for their purchase, seek to recover the purchase price, that is, get something for nothing.") (citations omitted).

The Supreme Court also held in Lewis v. Anderson that if New Conoco were to proceed against Old Conoco's former management it would be "simply pursuing Old Conoco's assets," one of which was its claim against former management. 477 A.2d 1050. Here, too, Diamond Shamrock Corporate Company (to which Old Diamond Shamrock's claims were transferred, see p.3, supra) seeks to pursue its assets by recovering for the wrongs done to it when Kidder misappropriated its confidential business information. Bangor Punta is simply not applicable in these circumstances.[10]

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10 Moreover, even if Kidder is correct that a minority of Maxus stockholders will receive an undeserved benefit if the litigation is successful, that should not prevent recovery by Diamond Shamrock Corporate Company or its parent corporation, Maxus, 54% of whose stockholders did not benefit from, and in fact were substantially harmed by, the merger. If the Court believes that recovery to the corporate treasury will unjustly enrich the former Natomas stockholders who received their shares in the merger, an appropriate remedy can be fashioned after trial. See Bangor Punta, supra, 417 U.S. at 718, and 15.

C. Maxus, Through Its Diamond Shamrock Corporate Company Subsidiary, Has Alleged Corporate Injury In the Texas Action.

As a last resort, Kidder relies on the technical form of the transaction by which Old Diamond Shamrock chose to acquire Natomas to argue that Old Diamond Shamrock suffered no corporate injury. Rather, Kidder argues that Old Diamond Shamrock stockholders were individually injured when they received too little for their shares. Thus, Kidder asserts, only the former stockholders of Old Diamond Shamrock have a cause of action. Answ. Br. at 27-31.

Kidder's argument is wrong, for several reasons. Most plainly, it was Old Diamond Shamrock which contracted with Kidder, to whom Kidder owed duties, and whose information was misappropriated by Kidder in violation of those duties. The misappropriation of Old Diamond Shamrock's information harmed Old Diamond Shamrock by causing it to pursue a detrimental tender offer for, and subsequently to contractually commit itself to an acquisition of, Natomas. That Old Diamond Shamrock eventually effected this transaction by forming a new corporation, Maxus, which would hold both Old Diamond Shamrock's stock and that of Natomas, is of no moment.

Kidder's oft-repeated statement that, once the transaction was accomplished, Maxus' assets were not diminished (Answ. Br. at 10, 16, 17, 18 n., 26, 27, 33) is similarly of no moment. Maxus did not even come into existence until July 19, 1983 (Notestine Aff. ¶ 5), several months after (i)

Kidder's alleged misappropriation of information, (ii) Old Diamond Shamrock's tender offer to acquire Natomas, and (iii) Old Diamond Shamrock's entry into the May 30 reorganization agreement by which it agreed to acquire Natomas. Pet. ¶¶ 19-24, 28. It is thus clear that the injury complained of was to Old Diamond Shamrock, and that the bulk of that injury predated Maxus' formation. Diamond Shamrock Corporate Company, to which claims arising from such injury were transferred, and Maxus, which owns all of its stock, have standing to assert the claims formerly belonging to Old Diamond Shamrock.

One of the ways that the injury to Old Diamond Shamrock manifested itself was that it agreed to an improvident acquisition of Natomas.[11] Focusing its attack on just one facet of the damage claimed by Old Diamond Shamrock,[12] Kidder argues that the merger reorganization agreement was not in substance an acquisition of Natomas by Old Diamond Shamrock;

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11 Old Diamond Shamrock, not Maxus (which was not yet formed), was the signatory to the May 30, 1983 reorganization agreement. Notestine Aff. Exh. 2.

12 Kidder concedes that if Diamond Shamrock Corporate Company is the successor to Old Diamond Shamrock, then Diamond Shamrock Corporate Company does have standing to seek recovery of Kidder's fees (Answ. Br. 17-18, n.6). As the undisputed record now shows, Diamond Shamrock Corporate Company is in fact the successor to and holder of all claims of Old Diamond Shamrock against Kidder, including the claim for Kidder's fees. See Supplemental Statement of Facts, supra, and Notestine Aff. This alone is sufficient to establish the standing of Diamond Shamrock Corporate Company for purposes of this motion. Kidder's arguments discussed herein go to the question of the extent of the damage proximately caused by its actions, not to the threshold standing question of whether Old Diamond Shamrock was injured by those actions.

instead, it relies on the technical form of the transaction to argue that it was an acquisition by a third party in which Old Diamond Shamrock's former stockholders were paid too little. Answ. Br. at 27. Such a claim, Kidder asserts, can only be maintained by the former stockholders of Old Diamond Shamrock individually. Answ. Br. at 27-32.

The short answer to this contention is that no one has ever asserted that Old Diamond Shamrock's stockholders received too little in the Natomas transaction. Rather, it is alleged that Old Diamond Shamrock, through the new holding company which it created to carry out the merger agreement with Natomas, overpaid to acquire Natomas.

Kidder's hypertechnical arguments concerning the nature of the transaction ignore reality. In fact, Old Diamond Shamrock set out to acquire Natomas (Answ. Br. at 1), it commenced a hostile tender offer for control of Natomas (Answ. Br. at 1, 6, 9), it agreed to a negotiated, tax-free acquisition, and it created New Diamond Shamrock, N Sub, Inc. and D Sub, Inc. in order to effectuate that acquisition. Notestine Aff. ¶ 6; Answ. Br. at 9. It was also agreed that, following the transaction, Old Diamond Shamrock's officers would become the officers of, and thus would control the day-to-day affairs of, New Diamond Shamrock. Notestine Aff. ¶ 6; Exh. 2. Old Diamond Shamrock Directors also constituted a majority of New Diamond Shamrock's board. Id. Not surprisingly, the transaction was treated for accounting purposes as an acquisition by New Diamond Shamrock, as the successor to Old Diamond Sham-

rock, of Natomas. Id. ¶ 7. In view of these facts, to regard the transaction at issue as an acquisition by a third party, Maxus, of Old Diamond Shamrock and Natomas, as Kidder does (Answ. Br. at 27), is to elevate form over substance in a manner contrary to Delaware law. E. I. du Pont de Nemours & Co., Inc. v. Shell Oil Co., Del. Supr., 498 A.2d 1108, 1117 (1985); Council of South Bethany v. Sand Piper Development Corp., Inc., Del. Ch., C.A. No. 935 (Sussex) Jacobs, V.C., slip op. at 13 (Sept. 4, 1986). Accord, Bangor Punta, supra, 417 U.S. at 717, n.14 ("Where one person has wronged another in a matter within equity's jurisdiction, equity . . . will not suffer the wrongdoer to escape restitution to such person through any device or technicality."), quoting Home Fire Insurance Co. v. Barber, Neb. Supr., 93 N.W. 1024, 1035 (1903).

In short, the transaction here in issue was an acquisition of Natomas by Old Diamond Shamrock. It does not matter whether one views the transaction as one in which Kidder's advice to Old Diamond Shamrock and its wrongful use of confidential information caused Old Diamond Shamrock to contractually bind itself to a transaction in which it overpaid to acquire Natomas, or one in which Old Diamond Shamrock (through Maxus, the company it created to carry out its acquisition) issued too much stock to buy Natomas. Under either view, Kidder's contention that the claim asserted belongs to the former stockholders of Old Diamond Shamrock, and not to Old Diamond Shamrock and Maxus, is wrong. Answ. Br. at 29, n.11.

If viewed as an over-priced acquisition by Old Diamond Shamrock, it is clear that Old Diamond Shamrock (or its successor, Diamond Shamrock Corporate Company), has standing to sue. It is black letter law that improper dissipation of corporate assets gives rise to corporate or derivative claims, but not individual claims by stockholders. 12B Fletcher Cyclopedia Corporations § 5911 at 421 (1984); see also Cede & Co. v. Technicolor, Inc., Del. Supr., 542 A.2d 1182, 1188, n.10 (1988). Moreover, in Youngman v. Tahmoush, Del. Ch., 457 A.2d 376 (1983), the only case cited by either party involving an alleged overpayment in a corporate acquisition, this Court clearly accepted that a cause of action seeking to enjoin an acquisition at an allegedly excessive price is derivative in nature, as it analyzed the plaintiff's standing to act as a derivative representative.

If one views the transaction as involving the wrongful issuance of stock or other changes in capital structure which caused the "impairment of certain shareholders' equity positions" as Kidder does (Answ. Br. at 27), the claims still belong to Old Diamond Shamrock and the company it created to carry out the Natomas acquisition, Maxus. As the Supreme Court recently held in Kramer v. Western Pacific Industries, Inc., Del. Supr., No. 328, 1987 (Aug. 22, 1988) (Exh. D hereto), allegations that options to purchase stock were wrongfully issued are derivative in nature and do not give rise to individual or class claims, even where plaintiff alleges that the alleged wrongful dilution of equity resulted

in a reduction in the price he received in a merger. Slip op. at 11-12. See also Elster v. American Airlines, Inc., Del. Ch., 100 A.2d 219, 222 (1953). Similarly, allegations concerning allegedly improper changes in the capital structure of a corporation have been held to be "clearly derivative." Moran v. Household International, Inc., Del. Ch., 490 A.2d 1059, 1170-1 (1985), aff'd, Del. Supr., 500 A.2d 1346 (1986); accord Margolies v. Pope & Talbot, Inc., Del. Ch., C.A. No. 8244, Hartnett, V.C. (Dec. 23, 1986) (Exh. E hereto). Claims that stock was issued "for inadequate consideration" likewise belong to the corporation and thus are derivative in nature. Bennett v. Breuil Petroleum Corp., Del. Ch., 99 A.2d 236 (1953).[13]

Nor is it any answer to claim, as Kidder does, that because some Maxus stockholders (those who owned Natomas stock) "benefited" by the alleged wrongful acts, the stockholders who were harmed by those acts can (and indeed, in Kidder's view, must) allege "special injury" entitling them to proceed individually. Answ. Br. at 27-29. By definition,

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13 The distinction which Kidder purports to find in Bennett between suits claiming that stock was issued in violation of legal requirements as to consideration and those alleging fraud or improper purpose (Answ. Br. at 30, n.11) is nonsense. Contrary to Kidder's assertion, Bennett did not "uph[o]ld the right of the plaintiff to proceed with an individual claim" challenging a stock issuance on grounds of "fraud or improper purpose." Rather, in the context of rejecting an argument that plaintiff had improperly joined derivative and non-derivative claims, the Court assumed -- without deciding -- that issuance of shares for an improper purpose (not, as Kidder suggests, for inadequate consideration) gave rise to an individual claim. 99 A.2d at 241.

every alleged issuance of stock or stock options for inadequate consideration harms only those stockholders who were not recipients of the newly-issued stock. If non-recipients were held to suffer "special injury," all suits for wrongful issuance of stock could be brought individually. This is clearly not the law, as Elster v. American Airlines, Inc., supra, and the many cases which have followed it, make clear.[14] Accord Tuckman v. Aerosonic Corp., Del. Ch., C.A. No. 4094, Hartnett, V.C., slip op. at 3, 32 (May 20, 1982) (claim that as a result of the issuance of stock to a controlling stockholder, "the stock holdings of the remaining stockholders were improperly diluted" was derivative); Sohland v. Baker, Del. Supr., 141 A.277 (1927). Indeed, as Keenan v. Esheman, Del. Supr., 2 A.2d 904, (1938) and Taormina v. Taormina Corp., Del. Ch., 78 A.2d 473, 476 (1951), plainly teach, the fact that some stockholders benefit from alleged wrongdoing does not allow the remaining stockholders to pursue individual suits to address what are by nature corporate wrongs.[15]

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14 To the contrary, "special injury" is alleged only when it is claimed that the wrongful issuance affects some special right of stockholders, such as a right to exercise voting control. E.g., Moran v. Household International, Inc., supra, 490 A.2d at 1170. No such claim is made here.

15 Kidder's suggestion that Taormina (and implicitly Eshleman, which it follows) may not be good law is frivilous. The fact that claims which (unlike those in the present case) directly challenge the consideration offered in a merger may be asserted individually in no way undermines the holding that where, as here, claims are derivative in nature, they may not be asserted individually merely because some stockholders are alleged to have acquiesced in or benefited from the alleged wrong.

In short, Kidder's reliance on the technical form of the business combination between Old Diamond Shamrock and Natomas is unavailing. The claims here in issue plainly belong to Diamond Shamrock Corporate Company, as successor to Old Diamond Shamrock.

D. Barring Recovery Would Grant To Kidder An Unjust Windfall.

Finally, if Old Diamond Shamrock is barred from recovering, a substantial wrong will go unremedied. While Kidder asserts blandly that Old Diamond Shamrock's stockholders can assert a direct action for the wrongs alleged in the Texas action, it neglects to identify the parties against whom or theories upon which recovery could be sought. If the stockholders sought to recover against Kidder, they would no doubt be met with the argument that Kidder had no contractual relationship with and no contractual or fiduciary duties to Old Diamond Shamrock's stockholders. Nor could the stockholders seek to recover against the Natomas stockholders who allegedly benefited by being overpaid in the merger, as there is no theory under which those stockholders engaged in or can be liable for any wrongdoing. Finally, the Old Diamond Shamrock stockholders could not recover against the Old Diamond Shamrock Directors or the New Diamond Shamrock Directors because those directors reasonably relied upon the advice and opinions of Kidder, in accordance with established principles of Delaware law, without any knowledge that Kidder was affirmatively engaged in wrongdoing in the very transaction in

CONCLUSION

For the reasons stated herein and in Maxus' opening brief, Maxus respectfully requests that its motion for partial summary judgment be granted and Kidder's cross-motion for summary judgment be denied.

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which its advice was relied upon. Indeed, the great irony in Kidder's position is that it relies so heavily on the Bangor Punta decision at the same time that it seeks to escape liability for its actions, and to thereby to achieve the very type of "windfall" which Bangor Punta seeks to avoid. See National Union Electric Corp. v. Matsushita Electric Industrial Co., Ltd., 498 F. Supp. 991, 1003 (E.D. Pa. 1980); Liberty National Bank & Trust Company of Louisville v. Foster, Ky. App., 737 S.W.2d 704 (1987).