

EXHIBIT 76

CAUSE NO. 0209156

OCCIDENTAL CHEMICAL CORPORATION

Plaintiff,

VS.

MAXUS ENERGY CORPORATION AND TIERRA SOLUTIONS, INC.

Defendants.

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IN THE DISTRICT COURT OF

DALLAS COUNTY, TEXAS

A-14th JUDICIAL COURT

PLAINTIFF'S ORIGINAL PETITION AND REQUEST FOR DECLARATORY JUDGMENT

Occidental Chemical Corporation ("Plaintiff") complains of Maxus Energy Corporation and Tierra Solutions, Inc. ("Defendants"), and for cause of action would respectfully show to the Court the following:

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JIM HAMILTON
DISTRICT CLERK
DALLAS COUNTY, TEXAS
DEPUTY

I. Discovery Control Plan

1. Discovery is intended to be conducted under Level 2 of Texas Rule of Civil Procedure 190.

II. The Parties

2. Plaintiff Occidental Chemical Corporation ("Occidental Chemical") is a New York corporation with its principal place of business in Dallas, Dallas County, Texas.

3. Defendant Maxus Energy Corporation ("Maxus") is a Delaware corporation with its principal place of business in The Woodlands, Montgomery County, Texas. Maxus may be served through its registered agent for service of process, C.T. Corporation System, 350 N. St. Paul Street, Dallas, Texas 75201.

4. Defendant Tierra Solutions, Inc. (f/k/a Chemical Land Holdings, Inc.) ("Tierra") is a Delaware corporation with its principal place of business in The Woodlands,

Montgomery County, Texas. Tierra maybe served through its registered agent for service of process, Prentice Hall Corporation System, 800 Brazos, Austin, Texas 78701.

III. Jurisdiction

5. The amount in controversy in this matter exceeds the jurisdictional limits of the district court.

IV. Venue

6. Venue is proper in Dallas County, Texas, because it is the county in which all or a substantial part of the events or omissions giving rise to the claim occurred and because it was the county of Maxus's principal place of business at the time all or some of the causes of action accrued.

V. Factual Background

7. In 1983, Diamond Shamrock Corporation was formed as a holding company which owned 100% of Diamond Shamrock Chemicals Company ("DSCC"). Pursuant to a Stock Purchase Agreement dated September 4, 1986 ("Agreement"), Diamond Shamrock Corporation sold all of the outstanding stock of DSCC to Oxy-Diamond Alkali Corporation. DSCC was subsequently merged into Occidental Chemical. In 1987, Diamond Shamrock Corporation changed its name to Maxus Energy Corporation.

8. Section 9.03(a) of the Agreement requires Maxus to indemnify, defend and hold harmless Occidental Chemical

from and against any and all claims, demands or suits (by any Entity, including, without limitation, any Governmental Agency), losses, liabilities, damages, obligations, payments, costs and expenses, paid or incurred, whether or not relating to, resulting from or arising out of any Third Party claim (including, without limitation, the reasonable cost and expenses of any and all actions, suits, proceedings, demands, assessments, judgments, settlements and compromises relating thereto and reasonable attorneys' fees in connection therewith), and whether for property damage, natural resource damage, bodily injury (including, without limitation,

damage and injury related to products and injury to any person living or dead on the date hereof or born hereafter), governmental fines or penalties (including, without limitation, for the violation of permits), pollution, threat to environment, environmental remediation, or otherwise (individually and collectively, "Indemnifiable Losses") relating to, resulting from or arising out of . . . (iii) any (A) Superfund Site and (B) any . . . "Federal Superfund Litigation" . . . (iv) the "Inactive Sites" (which for purposes of this Agreement, shall mean those former chemical plants and commercial waste disposal sites listed on Schedule 9.03(a)(iv) . . . (viii) the Historical Obligations.

9. Section 9.03(a)(iii) of the Agreement contains Maxus's obligation to indemnify Occidental Chemical for claims relating to, resulting from, or arising out of

any (A) Superfund Site and (B) any Litigation commenced after the Closing pursuant to the provisions of CERCLA or RCRA with respect to any release, storage or disposal of Polluting Substances at any commercial waste disposal facility ("Federal Superfund Litigation") to the extent, but only to the extent, that such Federal Superfund Litigation relates to, results from or arises out of the actions or omissions of any Diamond Company (including, without limitation, any DSCC Company) or any predecessor-in-interest thereof prior to the Closing, but excluding matters expressly covered by Article X hereof.

10. "Litigation" is defined in section 2.07 of the Agreement as meaning "any action, suit, claim, proceeding, investigation or written governmental inquiry." Schedule 2.07(g) sets forth a list of Superfund Sites—defined by section 2.07(g) of the Agreement as all Inactive Sites and other properties covered by section 9.03(a)(iii) which are included on the "national priority list" under CERCLA. A few of the Superfund Sites identified on schedule 2.07(g) are Tybouts Corners in Delaware City, Delaware, and Diamond Alkali in Newark, New Jersey.

11. Section 9.03(a)(iv) of the Agreement contains Maxus's indemnity obligation for "Inactive Sites." Maxus must indemnify Occidental Chemical for all claims relating to, resulting from, or arising out of

the "Inactive Sites" (which for purposes of this Agreement, shall mean those former chemical plants and commercial waste disposal sites listed on Schedule 9.03(a)(iv) and all other properties which

were previously, but which, as of the Closing Date, are not owned, leased, operated or used in connection with the business or operations of any Diamond Company, including, without limitation, any DSCC Company, or any predecessor-in-interest thereof), including, without limitation, any matter relating to any of the Inactive Sites for which (A) any Diamond Company (including, without limitation, any DSCC Company) on or prior to the Closing Date agreed to indemnify, defend or hold harmless any Entity, or (B) any Diamond Company may otherwise be held liable.

12. Schedule 9.03(a)(iv) contains a list of the Inactive Sites. Former chemical plant sites listed as Inactive Sites include (to name a few) former DSCC plants at Delaware City, Delaware (limited to the PVC plant and the PVC treatment facilities later purchased from Maxus by Ethyl Corporation), Franklin Park, Illinois, Kearny, New Jersey, and Newark, New Jersey.

13. Section 9.03(a)(viii) sets forth Maxus's obligation to indemnify Occidental Chemical for "Historical Obligations." Maxus must indemnify Occidental Chemical for claims relating to, resulting from, or arising out of

the Historical Obligations and any other obligations or liabilities (absolute or contingent) of any Diamond Company (including, without limitation, any DSCC Company prior to the Closing) or any predecessor-in-interest thereof or of any DSCC Company unrelated to the Chemicals Business, including, without limitation, obligations and liabilities arising out of, resulting from or incurred in connection with, any ownership, use or operation of the business or assets of any Diamond Company other than a DSCC Company, whether before or after the Closing Date.

14. Section 2.23(b) defines Historical Obligations as "those obligations, liabilities, guarantees and contingent liabilities of the DSCC Companies, or any of them, which arose prior to or in connection with the Reorganization and which relate to any business, asset or property other than those of the Chemicals Business." "Chemicals Business" is defined in section 2.02(a) as "the DSCC Companies taken as a whole and the Business Units taken as a whole, and the business being conducted by them in the aggregate as of the date of this Agreement [September 4, 1986]. . . ." (Agreement, § 2.02(b).) "Reorganization" means to the

reorganization of Diamond Shamrock Corporation in 1983 and 1984 whereby DSCC became a wholly-owned subsidiary of Diamond Shamrock Corporation. (Agreement, §2.23(a).)

15. Schedule 2.23 to the Agreement sets forth a description of certain specific Historical Obligations and describes by category all other Historical Obligations. Item number 1 identifies, as Historical Obligations,

1. Litigation involving any Diamond Company to the extent not related to the Chemicals Business but involving acts, occurrences or omissions prior to January 1, 1984, including, without limitation, the following pending Litigation:
 - i. In re Agent Orange Multidistrict Panel Litigation
 - ii. Personal injury actions arising in connection with the Lister Avenue Facility

Based upon information and belief, the Lister Avenue facility manufactured what is now commonly known as Agent Orange. Also based upon information and belief, DSCC manufactured, sold and distributed Agent Orange prior to January 1, 1984.

16. Item number 12 on schedule 2.23 identifies as a Historical Obligation

[a]ll liabilities and obligations associated with the discontinued businesses of DSCC or any predecessor in interest (regardless of whether or not chemical, petroleum or coal related) including, without limitation, all liabilities and obligations associated with any acquisition, disposition and merger agreements relating to such discontinued businesses, including, without limitation to the following: . . . Polyvinyl Chloride . . . VCM . . . Other Plastics.

17. Section 9.04 provides that Occidental Chemical must give Maxus thirty days written notice of a request for defense and indemnity. Maxus has ten days to respond. Maxus may assume the defense of any third-party claim at its own expense and by its own counsel (if reasonably satisfactory to Occidental Chemical). If Maxus does not respond after ten days, Occidental Chemical may assume its own defense, and Maxus is liable for any reasonable expenses in connection with the defense.

18. The foregoing provisions from the Agreement setting forth Maxus's indemnity obligations are clear and unambiguous. True and correct copies of the Agreement and the relevant schedules are attached hereto as Exhibit 1 and are incorporated by reference as though set forth fully herein.

19. Based upon information and belief, Maxus assigned to Tierra certain of its indemnity obligations under the Agreement. Any such assignment did not terminate Maxus's obligations to Occidental Chemical.

20. Despite the unambiguous language of the Agreement, Maxus and/or Tierra have refused to defend and indemnify Occidental Chemical for claims that relate to, result from, or arise out of Superfund Sites, Federal Superfund Litigation, Historical Obligations and/or Inactive Sites. The following list, although not inclusive, demonstrates Defendants' breach of the Agreement:

- (a) In August of 2002, Maxus rejected Occidental Chemical's tender of request for defense and indemnity in connection with Agent Orange lawsuits styled *Vicky S. Garncarz v. Dow Chemical Co. et al.*, pending in state court in Illinois, and *Case J. Sampey et al. v. Dow Chemical Co. et al.*, pending in the United States District Court in the Eastern District of Louisiana.
- (b) In June of 2001, Maxus refused to defend or indemnify Occidental Chemical for a third-party claim asserted by Ecolab, Inc., alleging CERCLA and RCRA violations arising out of operations of the former DSCC chemical plant site in Franklin Park, Illinois.
- (c) In September of 2000, Maxus refused to defend or indemnify Occidental Chemical in connection with a lawsuit styled *Norfolk Southern Corp. et al. v. Kaiser Aluminum & Chemical Corp. et al.*, in which the plaintiff sought recovery of remediation costs for damage to the Atlas Chemical Site in Waynesboro, Georgia, due to alleged pesticide and herbicide contamination from a discontinued DSCC business and from the operation of a former DSCC chemical plant.
- (d) In April of 2001, Maxus refused to defend or indemnify Occidental Chemical in connection with a Directive and Notice to Insurers from the New Jersey Department of Environmental Protection requiring the cleanup and removal of discharges at the former DSCC chemical plant site in Newark, New Jersey (referred to as the Summer Avenue site).

- (e) In June of 2001, Maxus refused to defend or indemnify Occidental Chemical for claims asserted in a lawsuit filed on May 29, 2001, and styled *Linda Valentine et al. v. PPG Indus. Ohio, Inc, et al.*, pending in Pickaway County, Ohio, in which the plaintiffs alleged wrongful death due to exposure to vinyl chloride monomer (VCM) from the former DSCC Delaware City, Delaware facility during the period of 1966 to 1982.
- (f) Maxus has refused to defend or indemnify Occidental Chemical in connection with 10 additional lawsuits involving personal injuries allegedly arising from exposure to VCM (*Bogner, Joyce E. vs. AIRCO, Inc. et al.*; *Zerby, Lori vs. Allied Signal Inc. et al.*; *Wiefering, Charles vs. Allied Chemical Corp. et al.*; *McKinley, Marian, et al. vs. GenCorp, Inc. et al.*; *Ross, Daniel, et ux vs. Conoco, Inc. et al.*; *Tousaint, Henry, et ux vs. Insurance Co. of North America et al.*; *Landon, Clarence & Berry, et al. v. Conoco, Inc. et al.*; *Pappion, Clifton J., et al. vs. Certainteed Corp. et al.*; *Flick, Donald Daniel and Genevieve vs. Southern Pacific Transport Co. et al.*; *Winzy Vassar, Jr., et al. vs. Air Products and Chemicals, Inc. et al.*). Occidental Chemical was sued as a successor to DSCC in these lawsuits.
- (g) In December of 1999 and again in September of 2000, Maxus declined to accept Occidental Chemical's tender of a request for defense and indemnity in connection with an Agent Orange class action lawsuit styled *Chang Ok-Lee et al. v. Dow Chemical Co. et al.*, filed December 2, 1999, pending in the United States District Court in the Eastern District of Pennsylvania. In February of 2000 and again in September of 2000, Maxus declined to accept Occidental Chemical's tender of a request for defense and indemnity in connection with Agent Orange litigation initiated in Korea (*II Joo La and 9 others v. Monsanto Co. et al.*; *Dae Jin Jang and 18 others v. Monsanto Co. et al.*; *Dong Jun Kim et al. v. Monsanto Co. et al.*). By letter, Maxus reserved all of its rights and defenses.

21. Each of the foregoing instances constitute or relate to, result from, or arise out of Superfund Sites, Federal Superfund Litigation, Historical Obligations and/or Inactive Sites under the Agreement. Despite receiving timely and proper notice from Occidental Chemical, Maxus and Tierra have breached the Agreement and refused to indemnify and defend Occidental Chemical for these claims on the grounds (except for some of the VCM claims) that section 9.03(a)(ii)(B) of the Agreement relieves Maxus of its obligation to indemnify Occidental with respect to any litigation initiated after September of 1998. Section 9.03(a)(ii)(B), however, is a wholly separate provision under Article IX that addresses Maxus's obligation to indemnify for

Litigation (as defined in the Agreement) generally. All clauses under Article IX are stated in the disjunctive, and each provides an independent basis for Maxus's defense and indemnification obligations. Although section 9.03(a)(ii) excepts from Maxus's obligation to indemnify Occidental for Litigation matters with respect to which litigation is commenced after the expiration of 12 years following the Closing Date (as defined in the Agreement, September of 1998), sections 9.03(a)(iii), 9.03(a)(iv) and 9.03(a)(viii) do not contain such a limitation. There is no time limitation on Maxus's indemnity obligation for Indemnifiable Losses (as defined in the Agreement) relating to, resulting from or arising out of Superfund Sites, Federal Superfund Litigation, Inactive Sites, and Historical Obligations and "any other obligations or liabilities (absolute or contingent) of any Diamond Company (including, without limitation, any DSCC Company prior to the Closing) or any predecessor-in-interest thereof or of any DSCC Company unrelated to the Chemicals Business, including, without limitation, obligations and liabilities arising out of, resulting from or incurred in connection with, any ownership, use or operation of the business or assets of any Diamond Company other than a DSCC Company, whether before or after the Closing Date." (Agreement, §9.03(a)(viii).)

22. In addition to relying on the time limitation pertinent to Maxus's indemnification obligation under section 9.03(a)(ii), Maxus and/or Tierra have also refused to defend and indemnify Occidental Chemical for some claims relating to DSCC's discontinued business of manufacturing VCM on the basis that Maxus sold part of its plastics business prior to entering into the Agreement with Occidental Chemical. Even assuming that Maxus did sell its VCM manufacturing facilities to a party other than Occidental Chemical, Maxus and/or Tierra are still obligated to defend and indemnify Occidental Chemical for all third-party claims alleging injury, losses or damages due to alleged VCM exposure because such claims are Historical Obligations under the unambiguous terms of the Agreement.

23. Occidental has already tendered to Maxus requests for defense and indemnity for additional claims relating to, arising out of, or resulting from Superfund Sites, Federal Superfund Litigation, Inactive Sites and Historical Obligations, and will continue to do so. Based on their conduct to date, it is very likely that Defendants will assert the same arguments and refuse to defend and indemnify Occidental Chemical with respect to those future requests for indemnity. Accordingly, Occidental Chemical seeks a determination of whether Defendants are obligated to defend and indemnify Occidental Chemical for all third-party claims that are asserted in litigation filed after September 1998, but that arise out of, result from, or relate to Superfund Sites, Federal Superfund Litigation, Inactive Sites or Historical Obligations.

VI. Cause of Action for Breach of Contract

24. All conditions precedent to Occidental Chemical's right to bring suit have occurred.

25. Defendants breached the Agreement by refusing to defend and indemnify Occidental Chemical for claims resulting from, relating to or arising out of Superfund Sites, Federal Superfund Litigation, Inactive Sites and/or Historical Obligations, as those terms are defined in the Agreement.

26. As a direct and proximate result of Defendants' breach of contract, Occidental Chemical has been damaged in an amount greater than the jurisdictional limits of this Court.

VII. Request for Declaratory Judgment

27. Pursuant to sections 37.003 and 37.004 of the Texas Civil Practice and Remedies Code, Occidental Chemical seeks a declaration that Defendants are required under the Agreement to indemnify, defend and hold harmless Occidental Chemical from and against any and all claims, demands, suits, losses, liabilities, damages, obligations, payments, costs and

expenses, paid or incurred, whether or not relating to, resulting from, or arising out of any third-party claim, and whether for property damage, natural resource damage or bodily injury, governmental fines or penalties, pollution, threat to environment, environmental remediation, or otherwise, that arise out of, result from, or relate to Superfund Sites, Federal Superfund Litigation, Historical Obligations and/or Inactive Sites, as those terms are defined in the Agreement. Occidental Chemical also seeks a declaration that the 12-year limitation applicable to Maxus's indemnity obligation described in section 9.03(a)(ii) of the Agreement does not apply to requests for indemnity or defense made by Occidental Chemical under sections 9.03(a)(iii), 9.03(a)(iv) and for 9.03(a)(viii) of the Agreement.

VIII. Request for Attorneys' Fees and Costs

28. Occidental Chemical further requests that the Court award Occidental Chemical its reasonable and necessary attorneys' fees for this lawsuit, which Occidental Chemical is entitled to recover under sections 37.009 and 38.001 of the Texas Civil Practice and Remedies Code.

IX. Jury Demand

29. Plaintiff demands a trial by jury and has tendered the appropriate jury fee.

X. Prayer for Relief

Plaintiff Occidental Chemical Corporation respectfully requests that upon final hearing, Plaintiff be awarded judgment against defendants on each claim for relief, actual damages, attorneys' fees and costs, pre-and post-judgment interest, and such other relief to which Plaintiff may show itself to be justly entitled.

Respectfully submitted,

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