MARC-PHILIP FERZAN
ACTING ATTORNEY GENERAL OF NEW JERSEY
Richard J. Hughes Justice Complex
25 Market Street, PO Box 093
Trenton, New Jersey 08625-0093
Attorney for Plaintiffs

By: John F. Dickinson, Jr.
Deputy Attorney General
(609) 984-4863

JACKSON GILMOUR & DOBBS, PC
3900 Essex Lane, Suite 700
Houston, Texas 77027

By: William J. Jackson, Special Counsel
(713) 355-5000

GORDON & GORDON
505 Morris Avenue
Springfield, New Jersey 07081

By: Michael Gordon, Special Counsel
(973) 467-2400

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION and THE ADMINISTRATOR OF THE NEW JERSEY SPILL COMPENSATION FUND, Plaintiffs, v. OCCIDENTAL CHEMICAL CORPORATION, TIERRA SOLUTIONS, INC., MAXUS ENERGY CORPORATION, MAXUS INTERNATIONAL ENERGY COMPANY, REPSOL YPF, S.A., YPF, S.A., YPF HOLDINGS, INC., YPF INTERNATIONAL S.A. (f/k/a YPF INTERNATIONAL LTD.) and CLH HOLDINGS, Defendants. MAXUS ENERGY CORPORATION AND TIERRA SOLUTIONS, INC., Third-Party Plaintiffs, v. 3M COMPANY, et al., Third-Party Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION - ESSEX COUNTY DOCKET NO. ESX-L9868-05 (PASR) Civil Action STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST MAXUS ENERGY CORPORATION

TABLE OF CONTENTS

Pursuant to Rule 4:46-2(b), Plaintiffs submit the following Statement of Undisputed Material Facts.

I. MAXUS'S RELATIONSHIP TO THE LEGACY LIABILITIES OF THE LISTER SITE AND THE DIAMOND ALKALI COMPANY.

A. Diamond Shamrock Corporation (a/k/a "Old Diamond") Is a Discharger Under the Spill Act.

1. From 1951 until 1967, Diamond Alkali Company owned and operated the agricultural chemicals manufacturing facility located at 80 Lister Avenue in Newark, New Jersey (the "Lister Plant"). See Ex. 1 at MAXUS034098, ¶ 1.[1] The Lister Plant, together with the real property located at 120 Lister Avenue, is referred to herein as the "Lister Site."

2. In 1967, Diamond Alkali Company merged with Shamrock Oil & Gas Company, and the company's name was changed to Diamond Shamrock Corporation. See Ex. 2 at MAXUS0181497, ¶¶ 1, 6.

3. Diamond Shamrock Corporation, referred to herein as "Old Diamond," was a single corporate entity with three operating units in the oil and gas, chemicals and minerals industries. See Ex. 3 at MAXUS058502, ¶ 2 and side bar chart.

4. Old Diamond continued to manufacture agricultural chemicals at the Lister Plant until August 1969 when the plant closed. See Maxus and Tierra's Answer at ¶ 22.

5. Old Diamond discharged hazardous substances into the Passaic River. See Point I of Plaintiffs' Statement of Undisputed Material Facts In Support of Their Motions for Partial Summary Judgment Against Defendants Occidental Chemical Corporation, Maxus Energy Corporation and Tierra Solutions, Inc., filed May 6, 2011 and incorporated by reference herein,

[1] Diamond Alkali Company (a/k/a "Old Diamond") is also the successor to Kolker Realty Company and Kolker Chemical Works, Inc., entities that owned and operated the Lister Plant, and discharged hazardous substances from the Lister Plant into the Passaic River, from 1946 – 1951. See Ex. 127, Consent Order on Track III Kolker-Era Issues, p. 2, ¶¶ 1-3.

at pp. 4-20; Order Partially Granting Plaintiffs' Motion for Summary Judgment Against Occidental Chemical Corporation, Maxus Energy Corporation and Tierra Solutions, Inc., dated July 19, 2011; Ex. 127, Consent Order on Track III Kolker-Era Issues, p. 2, ¶ 1. Therefore, Old Diamond was a discharger under the Spill Act in addition to being a legal successor.

B. Old Diamond Was a Single Corporate Entity with Operating Divisions.

6. In 1969, the last year of Lister Plant operations, Old Diamond had business units participating in a number of different industries including mining, oil and gas exploration, refining, resins and plastics, industrial chemicals and bio-chemicals. See Ex. 4 at MAXUS0058538-41. These operations, including the operations of the Lister Plant, were conducted by operating units of a single corporation. Id. at MAXUS0058551.

7. In the period from 1969 to 1982, Old Diamond continued these operations, with 56 percent of its sales and operating revenue in 1982 coming from oil and gas operations, 33 percent from chemicals operations, and 11 percent from coal operations. See Ex. 5 at OCCNJ0006596.

8. As of December 1982, the value of the assets held by Old Diamond was $2,716,304,973. See Ex. 6 at MAXUS0238643, ¶ 2.

C. In Mid-1983, Dioxin Contamination Was Discovered at the Lister Site, and Claims Related to the Dioxin Contamination Were Added to Existing Agent Orange Claims.

9. By 1980, Old Diamond faced substantial liability from armed service members who claimed to have been injured due to Agent Orange exposure while serving in Vietnam. See Ex. 126 at MAXUS0084798.

10. In early June 1983, dioxin was discovered at the Lister Site. See Ex. 7 at MAXUS0458497, ¶ 2. On June 2, 1983, Governor Kean issued Executive Order No. 40

declaring a state of emergency concerning dioxin discovered at the 80 Lister Avenue, Newark New Jersey. See Ex. 25 at NJDEP00051857-59.

11. On June 3, 1983, the New Jersey Department of Environmental Protection (the "DEP") informed Old Diamond about the dioxin contamination discovered at the Lister Site and asked for information about the plant's operations. See Ex. 8 at MAXUS3073657.

12. On June 10, 1983, Old Diamond responded to the request for information. See Ex. 9 at MAXUS00043049.

13. On June 13, 1983, a class action was filed in New Jersey state court against Old Diamond by a group of former employees and residents and businesses near the Lister Site. See Ex. 10 at MAXUS3074007-34.

D. Old Diamond's Corporate Transformation Begins in 1983.

1. About the same time dioxin is discovered at the Lister Site, Old Diamond set into motion a plan to transform itself into a "new" company.

14. In 1983, Old Diamond developed a plan to transform itself into a new company without the liabilities associated with its ongoing chemicals business. See Ex. 11 at OCCNJ0026058-61. As phrased in Maxus's interrogatory answers, the 1983 reorganization "was a continuation of efforts to transform Diamond Shamrock from a chemicals company to primarily an energy company." See Ex. 12, Maxus and Tierra's Responses to Plaintiffs' Track III Trial Interrogatories, at Request No. 10.

15. One of the primary reasons for the transformation, according to Old Diamond's (and later New Diamond's) Vice President and General Counsel James Kelley, was the new pollution control legislation and federal and state legislation requiring that Old Diamond clean up plant sites, groundwater and address other problems under Superfund and other laws and regulations that came into effect during the early 1980s. See Ex. 11 at OCCNJ0026059-60.

16. As a result of the reorganization, a "new" Diamond Shamrock Corporation ("New Diamond," n/k/a Maxus Energy Corporation ("Maxus")) would be formed to become the parent company of Old Diamond. See Ex. 13 at MAXUS019717 ¶¶ 1, 4.

17. James Kelley, Vice President and General Counsel of Old Diamond and then New Diamond, described the reorganization in a January 24, 1984 letter: "Diamond Shamrock has reorganized itself into a holding company." See Ex. 14 at MAXUS0229714, ¶ 1.

2. The Reorganization of Old Diamond.

18. Between 1983 and 1984, Old Diamond was reorganized to create a "new" Diamond Shamrock Corporation with the same corporate identity as Old Diamond and substantially all the assets of Old Diamond. A chart was prepared by Maxus for the deposition of its corporate secretary Timothy Fretthold in another lawsuit that summarized the steps of the reorganization. See Ex. 15 at MAXUS0055632-45.

a. Reorganization – Phase I.

19. On or about May 30, 1983, Old Diamond and an oil and gas company, Natomas Company ("Natomas"), executed an agreement for Old Diamond to acquire Natomas and for both Old Diamond and Natomas to become subsidiaries of a new parent company, New Diamond. See Ex. 16 at MAXUS018632, ¶ 2.

20. On or about July 19, 1983, Old Diamond caused "New Diamond Corporation" (New Diamond n/k/a Maxus) to be incorporated. See Ex. 17 at MAXUS0055094.

21. As planned and through two reverse triangular mergers, Old Diamond and Natomas became sister subsidiaries of New Diamond. See Ex. 13 at MAXUS0019717-19.

22. On or about September 1, 1983, New Diamond changed its name to Diamond Shamrock Corporation (see Ex. 18 at MAXUS0423402), and Old Diamond changed its name to "Diamond Chemicals Company." See Ex. 20 at MAXUS0055648.

23. Diamond Chemicals Company soon changed its name to Diamond Shamrock Chemicals Company ("DSCC"). See Ex. 21 at OCCNJ0009308.

24. New Diamond Corporation was named Diamond Shamrock Corporation from September 1, 1983 until April 1987, when it changed its name to Maxus Energy Corporation. See Ex. 81 at MAXUS2539029-30.

b. New Diamond assumed the corporate identity of Old Diamond in Phase I of the reorganization.

25. After the creation of New Diamond, holders of the publicly-traded stock in Old Diamond became owners of the publicly-traded stock of New Diamond because, during the 1983 reorganization, a share-for-share exchange occurred whereby each share of Old Diamond stock was replaced with a share of New Diamond stock. See Ex. 13 at MAXUS019717-19. The stock certificates for shares in Old Diamond became stock certificates for shares in New Diamond. See Ex. 22 at MAXUS0223870, ¶ 2. New Diamond told the Securities and Exchange Commission ("SEC") that it would not be necessary for Old Diamond stockholders to trade in their shares. Ibid.

26. The rights to acquire Old Diamond stock under employee stock options and incentive compensation plans were converted into rights to acquire stock in New Diamond. See Ex. 23 at MAXUS020151-52, MAXUS020185.

27. New Diamond stock was traded under the stock market ticker symbol "DIA," the symbol used by Old Diamond. See Ex. 5 at OCCNJ0006658, ¶ 6; Ex. 24 at MAXUS0059243, ¶ 6; Ex. 26 at MAXUS0061712, ¶ 6.

28. All of the officers of Old Diamond became the officers of New Diamond. See Ex. 27 at MAXUS0049791, ¶ 1, MAXUS0049809, ¶ 1; Ex. 28, Track III Admissions, at Request No. 17.

29. All of the directors of Old Diamond became directors of New Diamond. See Ex. 28, Track III Admissions, at Request No. 18.

30. The corporate headquarters of Old Diamond became the corporate headquarters of New Diamond. See Ex. 29 at OCCNJ0023934; Ex. 30 at MAXUS0056386.

31. By the end of Phase I of the reorganization, Old Diamond was a subsidiary of New Diamond, but Old Diamond still had all of the assets it had at the beginning of the reorganization. See Ex. 31 at MAXUS3819656, ¶ 4.

c. Phase 2 – New Diamond strips substantially all of the assets of Old Diamond.

32. At the same time the Natomas transaction was going forward, New Diamond management, which was the same management of Old Diamond, was planning a second phase of reorganization, including the means to remove Old Diamond's non-chemicals assets from Old Diamond and place them into New Diamond. See Ex. 32 at PL No. 153581, p. 1, ¶1.[2]

33. New Diamond management considered two means of moving the assets from Old Diamond to New Diamond. See ibid. An August 2, 1983 memorandum stated that either (i) Old Diamond could form a subsidiary, contribute the assets to the subsidiary, and then contribute the subsidiary to New Diamond; or (ii) Old Diamond could give the assets to New Diamond and let New Diamond create the subsidiary in which to place the assets. Ibid. at ¶ 3. "The difference, of course, occurs on the liability side[,]" the memorandum explained. Ibid. If the second alternative was chosen, "New Diamond would be saddled with [Old Diamond's] contingent liabilities." Ibid.

[2] Maxus had asserted the attorney-client privilege protected this document from discovery. Maxus has since withdrawn its claim of privilege.

34. New Diamond acted to strand Old Diamond's contingent liabilities in Old Diamond, so that New Diamond would not be "saddled" with them. On October 20, 1983, at a meeting of New Diamond's board of directors, James Kelley, Vice President and General Counsel of New Diamond, described the proposed structure of the corporation in which each operating unit of Old Diamond would become a separate subsidiary. See Ex. 33 at MAXUS3375581, ¶ 2. To effectuate this strategy, Old Diamond would create subsidiaries to hold its assets.

i. The assets of the formerly integrated Old Diamond were placed into subsidiaries and separated from the chemical business liabilities.

35. Between August and October 1983, at the direction of New Diamond, Old Diamond created three new subsidiaries: (1) Diamond Shamrock Refining and Marketing ("DS R&M"), (2) Diamond Shamrock Exploration Company ("DS E&P"), and (3) Diamond Shamrock Coal Company ("DS Coal"). See Ex. 34 at MAXUS0061087; Ex. 35 at OCCNJ0021405, ¶3; Ex. 36 at MAXUS1885030. On or about November 28, 1983, at the direction of New Diamond, Old Diamond created a fourth new, wholly-owned subsidiary known as Diamond Shamrock Corporate Company ("DS Corporate"). See Ex. 37 at MAXUS0055428-32.

36. On December 16, 1983, assignment and assumption agreements by which the assets were to be transferred from Old Diamond to the new subsidiaries were circulated to the operating unit subsidiaries for execution. See Ex. 38 at MAXUS3301753. In a memorandum describing the reorganization plan, the movement of Old Diamond's assets into subsidiaries, and later into New Diamond, was described as the stripping away of Old Diamond's non-chemical asset: "[Old Diamond] will be stripped of all assets and liabilities other than those related to the chemicals business." Ex. 19 at PL 153576, ¶ 1.

37. In an Assignment and Assumption Agreement signed on December 16, 1983, Old Diamond assigned to DS R&M all of the assets Old Diamond used in the operation of the refining and marketing business. See Ex. 39 at MAXUS022051, ¶ 3.

38. However, when New Diamond management consulted its tax department about the formation of the new subsidiaries, the tax department advised that the transaction should be structured with a certain ratio of debt to equity to reduce Texas franchise taxes. See Ex. 31 at MAXUS3819674.

39. As a result of this advice to reduce Texas taxes from the tax department, New Diamond included debt, i.e., promissory notes from the subsidiaries to Old Diamond, in the advised amount when DS E&P and DS R&M were capitalized. Ibid.

40. To reflect the new plan, Old Diamond executed a second Assignment and Assumption Agreement with DS R&M that included the debt-to-equity ratio determined to be most advantageous by the tax department. See Ex. 40 at MAXUS0055413. This new agreement specified that Old Diamond would make a capital contribution of $120,662,157, and that DS R&M was to execute and deliver to Old Diamond an unsecured promissory note for the difference between the net book value of the assets assigned to DS R&M by Old Diamond and the $120 million capital contribution. Ibid. at ¶ 3.

41. As provided for in the second Assignment and Assumption Agreement, DS R&M executed an unsecured promissory note, payable to Old Diamond for $361,983,771. See Ex. 41 at MAXUS022069. The fair market value of the assets transferred to DS R&M was $499,543,000. Ex. 31 at MAXUS3819662.

42. Similarly, Old Diamond's exploration and production assets were transferred to DS E&P in an Assignment and Assumption Agreement signed on January 12, 1984. See Ex. 42 at MAXUS022088.

43. Pursuant to that agreement, Old Diamond agreed to make a capital contribution of $262,874,000.00 to DS E&P. See Ex. 42 at MAXUS022088, ¶ 3.

44. In addition, DS E&P executed an unsecured promissory note payable to Old Diamond for $788,619,377. See Ex. 43 at MAXUS022079, ¶ 1. The amount of the promissory note was the net book value of the assets minus the $263 million capital contribution. See Ex. 42 at MAXUS0022088, ¶ 3.

45. Similarly, pursuant to a separate Assignment and Assumption Agreement, Old Diamond's coal assets were transferred to DS Coal. See Ex. 44 at MAXUS0055677-79.

46. Finally, on or about January 23, 1984, Old Diamond executed an Assignment and Assumption Agreement with DS Corporate, in which Old Diamond transferred to DS Corporate all of Old Diamond's remaining assets, other than those comprising Old Diamond's "industrial and proprietary chemicals businesses." See Ex. 45 at MAXUS0055945, ¶ 3. Pursuant to that agreement, Old Diamond agreed to make a capital contribution to DS Corporate in the amount of $27,235,750. Ibid.

47. DS Corporate executed an unsecured promissory note to Old Diamond for $81,636,750. See Ex. 46 at MAXUS022698.

48. The result of these agreements was that Old Diamond gave $410,771,907[3] in capital contributions to the subsidiaries, and Old Diamond received $1,232,240,898[4] in unsecured promissory notes from the subsidiaries. See, supra, Statement of Facts, at ¶¶ 40-47.

[3] ($27,235,750 + $262,874,000 + $120,662,157)

ii. Once Old Diamond's assets were moved to subsidiaries created by New Diamond, New Diamond directed Old Diamond to transfer the subsidiaries to New Diamond.

49. After Old Diamond's assets were transferred into the subsidiaries, the New Diamond board resolved that New Diamond would receive Old Diamond's stock in DS R&M, DS E&P, DS Coal and DS Corporate. See Ex. 47 at MAXUS3375607-08.

50. This resolution was put in the form of a written consent signed by the board of directors of Old Diamond on December 15, 1983. See Ex. 48 at MAXUS0219184-329. In the consent, the board of directors of Old Diamond set out the transactions by which "substantially all of the assets" of Old Diamond would be transferred to New Diamond. See id. at MAXUS0219187, ¶ 3.

51. On January 26, 1984, New Diamond reported to the SEC that it was undertaking a reorganization whereby Old Diamond would transfer to New Diamond both the stock of the subsidiaries and "cash, receivables and other assets, which collectively comprised substantially all of [Old Diamond's] property and assets[.]" See Ex. 49 at MAXUS061221, ¶ 2.

52. Old Diamond also transferred to New Diamond the right to receive the payments on the promissory notes executed by the new subsidiaries. See Ex. 48 at MAXUS0219190, ¶ 2. For example, Old Diamond endorsed the DS R&M promissory note to New Diamond. See Ex. 41 at MAXUS022072, ¶ 2. And Old Diamond endorsed the DS E&P promissory note to New Diamond, as well. See Ex. 43 at MAXUS022082, ¶ 2.

53. New Diamond also assumed Old Diamond's corporate debt. See Ex. 49 at MAXUS0061221-22. The corporate notes and debentures that New Diamond would assume were listed in Schedule II of the board consent. See Ex. 48 at MAXUS0219191.

---

[4] ($81,637,750 + 788,619,377 + $361,983,771)

54. The principal amount of debt transferred from Old Diamond to New Diamond as a result of the transfer of the debentures was $289,024,000. See Ex. 12, Maxus and Tierra's Responses to Plaintiffs' Track III Trial Interrogatories, at Request No. 7.

55. Accordingly, Old Diamond divested itself of $1,643,012,898 in cash and assets, and in exchange was excused from the payment of $289,024,000 principal in corporate debentures. See, supra, Statement of Facts, at ¶¶ 48-54. The difference between the money going out of Old Diamond and the principal of the debt for which it was relieved in exchange was $1,353,988,805. See id.

56. The creation of the new subsidiaries and the transfer of Old Diamond's assets to the new subsidiaries were events that constituted a second reorganization of Old Diamond that had an effective date of January 26, 1984, as reported to the SEC in a filing of the same date. See Ex. 49 at MAXUS061219-20.

57. The SEC filing stated that, in this second reorganization, "[Old Diamond] transferred to [New Diamond] all of its right, title and interest in and to (a) all of the issued and outstanding shares of capital stock of the Subsidiaries and (b) cash, receivables and other assets, which collectively comprised substantially all of [Old Diamond's] property and assets, effective as of the Effective Date . . . ." See id. at MAXUS0061221, ¶ 2.

58. New Diamond treated the distribution of the DS E&P, DS R&M and DS Coal stock to New Diamond as a reorganization under Section 368(a)(1)(D) of the Internal Revenue Code. See Ex. 50 at MAXUS3834653, ¶ 4.

E. New Diamond Continued the Business Operations of Old Diamond.

1. In public filings, "Diamond Shamrock Corporation" was represented as the same corporation before and after the reorganization.

59. After the 1983-84 reorganizations, New Diamond continued the business of Old Diamond as a "new hat" for Old Diamond. For instance, the two corporations contained virtually the same assets in their oil and gas and coal business segments, as evidenced by the Form 10-K filings of Old Diamond and New Diamond, and New Diamond operated these same assets in an uninterrupted manner. See Ex. 24 at MAXUS059210-15; Ex. 30 at MAXUS056387-88. Additionally, in its 1983 Form 8-B filing with the SEC, Maxus termed its creation and the reorganization of Old Diamond as a "transaction of succession" and described Old Diamond as a predecessor of New Diamond/Maxus. See Ex. 13 at MAXUS0019717, ¶ 3.

60. Similarly, in the specialty chemical business segment, Old Diamond reported its principal production plants in its 1982 Form 10-K. See Ex. 29 at OCCNJ0023943. The 1983 Form 10-K of New Diamond reported each and every one of these same assets. See Ex. 30 at MAXUS056397. The 1984 Form 10-K of New Diamond listed these same production plants, noting that New Diamond had sold three of the plants. Ex. 53 at OCCNJ0023878, ¶ 6.

61. The distinction between Old Diamond and New Diamond is completely absent from the operating and financial information provided in the 1983 Annual Report and Form 10-K of "Diamond Shamrock Corporation." Ex. 24 at MAXUS059217 (showing sales and operating revenues, operating profit, depreciation and other financial metrics for 1983, 1982 and 1981); Ex. 30 at MAXUS056390 (detailing "[d]rilling activities of the Company for the three years ending December 31, 1983" with no indication that a change in owner of the assets had occurred).

62. In fact, in its 1983 10-K filing, New Diamond defined "Company" to mean "'Diamond Shamrock Corporation' beginning on August 31, 1983 and 'Diamond Shamrock Chemicals Company' (formerly named Diamond Shamrock Corporation and sometimes referred to herein as 'Diamond Chemicals') prior to August 31, 1983 . . . ." See Ex. 30 at MAXUS0056387, ¶ 1.

63. In its 1983 Annual Report, New Diamond discussed its history of successful operations, stating as follows: "The past year has been one of the most active and exciting in the history of Diamond Shamrock," and that "[t]oday's Diamond Shamrock has been re-positioned as an energy company . . . . Over the past five years, we have assembled an inventory of oil, natural gas and coal prospects that hold exciting potential for future earnings." See Ex. 24 at MAXUS0059184-86.

64. The report chronicled the continued operations of a large, well-established entity with continuing operations in numerous industries. Id. at MAXUS0059190-206.

65. Similarly, in its 1984 Annual Report, New Diamond congratulates itself on its "rich and varied past" upon entering its "75th year[.]" See Ex. 26 at MAXUS0061649, ¶ 1.

2. New Diamond also represented to courts that it was, in reality, the continuation of Old Diamond.

66. Leading up to the reorganization, Old Diamond retained Kidder Peabody and Co. Inc. ("Kidder Peabody") to advise it regarding the acquisition of Natomas. See Ex. 27 at MAXUS0049783, ¶ 2.

67. Following the acquisition, New Diamond filed suit against Kidder Peabody, a Kidder Peabody employee named Martin Siegel, and Ivan Boesky, alleging that Siegel gave Boesky confidential information about the upcoming acquisition and that Boesky purchased

substantial amounts of Natomas stock, driving up the price Old Diamond was required to pay for Natomas. See id. at MAXUS0049784.

68. Boesky moved for judgment on the pleadings, based on an argument that Maxus had acquired Natomas, therefore the true plaintiffs were the Old Diamond shareholders who had become New Diamond's shareholders. See id. at MAXUS49808.

69. In a detailed response to this argument, New Diamond explained that Old Diamond had acquired Natomas, and it created New Diamond as "simply one of the vehicles" for achieving the acquisition. See id. at MAXUS0049791, ¶ 2. New Diamond argued that, in spite of all the technical transactions, the "real" restructuring resulted in Old Diamond sitting atop the corporate family tree as New Diamond. Ibid.

70. New Diamond further explained that the officers and directors moved from Old Diamond to New Diamond, that the stockholders went from Old Diamond to New Diamond, that the assets went from Old Diamond to New Diamond, and that the corporate name—Diamond Shamrock Corporation—went from Old Diamond to New Diamond. Id. at MAXUS0049790-91.[5]

71. Seeking a result that would disregard the technical corporate form it had set up, New Diamond urged the court to give effect to "corporate reality" – not technicalities. See Ex. 27 at MAXUS0049808. New Diamond even argued that placing New Diamond instead of Old Diamond at the top of the corporate tree, as the purchaser of Natomas, "would elevate form over substance in a manner contrary to Delaware law." Id. at MAXUS0049809. And, in the footnote following this statement, New Diamond quoted the following language: "Where one person has

[5] New Diamond told this story in more than one court. The parties to the Kidder Peabody litigation were also before the Delaware Chancery Court, arguing issues of corporate law. There, New Diamond recited the same facts and concluded as follows: "In short, it is plain that Old Diamond Shamrock agreed to acquire, and acquired Natomas in 1983." See Ex. 52 at MAXUS0209099, ¶ 3.

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." Ibid.

F. New Diamond's Sale of DSCC and Efforts to Avoid Responsibility for Old Diamond Required by the SPA.

72. Beginning in March 1984, Old Diamond executed the first of several Administrative Consent Orders ("ACO") requiring it to remediate the Lister Site and address contamination resulting therefrom. See Ex. 54 at MAXUS3081825-33. A second ACO was executed on December 20, 1984 requiring additional remediation and investigation of the Lister Site and related contamination. See Ex. 55 at MAXUS0208496-502.

73. Old Diamond and later DSCC[6] also sought insurance coverage to cover property damage claims brought against it by landowners near the Lister Site and for a settlement of the Agent Orange litigation related to the Lister Site. Diamond Shamrock Chemicals Co. v. Aetna Cas. Sur. Co., 268 N.J. Super. 167 (App. Div. 1992).

1. New Diamond/Maxus's sale of DSCC and indemnification of OCC.

74. In early 1986, New Diamond (soon to be known as Maxus) began to market the remnant of Old Diamond containing the chemical assets—DSCC—and an affiliate of Occidental Chemical Corporation ("OCC") emerged as a likely buyer. In an April 1986 letter, Maxus assured OCC that Maxus would retain certain of DSCC's environmental liabilities in any sale. See Ex. 56 at OCCNJ0001213-14. Specifically, Maxus assured OCC that while some environmental liabilities would pass to the buyer with DSCC's stock,

> [l]iabilities for cleanup costs mandated by any environmental protection law or regulation are excluded to the extent they arise out of or relate to . . . any site now owned by Diamond Shamrock

[6] In this motion, Plaintiffs refer to the corporation named Diamond Shamrock Corporation as "Old Diamond" to denote the integrated corporation containing the exploration and production, refining and marketing, coal, corporate and chemical assets, and "DSCC" to denote the same corporation after the exploration and production, refining and marketing, coal and corporate assets were transferred out of the corporation to New Diamond.

> or DSCC at which manufacturing operations have been permanently abandoned and . . . any site not now owned by Diamond Shamrock or DSCC which has been or may within three years from the date of closing be designated as a Superfund site. . . . [See id. at OCCNJ0001214, ¶ 3.]

75. Maxus also stated that "[a]ll litigation arising out of DSCC's manufacturing operations at 80 Lister Avenue, Newark, New Jersey, and any other sites where manufacturing operations have been permanently abandoned" would not be the responsibility of DSCC's buyer. Ibid. at ¶ 3(b).

76. In keeping with the April 1986 letter, as part of the September 4, 1986 Stock Purchase Agreement by which OCC acquired DSCC (the "SPA"), Maxus agreed to indemnify OCC for certain environmental liabilities. See Ex. 57 at OCCNJ0000344-49; Maxus Energy Corp. v. Occidental Chemical Corp., 244 S.W.3d 875 (Tex. App.—Dallas 2008, pet. denied).

77. Among the environmental liabilities from which Maxus agreed to indemnify OCC were those related to "Superfund Sites," "Inactive Sites," and "Historical Obligations." See Ex. 57 at OCCNJ0000346-49. Significantly, in July 1987, Maxus executed an agreement specifying that the Lister Site is an "Inactive Site" under the SPA and that OCC is entitled to indemnification under that provision for Lister Plant-related liabilities. See Ex. 58 at OCCNJ0022991, ¶ 4. With regard to third party beneficiaries, the SPA provided:

> Article XII. Section 12.06 Third Parties. Except as specifically set forth or referred to herein (including, without limitation, Articles IX and X and Section 12.03 hereof), nothing herein expressed or implied is intended or shall be construed to confer upon or give any Entity,[7] other than the parties hereto and their successors and permitted assigns, any rights or remedies under or by reason of this Agreement. [Ex. 57 at OCCNJ0000373.]

[7] Entity is a defined term in the SPA. The definition does not include governmental agencies. But elsewhere in the SPA, it is clear that governmental agencies such as the DEP are considered to be an "Entity" in the SPA. See Ex. 57 at OCC0000344, SPA at Section 9.03(a) (indemnifying parties for claims "by any Entity, including without limitation, any Governmental Agency.…").

Moreover, Section 12.11 (entitled Historical Obligations), although not specifically mentioned above, requires Maxus to obtain "amendments, novations, releases, waivers, consents or approvals necessary to have each of the DSCC Companies released from its obligations and liabilities under the Historical Obligations" and to "remain in compliance with its … Historical Obligations." Ex. 57 at OCC0000375-76. The Lister Site a/k/a "Newark" was listed as an Inactive Site for which Maxus would indemnify Maxus. Ex. 57 at OCC0001202-03.

78. Maxus, DSCC, and OCC were aware that the liabilities associated with the Lister Site were real and significant and that Maxus's indemnification of them was a material consideration in the sale of DSCC to OCC. See Ex. 56 at OCCNJ0001214; Ex. 128, OCC's Responses to Plaintiffs' Track III Requests for Admission, at Request No. 3 (stating that OCC admits that it and Maxus were aware of potential Environmental Liabilities associated with discontinued operations at the Lister Plant).

79. OCC would not have purchased DSCC from Maxus if it thought Maxus would not cover DEP's claims relating to the Lister Site. See Ex. 128, OCC's Responses to Plaintiffs' Track III Requests for Admission, at Request No. 1. Moreover, OCC admits that it expected Maxus to provide its necessary guarantees to cover the Historical Obligations related to the Lister Site. See id., at Request No. 6.

80. Consistent with the April 1986 letter, and as part of the SPA, Maxus was appointed DSCC's (now OCC's) "attorney in fact, for it in its name, place and stead … to pursue in its name in any reasonable manner … any Existing Claim." See Ex. 59 at OCCNJ0018321, ¶ 1. Under the SPA, an "Existing Claim" expressly included the Aetna litigation, which related specifically to the Lister Site. See Ex. 57 at OCCNJ0000324, ¶ 1. As such, during the Aetna litigation, in-house counsel for Maxus represented DSCC. See Ex. 60 at MAXUS0964733-34.

81. Maxus also represented to the DEP that it was the party that was handling the defense of the Lister Site liabilities under the SPA. See Ex. 67 at MAXUS3061401. Maxus also provided the DEP with a section of the SPA that gave Maxus the option to directly assume the defense of indemnified liabilities, but Maxus refused to provide the DEP with a full copy of the SPA or the indemnification provisions thereof. See Ex. 129 at MAXUS0694274-75.

82. For the years following the SPA, Maxus viewed the discharges from the Lister Site as being discharges of Maxus, and it viewed the associated liabilities as Maxus's liabilities. For example, in its 1987 and 1988 10-K reports, issued after the September 1986 SPA, Maxus reported that "[t]he Company was a defendant in a large number of lawsuits arising from exposure of military personnel in Vietnam to 'Agent Orange' manufactured by the Company and other companies which allegedly contained some amount of dioxin." See Ex. 61 at OCCNJ0003464, ¶ 2; Ex. 62 at OCCNJ0003693 (emphasis added). Maxus even referred to the Lister Plant as being "its" plant. See Ex. 62 at OCCNJ0003694, ¶ 2 (noting that "[o]ne major action remains of the several lawsuits filed against the Company in New Jersey state courts relating to its former Newark, New Jersey plant") (emphasis added).

83. In its 1989 10-K, Maxus describes its obligation to indemnify OCC for environmental liabilities:

> In connection with the sale of the Company's Chemical subsidiary, [DSCC], to [OCC] in 1986, the Company agreed to indemnify [DSCC] and [OCC] from and against certain liabilities relating to the business or activities of [DSCC] prior to September 1986 closing date (the "Closing Date"), including certain environmental liabilities relating to certain chemical plants and waste disposal sites used by [DSCC] prior to the Closing Date. [See Ex. 63, OCCNJ0013532, ¶ 5.]

84. In the same filing, Maxus described its efforts to obtain insurance coverage for claims related to the Lister Plant:

> The insurance companies which wrote [DSCC's] and the Company's primary and excess insurance during the relevant periods have to date refused to provide coverage for [DSCC's] or the Company's cost of the personal injury and property damage claims related to the Newark plant, the cleanup of the Newark plant site, and other environmental claims, including remedial activities at chemical plant sites and disposal sites. In two actions filed in New Jersey state courts, the Company is conducting litigation against all of these insurers for declaratory judgments that it is entitled to coverage for these claims. [Id. at OCCNJ0013533, ¶ 1.]

85. Maxus's description of the Aetna litigation is accurate. While the plaintiff in the case was DSCC, Maxus attorneys appeared in the case and served as counsel for DSCC in the litigation. See Ex. 60 at MAXUS0964678-79. This was part of the structure of the SPA, which provided that Maxus would "act in the name and on behalf of DSCC" in the litigation. See Ex. 57 at OCCNJ0000325, ¶ 1.

86. While the SPA provides for Maxus's indemnification of OCC's expenses for the Lister Site, so that Maxus is financially responsible for the discharges from the Lister Site, Maxus had been overseeing remediation activities at the Lister Site on behalf of DSCC even before SPA negotiations began. See, e.g., Ex. 64 at MAXUS1323066; Ex. 65 at MAXUS1640975.

87. Indeed, Maxus's role with respect to the Lister Site has not been simply that of a financial indemnitor. That is, Maxus is not only repaying OCC for expenses that OCC has incurred associated with the Lister Site. Instead, pursuant to the SPA and on behalf of OCC, Maxus has also paid the DEP directly for expenses incurred in the remediation of the Lister Site. See Ex. 66 at OCCNJ0022724, ¶ 1; Ex. 85 at MAXUS0047560, ¶ 1.

88. On August 12, 1987, Maxus wrote a letter to DEP explaining Maxus's post-SPA role with respect to the Lister Plant: "Under the agreement by which the stock of [DSCC] was sold, [Maxus] agreed to administer the consent orders relating to the Newark site. Accordingly,

the role of Maxus with respect to the Newark site is to respond to the consent orders on behalf of [OCC]." See Ex. 67 at MAXUS3061402, ¶ 3.

89. In order to effectuate its control over the implementation of remedial measures, a succession of Maxus employees have served as project manager during site remediation activities:

- Maxus employee Edward Noble was Manager for the Lister Site in 1987. See Ex. 68 at MAXUS0590769.
- Maxus employee Hadley Bedbury was designated as Project Coordinator with the EPA with responsibility for implementation of the work under the consent decree covering the Lister Site in 1989. See Ex. 69 at MAXUS3061495, ¶1.
- Maxus employee Richard McNutt was Project Manager in the early 1990's. See Ex. 70 at NJDEP0373163.

90. In addition, for over twenty years, Maxus has retained, controlled and paid the contractors conducting the remediation of the Lister Site. See, e.g., Ex. 73 at MAXUS0395932. In sum, for all intents and purposes, Maxus has been, and continues to be, responsible for the liabilities stemming from Old Diamond's operations at the Lister Plant.

2. Maxus has tried to avoid its obligations under the SPA.

91. As required under the terms of the SPA, OCC sent numerous requests for indemnification for Agent Orange litigation. See, e.g., Ex. 74 at OCCNJ0127549.

92. In 1999 and thereafter, Maxus began rejecting claims for indemnification, claiming that the indemnification only lasted 12 years. See, e.g., Ex. 75 at OCCNJ0127247.

93. OCC sued Maxus in Texas state court for breach of contract and sought a declaration that Maxus must indemnify it for Agent Orange and other liabilities beyond the 12-year limit asserted by Maxus. See Ex. 76 at REPSOL0003550.

94. The parties litigated the case through a jury verdict. The jury found for OCC. Maxus appealed, but the verdict was affirmed by the Court of Appeals. See Ex. 77, Maxus Energy Corp. v. Occidental Chemical Corp., 244 S.W.3d 875, 878 (Tex. App. 2008, pet. denied).

95. Maxus sought review by the Texas Supreme Court, but the court declined to hear the appeal. See Ex. 78.

96. Maxus took a similar position in this litigation and required OCC to file a cross claim to obtain indemnification. The Court has already found that OCC is entitled to indemnification from Maxus for the liabilities associated with the Lister Site. See Order, filed July 19, 2012.

G. Maxus Has Used the Reorganization to Evade Responsibility for Old Diamond Liabilities.

97. Maxus has used the fact that it was formed in 1983 as a defense in numerous matters in which plaintiffs, including the DEP, have sought to hold Maxus liable for Old Diamond's or DSCC's liabilities. Maxus even assured the DEP that the reorganization took place "for business reasons unrelated to" the environmental liabilities. Ex. 79 at MAXUS3061108, ¶ 1; Ex. 80 at OCCNJ0137582-83.

98. Maxus described its relationship to DSCC as "slender" in a 1995 letter to the DEP in which Maxus counsel, William Warren, was seeking to extricate Maxus from another New Jersey environmental problem caused by Old Diamond's activities in New Jersey. See Ex. 81 at MAXUS2539029, ¶ 1, MAXUS2539035, ¶ 3.

99. However, when Maxus needed to establish its close relationship to Old Diamond to gain a litigation advantage, Maxus cited to the complete overlap in officers and directors and the resulting shared control over both corporations by this management. See Ex. 27 at MAXUS0049791, ¶ 1; Ex. 52 at MAXUS0209115, ¶ 3.

100. Maxus also has taken contradictory positions on other issues, including the characterization of the massive promissory notes that were given by DS E&P and DS R&M in exchange for Old Diamond's assets. When it would lead to a reduced federal tax bill, Maxus argued that the notes were equity because there was no intention that the notes would be repaid or that any interest would be paid on the notes. See Ex. 31 at MAXUS3819658, ¶ 2. When DS E&P, by then named Midgard Energy, appeared in front of the Texas tax authorities, however, Maxus's position changed by arguing that the same notes were not equity because that position was the one that would result in lower taxes. See Ex. 82 at MAXUS3202515, ¶¶ 2-4.[8]

II. MAXUS'S RELATIONSHIP WITH TIERRA[9]

A. Tierra, as It Is Now Known, Is a Spill Act Liable Party.

101. Tierra Solutions, Inc. ("Tierra") is the current name of the current owner of the Lister Site. This corporate entity (known by various names over time) has owned the Lister Site since August 28, 1986. See Ex. 86 at OCCNJ0014001-06; Ex. 87 at OCCNJ0011274-77; Ex. 28, Track III Admissions, at Request No. 1; Ex. 88, Maxus's Stipulation of Facts Regarding Track III Alter Ego Claim in Lieu of Corporate Representative Deposition ("Maxus Stipulation of Facts"), at ¶¶ 1-4, 7.

102. Tierra was formed in March 1986 as Diamond Shamrock Process Chemicals, Inc. ("DSPC"), a subsidiary of DSCC. See Ex. 89 at MAXUS044390-03; Ex. 88, Maxus Stipulation

[8] DS E&P became Maxus Exploration Company, which in turn became Midgard Energy. See Ex. 83 at REPSOL0007533; Ex. 84 at REPSOL0006865.

[9] Plaintiffs' Track III alter ego claim is limited to a specific time period, from the time of Tierra's incorporation in March 1986 until the end of 1994 (the "Time Period"). The Time Period was negotiated by the Track III Parties and made part of the Track III Trial Plan entered by the Court, see Consent Order on Track III Trial Plan filed November 18, 2011, so that Track III discovery and claims would not interfere with Track IV. Accordingly, unless specifically stated otherwise, Statement of Facts ¶¶ 101 - 170 are limited to the Time Period.

of Facts, at ¶ 1; Ex. 90, Tierra's Objections and Responses to Plaintiffs' First Set of Interrogatories on Successor, Contract and Indemnification Issues, at Request Nos. 2, 15.

103. Just three months later in July 1986, before being capitalized, DSPC changed its name to Diamond Shamrock Chemical Land Holdings ("DSCLH"). See Ex. 91 at MAXUS0443862-64; Ex. 88, Maxus Stipulation of Facts, at ¶ 2; Ex. 90, Tierra's Objections and Responses to Plaintiffs' First Set of Interrogatories on Successor, Contract and Indemnification Issues, at Request Nos. 2, 15.

104. Its name was changed again in December 1987 to Chemical Land Holdings, Inc. ("CLH"), before eventually becoming known as Tierra Solutions, Inc. ("Tierra") in February 2002. For clarity, these entities are referred to as "Tierra" unless specifically stated otherwise. See Ex. 92 at MAXUS0443848-54; Ex. 93 at MAXUS0443833-35; Ex. 88, Maxus Stipulation of Facts, at ¶¶ 3-4; Ex. 90, Tierra's Objections and Responses to Plaintiffs' First Set of Interrogatories on Successor, Contract and Indemnification Issues, at Request Nos. 2, 15.

105. While Tierra was originally formed by DSCC, its stock was transferred only months later on September 4, 1986 to DS Corporate, Maxus's former subsidiary, at the time of and in connection with the SPA. See Ex. 90, Tierra's Objections and Responses to Plaintiffs' First Set of Interrogatories on Successor, Contract and Indemnification Issues, at Request No. 2; Ex. 57 at OCCNJ0000763-66; Ex. 94 at OCCNJ0018401, ¶ (v); Ex. 95, Deposition Testimony of David Rabbe, at p. 56:1-12.

106. In 1986, when Maxus and OCC were negotiating the SPA that would allow OCC to buy DSCC's stock, one of the issues addressed in the negotiations and in the ultimate transaction was legacy environmental liability. The SPA between OCC and Maxus was dated as

of September 4, 1986. See Ex. 57 at OCCNJ0000346-49. Environmental legacy liability, including legacy liability for the Lister Site, was addressed in the SPA. See id.

107. DS Corporate ultimately became Maxus. See Ex. 96, Responses of Maxus and Tierra to Plaintiffs' Second Set of Interrogatories, at Request No. 19.

108. Therefore, Tierra became a wholly owned subsidiary of the entity that became Maxus at the time Maxus was assuming the environmental responsibility for the Lister Site. See, supra, Statement of Facts, at ¶¶ 105-107.

109. Tierra was recently found by this Court to be liable under the Spill Act based on its ownership of the Lister Site. See Order Granting Plaintiffs' Motion for Partial Summary Judgment Against Tierra Solutions, Inc., dated August 24, 2011.

B. Tierra's Function Was to Hold Title to Real Property, Primarily Contaminated Real Property, for the Benefit of Maxus.

110. Tierra was formed as a land holdings company as part of Maxus's "overall environmental defense strategy" relating to the Lister Site and other legacy contaminated sites. See Ex. 97 at YPF0210163, ¶ 3; Ex. 98 at MAXUS0443916-18.

111. Tierra's function during the Time Period, as described by Maxus and Tierra, was to hold title to certain real property, principally former chemical plants operated by Old Diamond, some of which were contaminated. See Ex. 28, Track III Admissions, at Request No. 2; Ex. 88, Maxus Stipulation of Facts, at ¶ 7.

112. The real property Tierra held title to during the Time Period consisted of (i) the former chemical plant site located at 80 Lister Avenue and 120 Lister Avenue in Newark, New Jersey (the Lister Site), (ii) the former chemical plant site located in Kearny, New Jersey (the "Kearny Site"), (iii) a large block of land that included the former chemical plant site located in Painesville, Ohio (the "Painesville Site"), and uncontaminated contiguous parcels not used for

chemicals manufacturing, and (iv) certain brine fields associated with the operations at the Painesville Site. The Lister Site, the Kearny Site and the Painesville Site are collectively referred to as the "Sites." See Ex. 88, Maxus Stipulation of Facts, at ¶ 7.1.

113. Maxus designated Tierra to hold title to the Sites. Ex. 88, Maxus Stipulation of Facts, at ¶ 7.2.

114. Termed as "an intra-holding company transfer of title," the Sites were transferred by DSCC to Tierra just before the effective date of the SPA so that the Sites were not transferred to OCC but were, instead, "kept in the Diamond Shamrock family." See Ex. 88, Maxus Stipulation of Facts, at ¶ 7.3; Ex. 95, Deposition Testimony of David Rabbe, at p. 56:1-12; Ex. 67 at MAXUS3061401-02.

115. For instance, on or about August 28, 1986, Tierra acquired title to 80 and 120 Lister Avenue from DSCC purportedly "for the sum of TEN and 00/100 ($10.00) DOLLARS" each. See Ex. 86 at OCCNJ0014001-06; Ex. 87 at OCCNJ0011274-77; Ex. 28, Track III Admissions, at Request No. 7.

116. At the time Tierra acquired title to the Sites, Maxus and Tierra knew the Sites were subject to significant remedial measures that could cost millions of dollars. See Ex. 88, Maxus Stipulation of Facts, at ¶ 7.4.

117. The Sites were transferred to Tierra to "facilitate Maxus's remediation" of them "on OCC's behalf in response to claims for indemnity under the SPA." See Ex. 28, Track III Admissions, at Request No. 14; Ex. 95, Deposition Testimony of David Rabbe, at p. 60:9-22.

118. Tierra never charged Maxus any kind of rent, access fees or service fees in connection with any activities that it performed to "facilitate Maxus's remediation of former DSCC properties on OCC's behalf in response to claims for indemnity under the SPA." See Ex.

28, Track III Admissions, at Request No. 14; Ex. 88, Maxus Stipulation of Facts, at ¶ 13; Ex. 95, Deposition Testimony of David Rabbe, at pp. 68:6-14, 68:24-69:7.

119. In 1996, Dexter Peacock, counsel for Maxus, clarified and further described this business purpose when he explained it to YPF, S.A. He stated that Tierra's assets "consist[ed] mainly of contaminated properties previously used in connection with discontinued operations of [Maxus's] former chemicals business or purchased by Maxus or its predecessors as a part of [Maxus's] overall environmental defense strategy." See Ex. 97 at YPF0210163, ¶ 3.

120. During the Time Period, "Tierra conducted no revenue-generating or income-producing business operations … other than the sale of certain parcels associated with the Painesville Site." See Ex. 28, Track III Admissions, at Request Nos. 2, 14; Ex. 88, Maxus Stipulation of Facts, at ¶ 9; Ex. 95, Deposition Testimony of David Rabbe, at pp. 63:16-64:5.

121. Further, during the Time Period, "Tierra never intended to generate revenue or earn a profit … from business operations, beyond selling certain parcels associated with the Painesville Site." See Ex. 28, Track III Admissions, at Request Nos. 15-16; Ex. 88, Maxus Stipulation of Facts, at ¶ 10; Ex. 95, Deposition Testimony of David Rabbe, at p. 64:6-19.

122. Tierra had no bank accounts in its name during the Time Period. See Ex. 88, Maxus Stipulation of Facts, at ¶ 11; Ex. 95, Deposition Testimony of David Rabbe, at p. 65:15-17.

123. Tierra had no employees during the Time Period. See Ex. 88, Maxus Stipulation of Facts, at ¶ 8; Ex. 95, Deposition Testimony of David Rabbe, at p. 28:16-18.

124. Tierra had relatively nominal expenses during the Time Period, such as property taxes, which were paid using funds supplied by Maxus. See Ex. 28, Track III Admissions, at

Request No. 4; Ex. 88, Maxus Stipulation of Facts, at ¶ 12; Ex. 95, Deposition Testimony of David Rabbe, at pp. 64:20-65:14.

125. There was no agreement by which Tierra was to reimburse Maxus for expenses paid on behalf of Tierra during the Time Period. See Ex. 88, Maxus Stipulation of Facts, at ¶ 14; Ex. 95, Deposition Testimony of David Rabbe, at pp. 67:19-68:5.

126. Moreover, during the Time Period, Tierra did not reimburse Maxus for any of the expenses that Maxus paid on Tierra's behalf. See Ex. 95, Deposition Testimony of David Rabbe, at pp. 67:19-68:5.[10]

127. During the Time Period, Maxus filed consolidated tax returns on behalf of itself and its subsidiaries, including Tierra. Tierra never filed a separate tax return from the time of incorporation until at least 1995. See Ex. 88, Maxus Stipulation of Facts, at ¶ 18; Ex. 95, Deposition Testimony of David Rabbe, at pp. 66:13-67:4; Ex. 99 at MAXUS3414515-530; Ex. 100 (Exhibit 21 to the Deposition of Dave Rabbe).

C. Tierra Was Undercapitalized.

128. In its Certificate of Incorporation, Tierra had authority to issue 1,000 shares of Common Stock with a $1.00 par value. See Ex. 89 at MAXUS0443902, ¶ 4.

129. At the time of its name change to DSCLH in July 1986, Tierra "[had] not received any payment for any capital stock[.]" See Ex. 91 at MAXUS0443863, ¶ 4.

[10] Maxus and Tierra both claim that, while no money changed hands for reimbursements, Maxus tracked inter-company transfers as credits and debits. See Ex. 88, Maxus Stipulation of Facts, at ¶ 14; Ex. 95, Deposition Testimony of David Rabbe, at pp 61:21-62:19 (explaining that there were no employees of Tierra, so tracking costs were performed by employees of Maxus or officers of Tierra). By the end of 1994, Tierra had accrued $2,896,729.09 in intercompany payables, "nominal expenses" paid by affiliated companies that had not been offset by "credits." See Ex. 101 at MAXUS3188533-34.

130. Documents indicate that, at some point between July 1986 and 1994, Tierra issued 1,000 shares of Common Stock. See Ex. 88, Maxus Stipulation of Facts, at ¶ 6; Ex. 102 at YPF-AK-0041527.

131. A corporate resolution also indicates that only 10 shares of Common Stock were transferred by Tierra's initial sole shareholder, DSCC, to DS Corporate at the time of the SPA. See Ex. 94 at OCCNJ0018401, ¶ (v); Ex. 95, Deposition Testimony of David Rabbe, at pp. 51:22-52:18, 52:19-53:4.

132. As such, it is unclear when Tierra was initially capitalized. Regardless, Tierra was initially capitalized with between $10.00 and $1,000. See, supra, Statement of Facts, at ¶¶ 130-131. Tierra was not capitalized with sufficient funds to satisfy the liabilities it faced as landowner of the Sites. See, infra, Statement of Facts, at ¶¶ 134-147.

133. Also, Tierra never paid dividends to any shareholder from 1986-1994. See Ex. 28, Track III Admissions, at Request No. 13; Ex. 95, Deposition Testimony of David Rabbe, at p. 67:5-18; Ex. 88, Maxus Stipulation of Fact, at ¶ 19.

D. The Primary Assets of Tierra When It Was Formed Were the Valueless Lister Site and Other Similarly Contaminated Properties.

134. During the Time Period, Tierra had relatively nominal expenses, such as property taxes, which were paid using funds supplied by Maxus. See Ex. 28, Track III Admissions, at Request No. 4; Ex. 88, Maxus Stipulation of Facts, at ¶ 12; Ex. 95, Deposition Testimony of David Rabbe, at pp. 64:20-65:14.

135. In addition to these nominal expenses, Tierra also owned real property—primarily the Sites—that were burdened with significant environmental liabilities. In fact, the Sites "were subject to significant remedial measures costing millions of dollars." See Ex. 95, Deposition Testimony of David Rabbe, at p. 71:3-24; Ex. 88, Maxus Stipulation of Facts, at ¶ 7.4.

136. It was never intended that Tierra would ever be able to satisfy the cost of remediating the Sites. And at no time during the Time Period could Tierra have paid the costs to remediate the Sites that Tierra owned. See Ex. 95, Deposition Testimony of David Rabbe, at p. 71:3-24; Ex. 88, Maxus Stipulation of Facts, at ¶¶ 16-17.

137. The Sites were Tierra's primary assets, and those assets had a high negative net worth. See, infra, Statement of Facts, at ¶¶ 138-147.[11]

138. Multiple appraisals over the years have established a negative net worth for the Lister Site. In November 1983, an appraiser hired by Maxus, David T. Houston Co., valued the Lister Site at $676,250, under the assumption that "no environmental or legal problems" are associated with the property. See Ex. 103 at MAXUS0399753-764.

139. In September 1984, Maxus estimated the costs associated with the cleanup at the Lister Site and associated areas in Newark to be somewhere between $20.0 million – $29.5 million, assuming there were "no substantial ground water or river problems and use of encapsulation or contamination on-site." See Ex. 104 at MAXUS2286859-61. According to Tierra's corporate representative, David Rabbe, Tierra could not have covered these costs at any time during the Time Period. See Ex. 95, Deposition Testimony of David Rabbe, at pp. 72:18-73:16.

140. On August 11, 1986, New Diamond/Maxus, on behalf of DSCC (the property was transferred to Tierra on August 28, 1986), appealed the real property valuation of $191,400 for the Lister Site for 1986, claiming the real property had no value for tax purposes because "[t]his

[11] Besides the Sites, Maxus and Tierra claim that Tierra's assets also consisted of (i) certain uncontaminated parcels associated with the Painesville Site, (ii) worthless and/or depreciating buildings and equipment associated with former plant operations at the Sites, and (iii) trailers and other fixtures used in Site remediation that were purchased by Maxus. See Ex. 88, Maxus Stipulation of Facts, at ¶ 15; Ex. 99 at MAXUS3414515-530; Ex. 100, Exhibit 21 to the Deposition of Dave Rabbe.

property contains dioxin in the soil and in the subject building. The property is completely encapsulated and quarantined by order of the NJDEP. It is unusable for any purpose, unsaleable [sic] and the cost to cure the present condition is far above the value set by the assessor." See Ex. 105 at MAXUS0478710-14. Mr. Rabbe agreed with these statements. See Ex. 95, Deposition Testimony of David Rabbe, at pp. 74:3-75:7.

141. On September 11, 1986, after the Lister Site was transferred to Tierra, DSCC filed a Statement of Facts and Memorandum of Law in support of its appeal of the real property valuation. In that pleading, DSCC stated that it purchased 80 Lister Avenue from Marisol, Inc. for $676,000, but that purchase price did not represent the fair market value of the property because the purchase was intended "only to free Marisol from continuing liability and to dispose of litigation claims by Marisol against Diamond Shamrock." See Ex. 106 at PL No. 23126, at p. 3 ¶ 2.[12]

142. DSCC further argued in support of its appeal that "the cost to cure [the conditions at the Lister Site] will far outstrip the assessed value on the property. Pursuant to the March, 1984 Order of the NJDEP, a letter of credit for $12 million was committed to the remedial efforts by Diamond Shamrock, while alternatives which may be implemented range as high as $188 million." See Ex. 106 at PL No. 23126, at p. 3 ¶ 4.

143. On behalf of Tierra, in 1991, Maxus received tax refunds from the City of Newark after Maxus successfully argued that the Lister Site should have a negative valuation for property tax purposes. See Ex. 107 at MAXUS2318102-06; Ex. 95, Deposition Testimony of David Rabbe, at pp. 79:16-80:13 (acknowledging that the tax refund was sent to a property tax department on behalf of DSCLH, but that DSCLH had no property tax department at that time).

[12] Maxus had asserted the attorney-client privilege protected this document from discovery. Maxus has since withdrawn its claim of privilege.

144. On April 6, 1999, at the request of Tierra, but by contract with Maxus, Hannoch Appraisal Company valued 80-120 Lister Avenue at a $-17,125,000 as of March 9, 1999. See Ex. 108 at MAXUS3141634-98. The value of the Lister Site "as if clean" was estimated at $875,000. Near term remedial costs were estimated at $18,000,000. See id. at MAXUS3141639, ¶ 2.

145. According to the appraisal: "Property representatives estimate that approximately $32,000,000 has been spent in containment efforts to date, with at least another estimated $18,000,000 in near term costs anticipated. These expenditures do not clean the site but serve only to encapsulate and monitor the contamination. It is unknown what … the ultimate cost to clean the site would be." See ibid.

146. As of 1999, Maxus had spent over $52 million remediating the Lister Site, over $60 million remediating the Kearny Site, and over $17 million remediating the Painesville Site. See Ex. 109 at AA-YPF-0039067.

147. At no time during the Time Period could Tierra have paid these costs to remediate the Sites. See Ex. 95, Deposition Testimony of David Rabbe, at p. 71:3-24; Ex. 88, Maxus Stipulation of Facts, at ¶¶ 16-17. By 2008, Maxus, Tierra and their Repsol YPF, S.A. American affiliates had a cumulative net worth of negative $750 million. See Ex. 114, September 5, 2008 Opinion of Judge Goldman, at p. 27.

E. Maxus Controlled Tierra and Tierra Operated Solely For the Benefit of Maxus.

148. Because Tierra was not adequately capitalized, did not pay dividends to its shareholders, had no bank account or employees of its own, had no income-generating activities or plans (other than the sale of certain parcels associated with the Painesville Site), and functioned merely to facilitate Maxus's remediation activities, it served the business interests and defense strategies of Maxus, not Tierra. See, supra, Statement of Facts, at 110-133.

149. In fact, Maxus admits that "during the period in question, and thereafter, Tierra received all or substantially all of its funding from Maxus" and "Tierra had relatively nominal expenses, which Maxus and Tierra admit were paid using funds supplied by Maxus." See Ex. 28, Track III Admissions, at Request No. 4; Ex. 88, Maxus Stipulation of Facts, at ¶ 12; Ex. 95, Deposition Testimony of David Rabbe, at pp. 64:20-65:14.

150. Even activities incidental to land ownership, such as the payment of taxes and the negotiation of lease agreements, were carried out by Maxus "on behalf of Tierra" since Tierra had no employees or bank accounts of its own. See Ex. 110 at MAXUS0072310; Ex. 111 at PL No. 108438;[13] Ex. 95, Deposition Testimony of David Rabbe, at p. 115:1-4.

151. While Tierra held title to the Lister Site, as part of the "agreement by which the stock of [DSCC] was sold, Diamond Shamrock (now Maxus) agreed to administer the consent orders relating to the Newark site. Accordingly, the role of Maxus with respect to the Newark site is to respond to the consent orders on behalf of [OCC]." See Ex. 67 at MAXUS3061401-02; Ex. 112 at NJDEP00370030-31. As such, it was Maxus, not Tierra as landowner, which conducted the significant ongoing activities at the Lister Site. See Ex. 67 at MAXUS3061401-02.

F. All of Tierra's Officers and Directors Also Held Positions with Maxus and/or DS Corporate.

152. According to Maxus, each director of Tierra from 1986 – 1995 was appointed by Tierra's sole shareholder, DS Corporate. Tierra's directors appointed all the officers of Tierra during this time. Each officer and director of Tierra also held positions with Maxus and/or DS Corporate during this time period. See Ex. 88, Maxus Stipulation of Facts, at ¶ 21.

[13] Maxus had asserted the attorney-client privilege protected this document from discovery. Maxus has since withdrawn its claim of privilege.

G. Maxus Knew of Landowner Liability When It Created Tierra to Hold Title to Old Diamond's Legacy Contaminated Properties.

153. The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") was passed in December 1980. 42 U.S.C. § 9601 et seq. Its purpose was "to promote the timely cleanup of hazardous waste sites and to ensure that the costs of such cleanup efforts were borne by those responsible for the contamination." Burlington Northern and Santa Fe Ry. Co. v. United States, 556 U.S. 599, 129 S. Ct. 1870, 1872 (2009). From its inception, CERCLA imposed liability on a current owner of contaminated property. 42 U.S.C. § 9607(a).

154. Likewise, the New Jersey Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et seq. (the "Spill Act") was established in 1976. Under the Spill Act, "any person who has discharged a hazardous substance, or is in any way responsible for any hazardous substance, shall be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs no matter by whom incurred." N.J.S.A. 58:10-23.11g(c)(1). This Court has concluded that Tierra, as the current owner of the Lister Site who failed to qualify as an "innocent purchaser," is "in any way responsible" under the Spill Act for all cleanup and removal costs associated with the Lister Site. See Order Granting Plaintiffs' Motion for Partial Summary Judgment Against Tierra Solutions, Inc., dated August 24, 2011.

155. The Environmental Cleanup and Responsibility Act of 1983 ("ECRA"), N.J.S.A. 13:1K-6 et seq. was also established in New Jersey. ECRA complemented the Spill Act by imposing a self-executing duty to remediate contaminated property on the current owner or operator at the time of an industrial property sale or facility closure. In re Adoption of N.J.A.C. 7:26B, 128 N.J. 442, 446-47 (1992).

156. In April 1985, before Tierra acquired the Lister Site, New Diamond/Maxus understood the risk and potential liabilities of owning the Lister Site that ECRA imposed. In an

inter-company communication, Bill Hutton wrote to James Kelley, both of New Diamond/Maxus, explaining that "[t]he recent development (1984) by New Jersey (ECRA) to require cleanup of all manufacturing facilities before a sale can be made would now be a considerable liability to [Marisol] if he should attempt to sell on the open Market. It would cost him what it is going to cost us." See Ex. 113 at MAXUS0330031-32. Marisol was the then owner of 80 Lister Avenue. See id.

157. New Diamond/Maxus also understood the risk and potential liabilities of owning the Lister Site that CERCLA and the Spill Act imposed. On March 13, 1984, the DEP entered into an ACO with DSCC and Marisol, Inc. for the remediation of the Lister Site. See Ex. 54 at MAXUS3081825.

158. Moreover, on September 11, 1986, about the time the Lister Site was transferred to Tierra, DSCC filed a Statement of Facts and Memorandum of Law in support of its appeal of the Lister Site's real property valuation. In that pleading, DSCC stated that it purchased 80 Lister Avenue from Marisol, Inc. for $676,000, but that purchase price did not represent the fair market value of the property because the purchase was intended "only to free Marisol from continuing liability and to dispose of litigation claims by Marisol against Diamond Shamrock." See Ex. 106 at PL No. 23126, p. 3 ¶ 2, p. 5 ¶ 1.

159. In addition, under the ACOs signed by parties responsible for the Lister Site, the DEP required financial assurances in the amount of $12 million and $4 million to ensure that "funds will be available when needed" for the performance of remedial actions. See Ex. 115 at MAXUS3358669-78; Ex. 116 at OCCNJ0039641-53, 0039656-63; Ex. 117 at MAXUS2722861; Ex. 130 at MAXUS3081835.

160. Initially, these final assurances were provided by DSCC. See Ex. 115 at MAXUS3358669-78; Ex. 116 at OCCNJ0039641-53, 0039656-63; Ex. 130 at MAXUS3081835; Ex. 117 at MAXUS2722861.

161. However, after the Lister Site was transferred by DSCC to Tierra, the financial assurances were established on the account of Tierra. See Ex. 118 at MAXUS0376848-55; Ex. 116 at OCCNJ0039654 and OCCNJ0039673; Ex. 119 at OCCNJ0105827-28; Ex. 120 at MAXUS3061239-43; Ex. 121 at NJDEP00104376-77; Ex. 122 at NJDEP00074434.

162. According to David Rabbe, Tierra's corporate representative, the only connection Tierra had to the Lister Site, and consequently to the financial assurances it was obligated to provide, was as landowner. See Ex. 95, Deposition Testimony of David Rabbe, at pp. 108:12-109:18.

163. But, importantly, at no point during the Time Period did Tierra, by itself, have the funds to pay for remedial activities at the Lister Site or to cover the obligations to lenders providing the financial assurances. See Ex. 95, Deposition Testimony of David Rabbe, at p. 71:3-24; Ex. 88, Maxus Stipulation of Facts, at ¶¶ 16-17.

164. Tierra was only able to provide the financial assurances required by the DEP through a Guaranty dated April 2, 1987 stating that New Diamond/Maxus and Diamond Shamrock Exploration Company "fully and unconditionally guaranteed the obligations of [Tierra] in connection with the Letter of Credit." See Ex. 120 at MAXUS3061240, ¶ 1.

165. On October 23, 1989, Maxus, through its in-house environmental counsel Paul Herring, wrote to the DEP about the Kearny Site and Tierra's liability as landowner. See Ex. 123 at NJDEP00399962-72.

166. Mr. Herring wrote: "While [Tierra] may arguably be responsible for remediation of the [Kearny Site] to which it took title in 1986, it has no such liability with respect to sites to which DSCC chromite ore processing residue was transported 15 years or more before [Tierra] took title to the [Kearny Site] or, indeed, even came into existence." See id. at NJDEP00399963.

167. On January 24, 2001, William L. Warren, outside counsel to Maxus and Tierra in this litigation, wrote to Maxus and explained the reasons for Tierra's status as a responsible party with respect to the Kearny Site, as set forth in an April 1990 Administrative Consent Order. See Ex. 124 at AA-YPF-0038918-24.

168. Mr. Warren explained that Tierra was a "respondent [to the ACO] simply by virtue of its relatively recent acquisition of the former [DSCC] site (Diamond Site) in Kearny, New Jersey." See id. at AA-YPF-0038920, ¶ 3. "In short, the involvement of [Tierra] in the ACO at all times arises solely out of its ownership of the [Kearny Site] and is limited to that site." See id. at AA-YPF-0038921, ¶ 1.

169. Consequently, as Mr. Warren explained further, "both [Tierra] and Occidental have responsibility for the [Kearny Site]." See ibid. at ¶ 2. This was because, "[a]t the time the ACO was entered [in 1990], the prevailing view of the [DEP] was that [Tierra's] mere ownership of the [Kearny Site] gave rise to liability under [the Spill Act] with respect to that site because ownership made [Tierra] 'a person in any way responsible' for the [Kearny] Site." See id. at AA-YPF-0038921-22.

170. Mr. Warren concluded: "If you view the liability of Occidental as successor to Diamond Shamrock and the liability of [Tierra] arising solely from its acquisition of the [Kearny Site], the language of the ACO makes perfect sense as does the application of the Spill Act to these two companies." See id. at AA-YPF-0038923, ¶ 2.

Respectfully submitted,

MARC-PHILIP FERZAN
ACTING ATTORNEY GENERAL OF NEW JERSEY
Attorney for the Plaintiffs

By: _____
John F. Dickinson, Jr.
Deputy Attorney General

Dated: February 3, 2012

Of Counsel:

JACKSON GILMOUR & DOBBS, PC
3900 Essex Lane, Suite 700
Houston, Texas 77027

GORDON & GORDON, PC
505 Morris Avenue
Springfield, New Jersey 07081