

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In re

"AGENT ORANGE"

PRODUCT LIABILITY LITIGATION

MDL NO. 381

CHARLES T. ANDERSON,

Plaintiff,

-against-

DOW CHEMICAL COMPANY, *et al.*,

Defendants.

1:03 CV 5227 (JBW)

ROBERT S. BAUER, *et al.*,

Plaintiffs,

-against-

DOW CHEMICAL COMPANY, *et al.*,

Defendants.

1:04 CV 2088 (JBW)

FRANK S. CIRINO, *et al.*,

Plaintiffs,

-against-

DOW CHEMICAL COMPANY, *et al.*,

Defendants.

1:04 CV 2678 (JBW)

JOHN G. CLEMENS, *et al.*,

Plaintiffs,

-against-

DOW CHEMICAL COMPANY, *et al.*,

Defendants.

1:04 CV 1835 (JBW)

CLEMENT J. KALAS,

Plaintiff,

-against-

DOW CHEMICAL COMPANY, *et al.*,

Defendants.

1:03 CV ____ (JBW)

HENRY C. KIDD, *et al.*,

Plaintiffs,

-against-

DOW CHEMICAL COMPANY, *et al.*,

Defendants.

1:03 CV 5047 (JBW)

CHRISTINE NELSON, *et al.*,

Plaintiffs,

-against-

DOW CHEMICAL COMPANY, *et al.*,

Defendants.

1:03 CV 4010 (JBW)

CASE J. SAMPEY, JR., *et al.*,

Plaintiffs,

-against-

DOW CHEMICAL COMPANY, *et al.*,

Defendants.

1:03 CV 504 (JBW)

PETER D. SARACENO, *et al.*,

Plaintiffs,

-against-

DOW CHEMICAL COMPANY, *et al.*,

Defendants.

1:04 CV 1334 (JBW)

JEFFREY SCHUCKMAN, *et al.*,

Plaintiffs,

-against-

DOW CHEMICAL COMPANY, *et al.*,

Defendants.

1:03 CV 2120 (JBW)

CHARLES TERRY SMITH,

Plaintiff,

-against-

DOW CHEMICAL COMPANY, *et al.*,

Defendants.

1:04 CV 1837 (JBW)

SHERMAN CLINTON STEARNS, *et al.*,

Plaintiffs,

-against-

DOW CHEMICAL COMPANY, *et al.*,

Defendants.

1:03 CV 5965 (JBW)

J. MICHAEL TWINAM,

Plaintiff,

-against-

DOW CHEMICAL COMPANY, *et al.*,

Defendants.

1:03 CV 1028 (JBW)

THE VIETNAM ASSOCIATION FOR VICTIMS OF
AGENT ORANGE/DIOXIN, *et al.*,

Plaintiffs,

-against-

DOW CHEMICAL COMPANY, *et al.*,

Defendants.

04 CV 0400 (JBW)

SHERYL A. WALKER, *et al.*,

Plaintiffs,

-against-

DOW CHEMICAL COMPANY, *et al.*,

Defendants.

1:04 CV 2089 (JBW)

WILLIE WILLIAMS, JR., *et al.*,

Plaintiffs,

-against-

DOW CHEMICAL COMPANY, *et al.*,

Defendants.

1:03 CV 4009 (JBW)

**MOVANTS' STATEMENT PURSUANT TO LOCAL CIVIL RULE 56.1
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT DISMISSING
COMPLAINTS AS AGAINST DEFENDANTS VALERO ENERGY
CORPORATION (AS SUCCESSOR BY MERGER TO ULTRAMAR DIAMOND
SHAMROCK CORPORATION), MAXUS ENERGY CORPORATION, TIERRA
SOLUTIONS, INC. (FORMERLY KNOWN AS CHEMICAL LAND
HOLDINGS, INC.) AND OCCIDENTAL PETROLEUM CORPORATION**

Movants contend that there is no genuine issue to be tried as to the following material facts:

A. The Manufacture of Agent Orange by "Old Diamond Shamrock Corporation"

1. Prior to September 1, 1983, the company then known as Diamond Shamrock Corporation (hereinafter sometimes referred to as "Old Diamond"), which was known prior to on or about December 19, 1967 as Diamond Alkali Company ("Diamond Alkali"), was an operating company with divisions engaged in certain businesses, including chemical manufacturing. [Affidavit of Michael M. Gordon, sworn to on November 2, 2004 ("Gordon Aff."), ¶ 5; Affidavit of Harvey R. Smith, sworn to on November 5, 2003 ("Smith Aff."), ¶¶ 8-12.]

2. In August 1951, Old Diamond acquired Kolker Chemical Works, Inc., which operated a plant at 80 Lister Avenue in Newark, New Jersey (hereinafter "Newark" or the

“Newark Plant”). From 1951 until July 1969, Old Diamond manufactured at Newark, among other materials, the phenoxy herbicides 2,4-dichlorophenoxyacetic acid and 2,4,5-trichlorophenoxyacetic acid (“2,4,5-T”). Old Diamond terminated all production operations at the Newark Plant in July 1969. [Gordon Aff., ¶ 6].

3. Commencing in 1961 and continuing through 1968, Old Diamond produced at Newark and delivered to the United States phenoxy herbicide formulations denominated by the United States as “Agent Orange,” “Agent Pink” or “Agent Purple” (collectively, “Agent Orange”) pursuant to ten contracts entered into with the Defense General Supply Center, the Defense Fuel Supply Center, the U.S. Army or the U.S. Air Force. [Gordon Aff., ¶ 8].

B. Occidental Chemical Corporation Is the Successor by Merger to Old Diamond

4. On or about September 1, 1983, Old Diamond, together with Natomas Company, an international oil company, became a wholly owned subsidiary of a new holding company which was incorporated on or about July 19, 1983. The new holding company was initially named “New Diamond Corporation”. On or about September 1, 1983, the date of the Natomas acquisition, New Diamond changed its name to Diamond Shamrock Corporation (hereinafter sometimes referred to as “New Diamond”). [Smith Aff., ¶¶ 2-4, 13].

5. Correspondingly, also on or about September 1, 1983, Old Diamond changed its name from Diamond Shamrock Corporation to Diamond Chemicals Company, and on or about November 1, 1983 changed its name from Diamond Chemicals Company to Diamond Shamrock Chemicals Company. [Smith Aff., ¶¶ 9-10].

6. Three years later, on or about September 4, 1986, an affiliate of Occidental Chemical Corporation (“OCC”), Oxy-Diamond Alkali Corporation, acquired from New Diamond all the stock of Old Diamond (which, as noted above, was then known as

Diamond Shamrock Chemicals Company). [Smith Aff., ¶ 14; Affidavit of Robert D. Luss, sworn to on November 7, 2003 (“Luss Aff.”), ¶ 4].

7. On or about September 29, 1986, Old Diamond changed its name from Diamond Shamrock Chemicals Company to Occidental Electrochemicals Corporation. [Luss Aff., ¶ 5].

8. On or about November 30, 1987, Occidental Electrochemicals Company was merged into OCC. [Luss Aff., ¶¶ 2, 5].

9. By reason of the foregoing, although OCC is not itself a manufacturer of Agent Orange, it is the successor by merger to the manufacturer of Agent Orange that was known until on or about December 19, 1967 as Diamond Alkali Company, and successively thereafter as Diamond Shamrock Corporation (until on or about September 1, 1983), Diamond Chemicals Company (until on or about November 1, 1983), Diamond Shamrock Chemicals Company (until on or about September 29, 1986) and Occidental Electrochemicals Corporation (until its merger into OCC on or about November 30, 1987). [Gordon Aff., ¶¶ 13-14].

10. OCC is an indirect, wholly owned subsidiary of Occidental Petroleum Corporation (“Occidental Petroleum”). [Affidavit of Stephen P. Parise, sworn to on November 2, 2004 (“Parise Aff.”), ¶ 2]. Occidental Petroleum never manufactured or sold Agent Orange and has at all times been a separate and distinct corporate entity from OCC. [Parise Aff., ¶¶ 2, 5].

C. Neither Maxus Energy Corporation Nor an Affiliated Company, Tierra Solutions, Inc. (Formerly Known as Chemical Land Holdings, Inc.), Ever Designed, Manufactured, Marketed, Distributed or Sold Agent Orange

11. On or about April 28, 1987, New Diamond changed its name from Diamond Shamrock Corporation to Maxus Energy Corporation (“Maxus”). [Smith Aff., ¶¶ 2-4].

12. Maxus was not incorporated until on or about July 19, 1983, more than 14 years after Old Diamond last sold any Agent Orange to the United States and more than ten years after the end of the Vietnam war. [Smith Aff. ¶ 2; Gordon Aff., ¶ 16].

13. At all times since its formation, Maxus has been a holding company that owns the stock of other corporations and has not engaged in the chemicals business. [Smith Aff., ¶¶ 6-7].

14. Chemical Land Holdings, Inc. (“Chemical Land Holdings”) has been an affiliate of Maxus at all times since its incorporation on or about March 21, 1986. Chemical Land Holdings was incorporated under the laws of the State of Delaware as Diamond Shamrock Process Chemicals Inc. and changed its name to Diamond Shamrock Chemical Land Holdings Inc. on or about July 11, 1986. [Smith Aff., ¶ 15].

15. On or about December 4, 1987, several months after New Diamond changed its name to Maxus, Diamond Shamrock Chemical Land Holdings Inc. changed its name to Chemical Land Holdings, Inc. On or about February 25, 2002, Chemical Land Holdings changed its name to Tierra Solutions, Inc. [Smith Aff., ¶ 16].

D. Ultramar Diamond Shamrock Corporation Never Designed, Manufactured, Marketed, Distributed or Sold Agent Orange

16. In April 1987, New Diamond (then known as Diamond Shamrock Corporation) “spun off” to its shareholders the outstanding stock of one of its subsidiaries, Diamond Shamrock R&M, Inc., which was engaged in the refining and marketing of petroleum products. Diamond Shamrock R&M, Inc.’s assets included the stock of Diamond Shamrock Refining and Marketing Company (“DSR&M”). [Smith Aff., ¶ 19].

17. Neither Diamond Shamrock R&M, Inc. nor DSR&M were ever engaged in the chemical business, nor did they ever design, manufacture, market, distribute or sell Agent Orange. [Smith Aff., ¶ 19].

18. In February 1990, Diamond Shamrock R&M, Inc. changed its name to Diamond Shamrock, Inc. On or about December 3, 1996, several years after the spin-off from New Diamond, Diamond Shamrock R&M, Inc. (then named Diamond Shamrock, Inc.) merged with and into Ultramar Corporation. The merged company then changed its name to Ultramar Diamond Shamrock Corporation (“Ultramar Diamond Shamrock”). [Affidavit of J. Stephen Gilbert, sworn to on November 6, 2003 (“Gilbert Aff.”), ¶ 3].

19. Effective on or about December 31, 2001, Ultramar Diamond Shamrock was merged into Valero Energy Corporation, with Valero being the surviving corporation. [Gilbert Aff., ¶ 5].

Dated: New York, New York
November 2, 2004

CADWALADER, WICKERSHAM & TAFT LLP

By: /s/ Michael M. Gordon
Michael M. Gordon (MG8336)
Attorneys for Defendants Valero Energy Corporation
(as successor by merger to Ultramar Diamond
Shamrock Corporation), Maxus Energy Corporation
and Tierra Solutions, Inc. (formerly known as
Chemical Land Holdings, Inc.)
100 Maiden Lane
New York, New York 10038
(212) 504-6000

TO: COUNSEL FOR ALL PLAINTIFFS
IN CAPTIONED CASES

Affidavit of Michael M.
Gordon

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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WILLIE WILLIAMS, JR., *et al.*,

Plaintiffs,

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DOW CHEMICAL COMPANY, *et al.*,

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1:03 CV 4009 (JBW)

**AFFIDAVIT OF MICHAEL M. GORDON IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT DISMISSING COMPLAINTS AS AGAINST
DEFENDANTS VALERO ENERGY CORPORATION (AS SUCCESSOR BY MERGER
TO ULTRAMAR DIAMOND SHAMROCK CORPORATION), MAXUS ENERGY
CORPORATION, TIERRA SOLUTIONS, INC. (FORMERLY KNOWN AS CHEMICAL
LAND HOLDINGS, INC.) AND OCCIDENTAL PETROLEUM CORPORATION**

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

MICHAEL M. GORDON, being duly sworn, deposes and says:

1. I am a member of the bar of this Court and of the law firm of Cadwalader, Wickersham & Taft LLP, attorneys for defendant Occidental Chemical Corporation ("OCC"), and also for defendants Valero Energy Corporation (as successor by merger to Ultramar Diamond Shamrock Corporation), Maxus Energy Corporation, Tierra Solutions, Inc. (formerly known as Chemical Land Holdings, Inc.) and Occidental Petroleum Corporation, collectively referred to herein as the "Misjoined Defendants." I make this affidavit in support of the Misjoined Defendants' motion for summary judgment dismissing plaintiffs' complaints with prejudice as against them pursuant to Fed. R. Civ. P. 56.

2. I make this affidavit based on my knowledge of the documents produced and the testimonial evidence adduced during the extensive discovery proceedings in MDL No. 381, and also based on the affidavits that were submitted to the Court in support of the similar motion made by Valero Energy, Maxus Energy and Tierra Solutions in Isaacson v. Dow Chemical Co., et al., CV-98-6383 (JBW). In Isaacson, following the filing of that motion, this Court on January 26, 2004 “so ordered” a Stipulation dismissing the Isaacson action without prejudice as to those defendants.

3. I attach hereto as Exhibit A a true and correct copy of the complaint filed in Walker et al. v. Dow Chemical Co., et al. The allegations as to the Misjoined Defendants made in that complaint are representative of the allegations made in the remaining actions that are the subject of this motion. I also attach for the Court’s convenience, as Exhibit B, a chart which identifies which Misjoined Defendants have been included as defendants in each of the above-captioned cases.

4. I attach hereto true and correct copies of the following affidavits, three of which were previously filed with the Court in support of the Misjoined Defendants’ motion for summary judgment in the Isaacson action:

| <u>Exhibit No.</u> | <u>Description</u> |
|--------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------|
| C | Affidavit of Harvey R. Smith, Secretary of Maxus Energy Corporation, sworn to on November 5, 2003 (“Smith Aff.”). |
| D | Affidavit of Robert D. Luss, Associate General Counsel and Assistant Secretary of Occidental Chemical Corporation, sworn to on November 7, 2003 (“Luss Aff.”). |
| E | Affidavit of J. Stephen Gilbert, Managing Counsel of Valero Energy Corporation, sworn to on November 6, 2003 (“Gilbert Aff.”). |

F Affidavit of Stephen P. Parise, Assistant Secretary and Corporate Manager—Entities Administration of Occidental Petroleum Corporation, sworn to on November 2, 2004 (“Parise Aff.”).

A. **The Manufacture of Agent Orange by “Old Diamond Shamrock Corporation”**

5. Prior to September 1, 1983, the company then known as Diamond Shamrock Corporation (hereinafter sometimes referred to as “Old Diamond”), which was known prior to on or about December 19, 1967 as Diamond Alkali Company (“Diamond Alkali”), was an operating company with divisions engaged in certain businesses, including chemical manufacturing. See Smith Aff., ¶¶ 8, 12.

6. In August 1951, Old Diamond acquired Kolker Chemical Works, Inc., which operated a plant at 80 Lister Avenue in Newark, New Jersey (hereinafter “Newark” or the “Newark Plant”). From 1951 until July 1969, Old Diamond manufactured at Newark, among other materials, the phenoxy herbicides 2,4-dichlorophenoxyacetic acid and 2,4,5-trichlorophenoxyacetic acid (“2,4,5-T”). Old Diamond terminated all production operations at the Newark Plant in July 1969.

7. During the early 1960s, the United States developed several phenoxy herbicide formulations specifically for military use in Southeast Asia, including “Agent Orange”, “Agent Pink” and “Agent Purple”. (The United States’ phenoxy herbicide formulations are hereinafter collectively referred to as “Agent Orange”).

8. Commencing in 1961 and continuing through 1968, Old Diamond produced at Newark and delivered Agent Orange to the United States pursuant to ten contracts entered into with the Defense General Supply Center, the Defense Fuel Supply Center, the U.S. Army or the U.S. Air Force.

B. Occidental Chemical Corporation Is the Successor by Merger to Old Diamond

9. On or about September 1, 1983, Old Diamond, together with Natomas Company, an international oil company, became a wholly owned subsidiary of a new holding company which was incorporated on or about July 19, 1983. The new holding company was initially named "New Diamond Corporation". On or about September 1, 1983, the date of the Natomas acquisition, New Diamond changed its name to Diamond Shamrock Corporation (hereinafter sometimes referred to as "New Diamond"). See Smith Aff., ¶¶ 2-4, 13.

10. Correspondingly, also on or about September 1, 1983, Old Diamond changed its name from Diamond Shamrock Corporation to Diamond Chemicals Company, and on or about November 1, 1983 changed its name from Diamond Chemicals Company to Diamond Shamrock Chemicals Company. See Smith Aff., ¶¶ 9-10.

11. Three years later, on or about September 4, 1986, an affiliate of OCC, Oxy-Diamond Alkali Corporation, acquired from New Diamond all the stock of Old Diamond (which, as noted above, was then known as Diamond Shamrock Chemicals Company). See Smith Aff., ¶ 14; Luss Aff., ¶ 4. On or about September 29, 1986, Old Diamond changed its name from Diamond Shamrock Chemicals Company to Occidental Electrochemicals Corporation. See Luss Aff., ¶ 5.

12. On or about November 30, 1987, Occidental Electrochemicals Corporation was merged into OCC. See Luss Aff., ¶¶ 2, 5.

13. Thus, although OCC is not itself a manufacturer of Agent Orange, it is the successor by merger to the manufacturer of Agent Orange that was known until on or about December 19, 1967 as Diamond Alkali Company, and successively thereafter as Diamond Shamrock Corporation (until on or about September 1, 1983), Diamond Chemicals Company (until on or about November 1, 1983), Diamond Shamrock Chemicals Company (until on or

about September 29, 1986) and Occidental Electrochemicals Corporation (until its merger into OCC on or about November 30, 1987).

14. In their respective complaints, plaintiffs allege that each of the corporate defendants designed, manufactured, marketed, distributed and sold Agent Orange to the United States Government. See, e.g., Walker Complaint, ¶ 13 (a copy of which is annexed hereto as Exhibit A). OCC, as the successor by merger to Old Diamond, which manufactured and sold Agent Orange to the United States, is thus properly named as a defendant.¹

C. Neither Maxus Energy Corporation Nor an Affiliated Company, Tierra Solutions, Inc. (Formerly Known as Chemical Land Holdings, Inc.), Ever Designed, Manufactured, Marketed, Distributed or Sold Agent Orange

15. On or about April 28, 1987, New Diamond changed its name from Diamond Shamrock Corporation to Maxus Energy Corporation ("Maxus"). See Smith Aff., ¶¶ 2-4.

16. As stated in paragraph 9 above, Maxus was not incorporated until on or about July 19, 1983, more than 14 years after Old Diamond last sold any Agent Orange to the United States and more than ten years after the end of the Vietnam war. Moreover, at all times since its formation, Maxus has been a holding company that owns the stock of other corporations and has not engaged in the chemicals business. See Smith Aff., ¶¶ 6-7.

17. Since Maxus never designed, manufactured, marketed, distributed or sold Agent Orange, no basis exists for naming it as a defendant in this action.

¹ Occidental Chemical Corporation is an indirect, wholly owned subsidiary of Occidental Petroleum Corporation ("Occidental Petroleum"). See Parise Aff., ¶ 2. In three of the tag-along actions, Bauer, 1:04 CV 2088, Clemens, 1:04 CV 1835, and Walker, 1:04 CV 2089, plaintiffs have named as a defendant Occidental Petroleum, as well as OCC. However, Occidental Petroleum never manufactured or sold Agent Orange (see Parise Aff., ¶ 5), nor do the plaintiffs in those three actions allege any theory of veil-piercing that could serve as a basis for imposing any alleged liability of OCC on Occidental Petroleum. Thus, Occidental Petroleum should be dismissed from these actions.

18. Defendant Chemical Land Holdings, Inc. ("Chemical Land Holdings") has been an affiliate of Maxus at all times since its incorporation on or about March 21, 1986. Chemical Land Holdings was incorporated under the laws of the State of Delaware as Diamond Shamrock Process Chemicals Inc. and changed its name to Diamond Shamrock Chemical Land Holdings Inc. on or about July 11, 1986. On or about December 4, 1987, several months after New Diamond changed its name to Maxus, Diamond Shamrock Chemical Land Holdings Inc. changed its name to Chemical Land Holdings, Inc. On or about February 25, 2002, Chemical Land Holdings changed its name to Tierra Solutions, Inc. See Smith Aff., ¶¶ 15-16.

19. Since Chemical Land Holdings, like its affiliate, Maxus, was not formed until more than a decade after the war in Vietnam ended, Chemical Land Holdings plainly never designed, manufactured, marketed, distributed or sold Agent Orange. Thus, it too should be dismissed from this action.

D. Ultramar Diamond Shamrock Corporation Never Designed, Manufactured, Marketed, Distributed or Sold Agent Orange

20. In April 1987, New Diamond (then known as Diamond Shamrock Corporation) "spun off" to its shareholders the outstanding stock of one of its subsidiaries, Diamond Shamrock R&M, Inc., which was engaged in the refining and marketing of petroleum products. Diamond Shamrock R&M, Inc.'s assets included the stock of Diamond Shamrock Refining and Marketing Company ("DSR&M"). Neither Diamond Shamrock R&M, Inc. nor DSR&M were ever engaged in the chemical business, nor did they ever design, manufacture, market distribute or sell Agent Orange. See Smith Aff., ¶ 19; Gilbert Aff., ¶ 2.

21. In February 1990, Diamond Shamrock R&M, Inc. changed its name to Diamond Shamrock, Inc. On or about December 3, 1996, several years after the spinoff, Diamond Shamrock R&M, Inc. (then named Diamond Shamrock, Inc.) merged with and into

Ultramar Corporation. The merged company then changed its name to Ultramar Diamond Shamrock Corporation ("Ultramar Diamond Shamrock"). Effective on or about December 31, 2001, Ultramar Diamond Shamrock was merged into Valero Energy Corporation, with Valero being the surviving corporation. See Gilbert Aff., ¶¶ 3-4.

22. Since neither Diamond Shamrock R&M, Inc. nor DSR&M ever manufactured or sold Agent Orange, no basis exists for naming Diamond Shamrock R&M, Inc.'s successors – Ultramar Diamond Shamrock and Valero – as defendants in this action.'

WHEREFORE, I respectfully request that the Court issue an Order granting summary judgment dismissing each of the complaints in the above-captioned cases with prejudice as against defendants Valero Energy Corporation (as successor by merger to Ultramar Diamond Shamrock Corporation), Maxus Energy Corporation, Tierra Solutions, Inc. (formerly known as Chemical Land Holdings, Inc.) and Occidental Petroleum Corporation. The Court is respectfully referred to Exhibit B hereto for a list identifying which Misjoined Defendants have been named as defendants in each case.



Michael M. Gordon

Sworn to before me this
2^d day of November, 2004.



Notary Public

LINDA RICCI
Notary Public, State Of New York
No. 01RI6042190
Qualified in New York County
Commission Expires May 15, 2006

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(CITY OF ST. LOUIS)

2003 JUN 16 AM 10:06

CLERK 

SHERYL A. WALKER, and)
ERIC C. WALKER, a Minor, by his Mother and))
Next Friend, SHERYL A. WALKER, and))
STEVEN J. WALKER, and))
WILLIAM J. HAMILTON and))
ESTHER M. HAMILTON, his wife,))
Individually and on Behalf of))
All Others Similarly Situated,))

Plaintiffs,)

v.)

DOW CHEMICAL COMPANY,)
and)
MONSANTO COMPANY,)
and)
PHARMACIA CORPORATION,)
and)
SOLUTIA, INC.,)
and)
HERCULES, INCORPORATED,)
and)
THOMPSON HAYWARD CHEMICAL CO.,)
and)
T-H AGRICULTURE & NUTRITION CO.)
and)
OCCIDENTAL PETROLEUM)
CORPORATION,)
and)
OCCIDENTAL CHEMICAL CORP.,)
and)
UNIROYAL, INC.,)
and)
C.D.U. HOLDING, INC.,)
and)
UNIROYAL CHEMICAL COMPANY,)
and)
HARCROS CHEMICALS INC.,)

Cause No. 032 01785

Division No. 1

PRODUCT LIABILITY

TRIAL BY JURY DEMANDED

and)
 ULTRAMAR DIAMOND SHAMROCK)
 CORPORATION,)
 and)
 MAXUS ENERGY CORP.,)
 and)
 TIERRA SOLUTIONS INC.,)
 and)
 CHEMICAL LAND HOLDINGS, INC.,)
 and)
 DOES 1 THROUGH 100)

Defendants.

PETITION

PLAINTIFFS

1. The Plaintiffs Sheryl A. Walker, Eric C. Walker, a minor, by his mother and next friend, Sheryl A. Walker, and Steven J. Walker, are citizens of Missouri, who reside in Fenton, Missouri, and are the wife and children of Vietnam Veteran Daniel J. Walker who died on December 10, 2002, in Jefferson County, Missouri; Daniel J. Walker (hereinafter described as a "Representative Vietnam veteran") served in Vietnam from approximately 1968 to 1970, and while he was in Vietnam he was exposed to the Defendants' product, Agent Orange herbicides with dioxin contamination, and sustained various injuries alleged herein and damages in excess of the jurisdictional amount of Twenty Five Thousand Dollars (\$25,000.00).

2. The Plaintiffs William J. Hamilton and Esther M. Hamilton, are husband and wife who reside in St. Louis County, Missouri; Plaintiff William J. Hamilton (hereinafter described as a "Representative Vietnam veteran") served in Vietnam during 1967 and 1968, and while he was in Vietnam he was exposed to the Defendants' product Agent Orange herbicides with

dioxin contamination, and sustained various injuries alleged herein and damages in excess of the jurisdictional amount of Twenty Five Thousand Dollars (\$25,000.00).

DEFENDANTS

3. Defendant Dow Chemical Company is a Delaware corporation with its principal place of business in Midland, Michigan.
4. Defendant Monsanto Company is a Delaware corporation with its principal place of business in St. Louis, Missouri and liable for the acts of Monsanto Company and Pharmacia Corporation.
5. Defendant Pharmacia Corporation is a Delaware corporation with its principal place of business in St. Louis, Missouri, and liable for the acts of Monsanto Company.
6. Defendant Solutia, Inc. is a Delaware corporation with its principal place of business in St. Louis, Missouri, and liable for the acts of Monsanto Company and Pharmacia Corporation.
7. Defendant Hercules Incorporated is a Delaware corporation with its principal place of business in Wilmington, Delaware.
8. Defendants Thompson Hayward Chemical Co. a/k/a Thompson Chemical Corporation and T-H Agriculture & Nutrition Company are Delaware corporations with its principal places of business in Kansas City, Kansas.
9. Defendant Occidental Petroleum Corp. is a Delaware Corporation with its principal place of business in Los Angeles, California.
10. Defendant Occidental Chemical Corporation is a New York corporation with its principal place of business in Dallas, Texas.

11. Defendants Uniroyal, Inc., C.D.U. Holding, Inc. and Uniroyal Chemical Company are New Jersey corporations with their principal places of business in Middlebury Connecticut.
12. Defendant Harcros Chemicals Inc. is a Delaware corporation with its principal place of business in Kansas City, Kansas.
13. Ultramar Diamond Shamrock Corporation, Chemical Land Holdings, Inc., Tierra Solutions, Inc., and Maxus Energy Corporation are related corporations with their principal place of business in San Antonio, Texas, and manufactured Agent Orange in New Jersey.
14. Defendants Does 1 through 100 are other corporations which presently cannot be identified who directly or through their corporate predecessors or subsidiaries manufactured, marketed, distributed and sold Agent Orange.
15. The defendants, and each of them, are registered to do business and do business in Missouri and are further subject to the jurisdiction of this Court in accordance with the Missouri Long Arm Statute, § 508.500 RSMo.
16. Venue is proper in the City of St. Louis in accordance with § 508.040 RSMo., for the reason that one or more of the defendants have or usually keep an office(s) or agent(s) for the transaction of usual and customary business in the City of St. Louis, Missouri, and the cause(s) of action alleged herein against one or more of the defendants accrued in the City of St. Louis, Missouri.

CLASS ACTION ALLEGATIONS

17. Representative plaintiffs and the class bring this claim pursuant to Rule 52.08 of the Missouri Rules of Court. The class is defined as all veterans of the Vietnam War who served in Vietnam and were exposed to Agent Orange herbicides (as defined in paragraph 24 below)

in Vietnam, including but not limited to Agent Orange, and who were diagnosed with cancer(s) related to said herbicide exposure and/or Type-II Diabetes after December 31, 1994.

18. The class is so numerous that joinder of all members of the class is impracticable. It is estimated that the class exceeds 5,000 people.
19. There are questions of law and fact common to the class. Among the questions of law and fact common to the class are the following:
 - a. Whether exposure to Agent Orange causes Diabetes Type II in Vietnam Veterans;
 - b. Whether exposure to Agent Orange causes any cancers in Vietnam Veterans;
 - c. Whether defendants could have reduced the level of dioxins in the Agent Orange herbicides by different manufacturing and quality control procedures;
 - d. Whether defendants could have reduced the levels of dioxin contamination in the herbicides through the use of different analytical and detection procedures;
 - e. Whether defendants knew that these methods were available to reduce the level of dioxin in their herbicides;
 - f. Whether defendants informed U.S. government officials responsible for the decision to deploy the Agent Orange herbicides in Vietnam of the information set forth in paragraph 60 of this complaint;
 - g. Whether defendants jointly agreed to conceal and refrain from informing the U.S. government officials responsible for the decision to deploy Agent Orange herbicides in Vietnam of the information set forth in paragraph 60 of the complaint;

- h. Whether defendants individually and collectively knew that dioxin at the levels of which it was present in this herbicides created a substantial risk to human health;
 - i. Whether Agent Orange herbicides were an "off-the-shelf product" not significantly different from commercial formulations for herbicides;
 - j. Whether 2,4,5 T was an off-the-shelf product;
 - k. Whether the mixtures of 2,4,5 T and 2,4 D which formed the Agent Orange herbicides were similar to off-the-shelf products;
 - l. Whether the manufacturing methods for Agent Orange were specified by the U.S. government or by the defendants;
 - m. Whether the quality control methods for Agent Orange were specified by the U.S. government or by the defendants;
 - o. Whether the historical experiences involving occupational exposures to dioxin should have alerted defendants that exposure to these herbicides would cause a severe risk of harm to human health.
20. The prosecution of separate actions by or against individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party or parties in the class. There are no major difficulties likely to be encountered in the management of this case as a class action.

NON-REMOVABILITY

21. This case is not removable to federal court because there is no complete diversity of citizenship and the claims do not arise under federal law.

22. At all times material hereto, defendants were not acting as government officers, but private contractors selling off the shelf products to the U.S. government.
23. Defendants could have fully complied with their government contracts without producing dioxin contamination in Agent Orange.

ACTS OF DEFENDANTS

24. During the period of 1961 to 1972 each of the corporate Defendants designed, manufactured, marketed, distributed and sold to the United States Government the phenoxy herbicides (hereinafter collectively described as Agent Orange herbicides), known as Agent Orange, Orange II, Purple, Pink and Green, and whose basic component formulations were:
 - a. Agent Orange was a 50/50 mixture of the n-butyl esters of 2,4-D and 2,4,5-T (2,4,5-trichlorophenoxyacetic acid);
 - b. Agent Orange II was a 50/50 mixture of the isooctyl ester of 2,4,5-T and the n-butyl ester of 2,4-D;
 - c. Agent Purple was a 50/30/20 by weight mixture of the n-butyl ester of 2,4,-D, n-butyl ester of 2,4,5-T and isobutyl ester of 2,4,5-T;
 - d. Agent Pink was a 60/40 by weight mixture of n-butyl ester of 2,4,5-T and the isobutyl ester of 2,4,5-T;
 - e. Agent Green was a single component formulation consisting of n-butyl of 2,4,5-T.
25. The Agent Orange herbicides manufactured and sold by the Defendants to the United States Government for use in Vietnam during the aforesaid period contained deadly toxic contaminants including dioxins which were inherently dangerous to human health and capable of causing severe injuries to persons exposed thereto. The most toxic and deadly

dioxin 2,3, 4, 5,7,8-tetrachlorodibenzo para dioxin, more commonly referred to as "TCDD" or "dioxin".

26. Each Defendant's Agent Orange herbicides, as so supplied to the military for use in Vietnam contained the toxic contaminant dioxin, was defective, and unreasonably dangerous to the representative plaintiff Vietnam veteran(s) and the class.

INJURY TO REPRESENTATIVE PLAINTIFFS AND THE CLASS

27. As direct and proximate results of the acts described above, the representative plaintiff Vietnam veterans Daniel Walker and William Hamilton and the class were caused to suffer grievous, serious, and severe injuries, and sustained serious and permanent injuries to their health, strength and activity, and severe shock to their nervous system, including but not limited to cancer and Diabetes Type II, which was manifested and diagnosed less than five years before commencement of this action, and representative Vietnam veteran Daniel Walker died.
28. As a further proximate result of the defendants' wrongful conduct, the representative Vietnam veterans and the class were required to, and did, employ physicians and surgeons to examine, treat and care for them, and the representative plaintiff Vietnam veterans and the class incurred, and will incur, hospital, medical and other and additional incidental expenses.
29. As a further proximate result of the defendants' wrongful conduct, the representative plaintiff wife and children of deceased Vietnam veteran Daniel Walker, and the class were deprived of their deceased husbands' and fathers' services, companionship, support and consortium; and the wife of William Hamilton has lost and will lose the consortium of her spouse.

COUNT I
PRODUCT LIABILITY
Strict Liability in Tort
DESIGN DEFECT

30. The Representative plaintiffs and the class adopt, repeat, reiterate and reallege each and every allegation contained in the above Paragraphs.
31. During the period from 1961 to 1972 each of the Defendants designed, manufactured, and sold the United States Government Agent Orange herbicides contaminated with dioxin.
32. At all times herein mentioned, the Defendants had a duty to make a safe product and breached that duty by designing and manufacturing the Agent Orange herbicides which were defective and unreasonably dangerous.
33. But for the design defect of the Defendants, the representative Vietnam veterans and the Representative plaintiffs and the class would not have sustained their injuries and damages.
34. The Agent Orange herbicides manufactured by the Defendants were not produced in accordance with military specifications set forth in their Government contracts.
35. The Government contracts, pursuant to which the Defendants manufactured their Agent Orange herbicides, did not order, request, or put limitations on any permissible level of the toxic contaminant dioxin. The herbicides produced by the Defendants were generally similar in that all had dangerous levels of dioxin, but except that they contained varying degrees of the toxic contaminant dioxin. The Defendants jointly controlled all of the manufacturing processes used in the production of the Agent Orange herbicides supplied to the military.

36. The Defendants' defective products were used in a foreseeable manner and brought about foreseeable injuries to the representative Vietnam veterans and the representative plaintiffs and the class.
37. As actual and proximate results of the Defendants' defective products, the representative Vietnam veterans and the class were exposed to the Defendants' herbicides and were thereby caused to suffer severe injuries complained thereof.
38. By reason of the foregoing, each Defendant is individually, jointly and severally liable as tortfeasors to pay such damages to Representative plaintiffs and the class.

Strict Liability in Tort

INADEQUATE WARNING

39. The Representative plaintiffs and the class adopt, repeat, reiterate and reallege each and every allegation contained in the above Paragraphs.
40. During the period from 1961 to 1972 each Defendant designed, manufactured, and sold to the United States Government the contaminated Agent Orange herbicides for use in Vietnam by representative Vietnam veterans and the class and persons in their position.
41. The Defendants had a duty to give timely warnings to the United States Government of the full danger of their products and breached that duty by manufacturing the Agent Orange herbicides without such adequate timely warnings, rendering their products defective and unreasonably dangerous.
42. The representative Vietnam veterans and the class had no reason to expect or anticipate that the Agent Orange herbicides would cause them severe harm.
43. The Defendants did not give an adequate timely warning as to the danger of the defective products either to the United States Government Officials responsible for decision to deploy

the Agent Orange herbicides or to the representative Vietnam veterans and the class who were at risk from the danger of the defective products.

44. But for the Defendants' failure to provide adequate timely warnings to the United States Government, the representative Vietnam veterans and the class would not have sustained their injuries.
45. The Defendants' defective products were used in foreseeable manners and brought about foreseeable injuries on the representative Vietnam veterans and the class who were foreseeable victims.
46. As actual and proximate results of the Defendants' inadequate warnings, the representative Vietnam veterans and the class were exposed to the Defendants' herbicides and were thereby caused to suffer severe injuries complained thereof.
47. By reason of the foregoing, each Defendant is individually, jointly and severally liable as tortfeasors to pay such damages to Representative plaintiffs and the class.

COUNT II
Negligence
DESIGN AND PRODUCTION

48. The Representative plaintiffs and the class adopt, repeat, reiterate and reallege each and every allegation contained in the above Paragraphs.
49. During the period from 1961 to 1972 each Defendant designed, manufactured, and sold to the United States Government the contaminated Agent Orange herbicides.
50. The Defendants had a duty to make safe product and breached the duty by manufacturing the Agent Orange herbicides that were defective and unreasonably dangerous.
51. Each Defendant negligently designed and produced Agent Orange herbicides it supplied to the United States Government for use in Vietnam in that each Defendant:

- a. failed to design its herbicides so that they were free from the toxic contaminant dioxin;
 - b. failed to follow reasonable manufacturing methods and procedures that would avoid the formation of or eliminate the toxic contaminant dioxin;
 - c. failed to test the Agent Orange herbicides to insure that they were free from the toxic contaminant dioxin.
52. Defendants could have fully complied with all provisions of their contracts with the United States Government, and still produced Agent Orange without toxic levels of dioxin, had they used reasonable manufacturing and quality control procedures.
53. The Defendants owned or controlled virtually all of the Agent Orange herbicide market and product capacity and supplied to the military, the sole source purchaser, over 99% of the herbicides contracted for, and received over 99% of the purchase price.
54. Each Defendant's herbicide was toxic and harmful to human health and contaminated with dioxin in varying degrees.
55. But for the defective design of the Defendants, the Representative Vietnam veterans and the class would not have sustained their injuries.
56. The Defendants' defective products were used in foreseeable manners and brought about foreseeable injuries to the Representative Vietnam veterans and the class who were each a foreseeable victim.
57. As actual and proximate results of the Defendants' negligent design, the Representative Vietnam veterans and the class were exposed to the Defendants' herbicides and were thereby caused to suffer severe injuries complained thereof.

58. By reason of the foregoing, each Defendant is individually, jointly and severally liable as tortfeasors to pay such damages to the Representative plaintiffs and the class.

COUNT III
CLAIMS UNDER NEGLIGENCE
First Claim: Breach of Duty to Warn
as to the Defendants' Products

59. The Representative plaintiffs and the class adopt, repeat, reiterate and reallege each and every allegation contained in the above Paragraphs.
60. The Defendants, individually and collectively, knew of the following:
- a. That dioxin, its extreme toxicity, its presence in the manufacturing process and the herbicides themselves, and variables determining levels of dioxin in the chemical herbicides' manufacturing process, and its existence in the herbicides, created a substantial risk to human health;
 - b. That exposure to the herbicides would be harmful to humans by reason of historical experiences involving occupation related injuries to workers following exposure to dioxin-contaminated materials in Defendants' manufacturing facilities in addition to substantial scientific information in the Defendants' possession, custody and control, evidencing the extreme toxicity of such material;
 - c. That the levels of dioxin contamination in the herbicides manufactured for use in Vietnam could be reduced by the use of appropriate analytical and detection procedures, coupled with alternative and careful methods of manufacturing or quality control and that the Defendants could have eliminated the substantial risk to human health involved in the use of the herbicides in Vietnam;

- d. That the Defendants already had information in the form of judgments and assessments of the risks to health;
 - e. That the deployment and use of the herbicides manufactured by the Defendants in Vietnam could and would cause substantial adverse affects to persons who were exposed to the herbicides.
61. That during the period of 1961 to 1972, the United States Government officials responsible for the decision to deploy the Agent Orange herbicides in Vietnam did not know about the information set forth in the preceding paragraph with respect to Agent Orange herbicides' manufacturing processes, dioxin as a contaminant, applicable detection and risk reduction methods, and health hazards associated with human exposure to such herbicides.
62. Defendants jointly agreed to conceal this information from and refrain from disclosing it in a timely fashion to USG officials responsible for the decision to use those herbicides in Vietnam.
63. During the period from 1961 to 1972, the Defendants had a duty to but failed to warn and share with the Government, the aforesaid information which the Defendants knew or should have known with respect to the Agent Orange herbicides they were supplying to the United States Government for use in Vietnam.
64. During the period from 1961 to 1972, the Defendants also knew that the dioxin contaminated Agent Orange herbicides which they were supplying to the Government would be contained in drums unmarked with any corporate identification and mixed together with other contaminated Defendants' products before being sprayed in Vietnam.
65. By reason of the Defendants' failure to warn the Government of the health hazards accompanying the use of the dioxin contaminated Agent Orange herbicides being sold to the

Government, and by reason of the Defendants' failure to disclose to the Government material information about the Agent Orange manufacturing process, dioxin as a contaminant and detection and risk reduction methods, and the Government failed to explicitly specify that the herbicides be free to toxic levels of dioxin.

66. By reason of each Defendant's breach of its duty to warn and to share such information with the Government and military, the Government and military were prevented from:
- a. making an informed decision not to use a particular Defendant's dioxin contaminated herbicides.
 - b. imposing protective safety measures in connection with the use of Agent Orange herbicides in Vietnam; or prescribing their use in a manner that would have protected the risk of exposure to the military servicemen;
 - c. providing exposed soldiers prophylactic medical examinations and treatment to avert or mitigate injuries caused by such exposure; and
 - d. deciding not to use such herbicides in the Vietnam conflict whatsoever, or, alternatively, to sharply curtail their use in a limited fashion designed to prevent human exposures to injuries.
67. Each of the Defendant's failure to warn the responsible Government and military officials and to share its information as above alleged prevented the military and Government from taking the actions described in the above paragraphs.
68. But for the negligent failure of the Defendants to warn, the Representative Vietnam veterans and the class would not have sustained their injuries.
69. The Defendants' defective products were used in foreseeable manners and brought about foreseeable injuries to the Representative Vietnam veterans and the class.

70. As actual and proximate results of each Defendant's breach of its aforesaid duties, the representative Vietnam veterans and the class were exposed to the Defendants' herbicides and were thereby caused to suffer severe injuries, diseases, physical disorders and irritations, for which the representative plaintiffs and the class is entitled to and seeks to recover monetary damages from the Defendants.
71. By reason of the foregoing, each Defendant is individually, jointly and severally liable as tortfeasors to pay such damages to the Representative plaintiffs and the class..

**Second Claim: Breach of Duty to Warn
as to the other Defendants' Products**

72. The Representative plaintiffs and the class adopt, repeat, reiterate and reallege each and every allegation contained in the above Paragraphs.
73. Each Defendant knew or should have known that the other Defendants were manufacturing and selling to the military dioxin contaminated Agent Orange herbicides for use in Vietnam during the period 1961 and 1972.
74. Each Defendant knew or should have known that the Agent Orange herbicides being supplied by other defendants to the military for use in Vietnam were dangerous to human health.
75. Each Defendant knew or should have known that the other Defendants failed to warn the Government purchasers and users as to the health hazards associated with the use of their products in a timely manner and that the other Defendants had also failed to share with the Government material information in a timely manner about the Agent Orange manufacturing processes, dioxin as a contaminant and detection and risk reduction methods.

76. Each Defendant knew or should have known that none of the barrels of Agent Orange they sold to the government contained any company identifying marks, and that the Agent Orange herbicides shipped to Vietnam would be mixed and sprayed without discrimination as to which Defendant's product was being utilized and that the Representative Vietnam veterans and the class would be exposed to such dioxin contaminated herbicides and would suffer the injuries complained of.
77. Each Defendant's breach of its duty to warn and to share with the Government the information with respect to the other Defendants' dioxin contaminated herbicides, the health hazards associated therewith and the means of detection, risk avoidance and risk reduction, was a substantial factor in preventing the military from taking the action described in Paragraph 66.
78. The Defendants failure to warn as to the other Defendants' defective products was a substantial factor in bringing about the harm the Representative Vietnam veterans and the class suffered.
79. The Defendants' defective products were used in foreseeable manners and brought about foreseeable injuries to the Representative Vietnam veterans and the class who were each a foreseeable victim.
80. As actual and proximate results of each Defendant's breach of its aforesaid duties, the Representative Vietnam veterans and the class were exposed to the Defendants' herbicides and were thereby caused to suffer severe injuries, diseases, physical disorders and irritations, for which the Representative plaintiffs and the class are entitled to and seek to recover monetary damages from the Defendants.

81. By reason of the foregoing, each Defendant is individually, jointly and severally liable as tortfeasors to pay such damages to the Representative plaintiffs and the class.

**CLAIMS UNDER FRAUD
AND MISREPRESENTATION**

82. The Representative plaintiffs and the class adopt, repeat, reiterate and reallege each and every allegation contained in the above Paragraphs.
83. Each Defendant knew its product was hazardous to human health and contaminated. Each Defendant knew that the other Defendants' herbicides were hazardous and contaminated with dioxin. None of the Defendants warned in a timely manner the uninformed, less expert military purchasers and users of the toxic herbicides or of the dioxin contamination and the means of its avoidance.
84. The Defendants instead falsely and fraudulently misrepresented the facts to the pertinent United States Government Officials, conspired and acted in concert secretly and persistently to deceive the military and other governmental agencies about the matters hereinbefore alleged through misrepresentations, suppression and withholding of information and other schemes.
85. The Defendants knew that each other's herbicides were dangerous to human health and contaminated with dioxin; that each other's products constituted a breach of duty to warn, and that each was negligent in the design and production of the Agent Orange herbicides being supplied to the government or used in Vietnam and that exposure to such herbicides could and would cause injuries to the Representative Vietnam veterans and the class.
86. The Defendants and each of them knew of health hazards associated with exposure to such herbicides and each of them during the period in question either made affirmative statements

misrepresenting material facts concerning such hazards or willfully did not disclose such material facts by conscious and willful omission.

87. By reason of the Defendants' misrepresentations, the military and the Government responsible for procuring and distributing Agent Orange were lulled into a belief that the Defendants' Agent Orange herbicides were safe to human health, and the military was prevented from taking the actions described in the above Paragraphs.
88. Defendants conspired to conceal and affirmatively misrepresent the health hazards of Agent Orange and dioxin to the U.S. government. Defendants aided and abetted one another in furtherance of the conspiracy to perpetrate the fraud that Agent Orange was harmless to the health of humans and contained no dioxin at levels harmful to humans.
89. Each of the Defendants' products was defective and dangerous to human health, especially in view of the presence of the toxic contaminant dioxin.
90. By reason of the foregoing, each Defendant is individually, jointly and severally liable for the injuries suffered by the Representative Vietnam veterans and the class and is responsible for and must pay all special, general, compensatory and punitive damages.

**CLAIMS UNDER CONSPIRACY
AND AIDING AND ABETTING**

91. Plaintiffs incorporated by reference paragraphs 1 through 90, as though fully set forth.
92. Defendants entered into specific agreements to conceal and suppress information to make false representations about the safety of Agent Orange. This conspiracy of silence thus required the participation of each and every member of the conspiracy in order to succeed. If one member disclosed the truth about the dangers of Agent Orange to the government, the other members would no longer be able to conceal the truth.

93. By jointly agreeing to fraudulently conceal and misrepresent the danger of Agent Orange to the government, each defendant, acting individually, aided and abetted the others in fraudulently concealing misrepresenting these dangers to the government and representative plaintiffs and the class.
94. By reason of the foregoing, each Defendant is individually, jointly and severally liable for the injuries suffered by the Representative Vietnam veterans and the class and is responsible for and must pay all special, general, compensatory and punitive damages.

CLAIMS FOR PUNITIVE DAMAGES

95. The Representative plaintiffs and the class adopt, repeat, reiterate and reallege each and every allegation contained in the above Paragraphs.
96. Each Defendant knew or had reason to know not only that its conduct and the other Defendants' conducts created an unreasonable risk of harm to the Representative Vietnam veterans and the class but also that such harm was substantially certain to occur. Nevertheless, each Defendant proceeded with its conduct in reckless or conscious disregard of such consequences to the Representative Vietnam veterans and the class.
97. As actual and proximate results, the Representative Vietnam veterans and the Representative plaintiffs and the class suffered the injuries complained thereof, and are entitled to punitive damages, in addition to special, general, and compensatory damages.
98. Wherefore, the Representative plaintiffs and the class demands judgment of the "corporate Defendants" DOW CHEMICAL COMPANY, PRODUCT LIABILITY, MONSANTO COMPANY, PHARMACIA CORPORATION, SOLUTIA, INC, HERCULES, INCORPORATED, THOMPSON HAYWARD CHEMICAL CO., T-H AGRICULTURE & NUTRITION CO.; OCCIDENTAL PETROLEUM CORPORATION, OCCIDENTAL

CHEMICAL CORP., UNIROYAL, INC., C.D.U. HOLDING, INC., UNIROYAL CHEMICAL COMPANY, HARCROS CHEMICALS INC., ULTRAMAR DIAMOND SHAMROCK CORPORATION, MAXUS ENERGY CORP, TIERRA SOLUTIONS INC. and CHEMICAL LAND HOLDINGS, INC. AND DOES 1 THROUGH 100 for the following relief:

- a. Judgment in such sums as are fair and reasonable as this Court and jury shall find in favor of the Representative plaintiffs and the class as shall fully, adequately and completely compensate them for all usual and customary elements of damage awardable in cases of personal injuries and death, both general and special, including but not limited to physical pain and mental suffering, past, present and future, the reasonable and necessary costs of medical and hospital services and treatments, past, present and future, loss of earnings, disabilities, disfigurements, loss of society, consortium, services and companionship, and all other recognized losses, costs and damages incurred by the Representative plaintiffs and the class, their spouses and derivative claims;
- b. Judgment in favor of the Representative plaintiffs and the class and for punitive damages in an amount to be determined by the Court and jury of sufficient magnitude to adequately punish Defendants and each of them, jointly and severally, by reason of their willful and wrongful conduct and the great magnitude of damages which it has wrought;
- c. Together with such other and further relief as to this Court shall seem just and proper under the circumstances, plus interest, reasonable counsel fees and the costs and disbursements of this action.



GERSON H. SMOGER (Pro Hac Vice)
SMOGER & ASSOCIATES, P.C.
3175 Monterey Blvd.
Oakland, CA 94602
(510) 531-4529
FAX (510) 531-4377



MARK L. BRONSON MO Bar #23183
NEWMAN BRONSON & WALLIS
2300 West Port Plaza Drive
St. Louis, MO 63146-3213
(314) 878-8200
FAX (314) 878-7839

MARK R. CUKER (Pro Hac Vice)
WILLIAMS, CUKER & BEREZOPSKY
Woodland Corporate Park
210 Lake Drive East, Suite 100
Cherry Hill, NJ 08002
(856) 667-0500

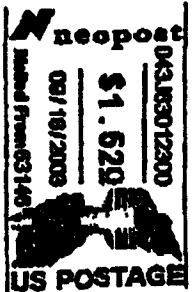
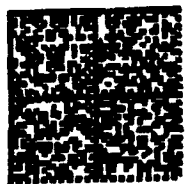
**ATTORNEYS FOR REPRESENTATIVE
PLAINTIFFS AND THE CLASS**

NEWMAN BRONSON & WALLIS
 ATTORNEYS AT LAW
 2300 WEST PORT PLAZA DRIVE
 ST. LOUIS, MISSOURI 63146

FORWARDING ADDRESS REQUESTED

Dow Chemical Company
 c/o The Corporation Company
 120 South Central Avenue
 Clayton, MO 63105

RETURN POSTAGE GUARANTEED
FIRST CLASS MAIL



TOTAL P.35

AGENT ORANGE CASES: MISJOINED DEFENDANTS

| Plaintiffs | Civil Action No. | Misjoined Defendants |
|--------------------------------------------------------------------------------|-------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Anderson | 1:03 CV 5227 (JBW) | Valero Energy Corporation |
| Bauer, et al. | 1:04 CV 2088 (JBW) | Occidental Petroleum Corporation; Ultramar Diamond Shamrock, Corp.; Maxus Energy, Corp.; Tierra Solutions, Inc.; Chemical Land Holdings, Inc. |
| Cirino, et al. | 1:04 CV 2678 (JBW) | Ultramar Diamond; Maxus Energy Corp.; Chemical Land Holdings, Inc. |
| Clemens et al. | 1:04 CV 1835 (JBW) | Occidental Petroleum Corporation; Ultramar Diamond; Chemical Land Holdings, Inc.; Maxus Energy Corp.; Valero Energy Corp. |
| Kalas | 1:03 CV ____ (JBW) | Maxus Energy Corporation |
| Kidd, et al. | 1:03 CV 5047 (JBW) | Ultramar Diamond; Chemical Land Holdings, Inc.; Maxus Energy Corp. |
| Nelson, et al. | 1:03 CV 4010 (JBW) | Ultramar Diamond; Chemical Land Holdings, Inc.; Maxus Energy Corp. |
| Sampey, et al. | 1:03 CV 504 (JBW) | Ultramar Diamond; Chemical Land Holdings, Inc.; Maxus Energy Corp. |
| Saraceno, et al. | 1:04 CV 1334 (JBW) | Diamond Shamrock Refining and Marketing Company |
| Schuckman, et al. | 1:03 CV 2120 (JBW) | Ultramar Diamond Shamrock Corporation; Maxus Energy Corp.; Chemical Land Holdings, Inc. |
| Smith | 1:04 CV 1837 (JBW) | Ultramar Diamond Shamrock; Chemical Land Holdings, Incorporated |
| Stearns, et al. | 1:03 CV 5965 (JBW) | Maxus Energy Corporation; Ultramar Diamond Shamrock Corporation; Valero Energy Corporation |
| Twinam | 1:03 CV 1028 (JBW) | Ultramar Diamond; Chemical Land Holdings, Inc.; Maxus Energy Corp. |
| The Vietnam Association for Victims of Agent Orange/Dioxin, et al. | 04 CV 0400 (JBW) | Ultramar Diamond Shamrock Corporation; Maxus Energy Corporation; Diamond Shamrock Refining and Marketing Company; Chemical Land Holdings, Inc. |

| Plaintiffs | Civil Action No. | Misjoined Defendants |
|-------------------|-------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Walker, et al. | 1:04 CV 2089 (JBW) | Occidental Petroleum Corporation; Ultramar Diamond Shamrock Corporation; Maxus Energy Corp.; Tierra Solutions Inc.; Chemical Land Holdings, Inc. |
| Williams, et al. | 1:03 CV 4009 (JBW) | Ultramar Diamond; Chemical Land Holdings, Inc.; Maxus Energy Corp. |

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE "AGENT ORANGE"
PRODUCT LIABILITY LITIGATION

MDL No. 381 (JBW)

JOE ISAACSON and PHYLLIS LISA
ISAACSON, his wife,

CV-98-6383

Plaintiffs,

- against -

DOW CHEMICAL COMPANY, MONSANTO
COMPANY; AMERICAN HOME
PRODUCTS, INC.; HERCULES,
INCORPORATED; THOMPSON HAYWARD
CHEMICAL CO.; T-H AGRICULTURE &
NUTRITION CO.; OCCIDENTAL
CHEMICAL CORPORATION; UNIROYAL,
INC.; C.D.U. HOLDING, INC.; UNIROYAL
CHEMICAL COMPANY; HARCROS
CHEMICALS INC.; ULTRAMAR DIAMOND
SHAMROCK CORPORATION, MAXUS
ENERGY CORP., and CHEMICAL LAND
HOLDINGS, INC. and DOES 1 THROUGH
100,

Defendants.

**AFFIDAVIT OF HARVEY R. SMITH
IN SUPPORT OF
MOTION FOR SUMMARY
JUDGMENT DISMISSING
COMPLAINT AS AGAINST
DEFENDANTS MAXUS ENERGY
CORPORATION AND CHEMICAL
LAND HOLDINGS, INC. (NOW
KNOWN AS TIERRA SOLUTIONS, INC.)**

STATE OF TEXAS)
 : ss.:
COUNTY OF MONTGOMERY)

HARVEY R. SMITH, being duly sworn, deposes and says:

1. I am the duly appointed and serving Secretary of defendant Maxus Energy Corporation ("Maxus"). In such capacity, I have knowledge of the facts set out herein and am familiar with Maxus, its organization, operations, properties and affiliated companies. I make

this affidavit in support of the motion of Maxus and its affiliate, Tierra Solutions, Inc. (formerly known as Chemical Land Holdings, Inc.), for summary judgment dismissing plaintiffs' Amended Complaint with prejudice as against Maxus and Tierra Solutions.

A. Maxus Energy Corporation

2. Maxus was incorporated in Delaware on or about July 19, 1983 as New Diamond Corporation. A copy of the Certificate of Incorporation for New Diamond Corporation is annexed hereto as Exhibit A.

3. On or about September 1, 1983, Maxus changed its name from New Diamond Corporation to Diamond Shamrock Corporation.

4. On or about April 28, 1987, Maxus changed its name to Maxus Energy Corporation from Diamond Shamrock Corporation.

5. The changes of name from New Diamond Corporation to Diamond Shamrock Corporation to Maxus Energy Corporation did not involve any change in the corporate structure. They were merely changes in the name by which Maxus was known.

6. At all times since its incorporation in July 1983, Maxus has been a holding company that owns the stock of other corporations.

7. Maxus has never been engaged in the chemicals business or in the design, manufacture, marketing, distribution or sale of any herbicide, including "Agent Orange."

B. "Old Diamond"

8. Prior to September 1, 1983, there was another company named Diamond Shamrock Corporation (hereinafter sometimes referred to as "Old Diamond"). Old Diamond was originally incorporated as Diamond Alkali Company on or about December 28, 1928.

9. On or about September 1, 1983, Old Diamond changed its name to Diamond Chemicals Company from Diamond Shamrock Corporation.

10. On or about November 1, 1983, Old Diamond changed its name to Diamond Shamrock Chemicals Company from Diamond Chemicals Company.

11. Old Diamond was a separate and distinct company from Maxus. Old Diamond is not the predecessor of Maxus.

12. Old Diamond was an operating company with divisions engaged in certain businesses, including chemical manufacturing.

13. On September 1, 1983, Old Diamond, together with Natomas Company, an international oil company, became a wholly owned subsidiary of New Diamond (now known as Maxus), which, as noted above, was incorporated on or about July 19, 1983.

14. On or about September 4, 1986, an affiliate of Occidental Chemical Corporation, Oxy-Diamond Alkali Corporation, acquired from Maxus all the stock of Old Diamond (which, as noted above, was then known as Diamond Shamrock Chemicals Company).

C. Chemical Land Holdings, Inc.

15. Defendant Chemical Land Holdings, Inc. ("Chemical Land Holdings") has been an affiliate of Maxus at all times since its incorporation on or about March 21, 1986. Chemical Land Holdings was incorporated under the laws of the State of Delaware as Diamond Shamrock Process Chemicals Inc. and changed its name to Diamond Shamrock Chemical Land Holdings Inc. on or about July 11, 1986.

16. On or about December 4, 1987, several months after New Diamond changed its name to Maxus, Diamond Shamrock Chemical Land Holdings Inc. changed its name to Chemical Land Holdings, Inc. On or about February 25, 2002, subsequent to the commencement of this action, Chemical Land Holdings changed its name to Tierra Solutions, Inc.

17. Chemical Land Holdings has never been engaged in the chemicals business or in the design, manufacture, marketing, distribution or sale of any herbicides, including "Agent Orange."

18. In both their Complaint and Amended Complaint in this action, plaintiffs allege, incorrectly, that during the period from 1961 to 1972, Maxus and Chemical Land Holdings each designed, manufactured, marketed, distributed and sold to the United States Government certain phenoxy herbicides, including "Agent Orange." In fact, as described above, not only have Maxus and Chemical Land Holdings never been engaged in the manufacture of chemicals, but neither corporation was formed until more than a decade after the war in Vietnam ended.

D. Diamond Shamrock R&M, Inc.

19. In April 1987, Maxus "spun off" to its shareholders the outstanding stock of one of its subsidiaries, Diamond Shamrock R&M, Inc., which was engaged in the refining and marketing of petroleum products. Diamond Shamrock R&M, Inc.'s assets included the stock of Diamond Shamrock Refining and Marketing Company ("DSR&M"). Neither Diamond Shamrock R&M, Inc. nor DSR&M were ever engaged in the chemical business, nor did they ever design, manufacture, market, distribute or sell Agent Orange.

WHEREFORE, I respectfully request that the Court issue an Order granting summary judgment dismissing this action with prejudice as against Maxus Energy Corporation and its affiliate, Tierra Solutions, Inc. (formerly known as Chemical Land Holdings, Inc.).



Harvey R. Smith

Sworn to before me this
5th day of November, 2003.



Notary Public

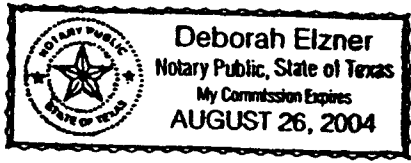
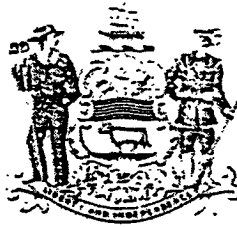




Exhibit A

State of Delaware



Office of Secretary of State

I, GLENN C. KENTON, SECRETARY OF STATE OF THE STATE OF DELAWARE DO HEREBY CERTIFY THE ATTACHED IS A TRUE AND CORRECT COPY OF THE CERTIFICATE OF INCORPORATION OF NEW DIAMOND CORPORATION FILED IN THIS OFFICE ON THE NINETEENTH DAY OF JULY, A.D. 1983, AT 10 O'CLOCK A.M.

|||

Glenn C. Kenton
Glenn C. Kenton, Secretary of State

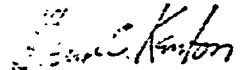
AUTHENTICATION: 10019323

DATE: 07/20/1983

832000303

CERTIFICATE OF INCORPORATION
OF
NEW DIAMOND CORPORATION

JUL 19 1953 10 AM



The undersigned, for the purpose of organizing a corporation under the ~~General Corporation~~ Law of the State of Delaware, does hereby certify as follows:

FIRST. The name of the Corporation (the "Corporation") is New Diamond Corporation.

SECOND. The registered office of the Corporation in the State of Delaware is located at 100 West Tenth Street, in the City of Wilmington, County of New Castle. The name of the Corporation's registered agent at such address is The Corporation Trust Company.

THIRD. The purpose of the Corporation is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of the State of Delaware.

FOURTH. The Corporation is authorized to issue two classes of capital stock, designated Common Stock and Preferred Stock. The amount of total authorized capital stock of the Corporation is 400,000,000 shares, divided into 300,000,000 shares of Common Stock \$1.00 par value, and 100,000,000 shares of Preferred Stock, \$1.00 par value.

The Preferred Stock may be issued in one or more series. The Board of Directors is hereby authorized to issue the shares of Preferred Stock in such series and to fix from time to time before issuance the number of shares to be included in any series and the designation, relative powers, preferences and rights and qualifications, limitations or restrictions of all shares of such series. The authority of the Board of Directors with respect to each series shall include, without limiting the generality of the foregoing, the determination of any or all of the following:

(a) the number of shares of any series and the designation to distinguish the shares of such series from the shares of all other series;

(b) the voting powers, if any, and whether such voting powers are full or limited, in any such series;

(c) the redemption provisions, if any, applicable to such series, including the redemption price or prices to be paid;

(d) whether dividends, if any, shall be cumulative or noncumulative, the dividend rate of such series, and the dates and preferences of dividends on such series;

(e) the rights of such series upon the voluntary or involuntary dissolution of, or upon any distribution of the assets of, the Corporation;

(f) the provisions, if any, pursuant to which the shares of such series are convertible into, or exchangeable for, shares of any other class or classes or of any other series of the same or any other class or classes of stock, or any other security, of the Corporation or any other corporation, and price or prices or the rates of exchange applicable thereto;

(g) the right, if any, to subscribe for or to purchase any securities of the Corporation or any other corporation;

(h) the provisions, if any, of a sinking fund applicable to such series; and

(i) any other relative, participating, optional or other special powers, preferences, rights, qualifications, limitations or restrictions thereof;

all as shall be determined from time to time by the Board of Directors and shall be stated in said resolution or resolutions providing for the issue of such Preferred Stock (a "Preferred Stock Designation").

Each holder of Common Stock of the Corporation entitled to vote shall have one vote for each share thereof held.

Except as may be provided by the Board of Directors in a Preferred Stock Designation, the Common Stock shall have the exclusive right to vote for the election of Directors and for all other purposes, and holders of Preferred Stock shall not be entitled to receive notice of any meeting of stockholders at which they are not entitled to vote or consent.

The Corporation shall be entitled to treat the person in whose name any share of its stock is registered as the owner thereof, for all purposes, and shall not be bound to recognize any equitable or other claim to, or interest in, such share on the part of any other person, whether or not the Corporation shall have notice thereof, except as expressly provided by applicable laws.

FIFTH. In furtherance of, and not in limitation of the powers conferred by statute, the Board of Directors is expressly authorized and empowered:

(a) To make and alter the By-Laws of the Corporation; provided, however, that the By-Laws made by the Board of Directors under the powers hereby conferred may be altered or repealed by the Board of Directors or by the stockholders having voting powers with respect thereto.

(b) From time to time to determine whether and to what extent, and at what times and places, and under what conditions and regulations, the accounts and books of the Corporation or any of them, shall be open to inspection of stockholders; and no stockholder shall have any right to inspect any account, book or document of the Corporation, except as conferred by applicable law and subject to the rights, if any, of the holders of any series of Preferred Stock as provided in the Preferred Stock Designation for such series.

The Corporation may in its By-Laws confer powers upon its Board of Directors in addition to the foregoing and in addition to the powers and authorities expressly conferred upon the Board of Directors by applicable law.

SIXTH. The stockholders and Board of Directors of the Corporation shall have power to hold their meetings and to have one or more offices of the Corporation within or without the State of Delaware, and to keep the books of the Corporation outside of the State of Delaware at such place or places as may from time to time be designated by the Board of Directors.

SEVENTH. Subject to the rights of the holders of Preferred Stock or any other class of capital stock of the Corporation (other than Common Stock) or any series of any of the foregoing which is outstanding, any action required or permitted to be taken by the stockholders of the Corporation must be effected at an annual or special meeting of stockholders of the Corporation and may not be effected by any consent in writing of such stockholders.

EIGHTH. The Corporation reserves the right to amend, alter, change or repeal any provision contained in the Certificate of Incorporation, including in a Preferred Stock Designation, in the manner now or hereafter prescribed by applicable law and this Certificate of Incorporation, including any applicable Preferred Stock Designation, and all rights conferred upon stockholders herein are created subject to this reservation.

NINTH. The name and mailing address of the incorporator is Timothy J. Fretthold, 3300 Diamond Shamrock Tower, 717 North Harwood Street, Dallas, Texas 75201.

IN WITNESS WHEREOF, the undersigned, being the incorporator hereinabove named, does hereby execute this Certificate of Incorporation this 4th day of July, 1983.

RECEIVED FOR RECORD

JUL 14 1983

LEO J. DUCAN, Jr., Recorder


Timothy J. Fretthold



Exhibit A

491690

221-B

CRIS COUNTY, TEXAS
James Bradford County Clerk

XX 36 333
PAGE 1

State of Delaware



142-00-0830

0012221 001690 9 17.00

Cont.

Office of Secretary of State

I, MICHAEL MARKINS, SECRETARY OF STATE OF THE STATE OF DELAWARE DO HEREBY CERTIFY THE ATTACHED IS A TRUE AND CORRECT COPY OF THE CERTIFICATE OF OWNERSHIP OF OCCIDENTAL CHEMICAL CORPORATION, A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF NEW YORK, MERGING OCCIDENTAL ELECTROCHEMICALS CORPORATION A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF DELAWARE, PURSUANT TO SECTION 253 OF THE GENERAL CORPORATION LAW OF THE STATE OF DELAWARE, AS RECEIVED AND FILED IN THIS OFFICE THE THIRTIETH DAY OF NOVEMBER, A.D. 1967, AT 10 O'CLOCK A.M.

17
2

*(2)
de
de*

AND I DO HEREBY FURTHER CERTIFY THAT THE AFORESAID CORPORATION SHALL BE GOVERNED BY THE LAWS OF THE STATE OF NEW YORK.

|||||



727337922

Michael Markins
Michael Markins, Secretary of State

AUTHENTICATION: 11480805

DATE: 12/03/1967

After Recordation return to: Nicholson Land Services, P.O. Box 19671, Houston, TX 77224

THE ABOVE IS A TRUE, CORRECT AND COMPLETE COPY OF THE ORIGINAL RECORD AS FILED IN MY OFFICE AND IS AVAILABLE UNDER THE PUBLIC INFORMATION ACT OF THE STATE OF TEXAS. THE STATE OF TEXAS COUNTY OF HARRIS

EXHIBIT "A"

JAN 14 1988



ANITA RODENAEVER
COUNTY CLERK
HARRIS COUNTY, TEXAS

By *James Petty*
Deputy
JAMES PETTY

RLTUN: 11
Nicholson Land Services
P.O. Box 19671
Houston, TX 77224

88 36 334

142-00-0831

CERTIFICATE OF OWNERSHIP AND MERGER
of
OCCIDENTAL ELECTROCHEMICALS CORPORATION
into
OCCIDENTAL CHEMICAL CORPORATION
and
APPOINTMENT OF AGENT FOR SERVICE

Occidental Chemical Corporation (the "Corporation"), pursuant to Delaware Code Ann. Tit. 8, § 252(d) and § 253, hereby certifies that it is a corporation duly organized and existing under the laws of the State of New York; that it owns all the outstanding shares of stock of Occidental Electrochemicals Corporation ("OEC"), a corporation duly organized and existing under the laws of the State of Delaware; that the laws of the State of New York permit a merger of a wholly-owned Delaware subsidiary corporation into its New York parent corporation; that the following resolution was duly adopted by the unanimous written consent of the members of its board of directors on November 25, 1987 and that such resolution has not been rescinded and is in full force and effect on the date hereof:

RESOLVED, that OEC, all of whose shares of stock are owned by this Corporation, be merged with and into this Corporation; that this Corporation assume all of the obligations and liabilities of OEC; and that the Chairman of the Board, the President, any Vice President, the Treasurer, any Assistant Treasurer, the Secretary or any Assistant Secretary of this Corporation be, and each of them hereby is, authorized and empowered to execute, acknowledge, deliver, file and record all such certificates, agreements and other instruments as may be required by law to give effect to this merger, and to take all such further actions and to execute, acknowledge, deliver, file and record all such further documents, including, but not limited to, applications, reports, surety bonds, irrevocable consents and appointments of attorneys for service of process, as such officer deems necessary or advisable in the best interests of this Corporation to carry out the purposes of this resolution.

non possession herein which restricts the sale, return, or use of the OEC-...
PROPERTY OF CLERK OF COURTS HARRIS COUNTY TEXAS
THE STATE OF TEXAS }
COUNTY OF HARRIS }
The above is a full, true, and correct photographic copy of the original
record now in the public custody and possession, as the same is recorded
in the Official Public Records of said Property as my Office and Profession
as Secretary, and being Microfilm identification numbers as shown
thereon hereby certified.

JAN 14 1988



ANITA BODEHEAVER
COUNTY CLERK
HARRIS COUNTY, TEXAS

By *James Petty*
Deputy

JAMES PETTY

EX-12RN6066

142-00-0832

The undersigned Corporation agrees that it may be served with process in the State of Delaware in any proceeding for enforcement of any obligation of its aforesaid Delaware subsidiary corporation, as well as for the enforcement of any obligation of the undersigned Corporation arising from the merger contemplated hereby, and it hereby irrevocably appoints the Secretary of State of the State of Delaware as its agent to accept service of process in any such suit or other proceeding. The address of the undersigned Corporation to which a copy of any such process shall be mailed by said Secretary of State is: Occidental Chemical Corporation, c/o Occidental Petroleum Corporation, 10889 Wilshire Boulevard, Suite 1500, Los Angeles, California 90024, Attention: John W. Alden.

IN WITNESS WHEREOF, the undersigned Corporation has caused this Certificate and appointment to be signed on its behalf by its Vice President and its corporate seal to be hereunto affixed, duly attested by its Assistant Secretary this 25th day of November, 1987.

OCCIDENTAL CHEMICAL CORPORATION

By: *Ronald B. Casriel*
 Ronald B. Casriel, Vice President

(Corporate Seal)

Attest:

Stephen P. Parise
 Stephen P. Parise, Assistant Secretary

THE STATE OF TEXAS
 COUNTY OF HARRIS

The above is a full, true and correct photographic copy of the original record now in my locker custody and possession, as the same is recorded in the Official Public Records of Real Property in my office and preserved by electronic, and having electronic identification Number as shown.

JAN 14 1988



ANITA BODEHEAVER
 COUNTY CLERK
 HARRIS COUNTY, TEXAS

James Petty
 JAMES PETTY
 Deputy

88 36 356

State of New York }
Department of State }

142-00-0833

087-189

I hereby certify that I have compared the attached copy with the original document filed by the Department of State and that the same is a correct transcript of said original.

DEC 6 1987

Witness my hand and seal of the Department of State at

[Signature]
Secretary of State

ANY PROVISION HEREIN WHICH RESPECTS TO THE SALE, RENTAL, OR USE OF THE OCEANIC OIL-GAS PROPERTY BECAUSE OF COLLISION OR ACCIDENT IS HEREBY WAIVED AND VOID IN FULL.
THE STATE OF TEXAS }
COUNTY OF HARRIS }
The above is a full, true and correct photographic copy of the original record kept in my lawful custody and possession, as the same is recorded in the Official Public Records of Real Property in my office and preserved in accordance, and having recorded identification number as stamped thereon I hereby certify as

JAN 14 1988



ANITA RODEHEAVER
COUNTY CLERK
HARRIS COUNTY, TEXAS

[Signature]
Deputy

JAMES PETTY

-4

572123

CT

742-00-0834

STATE OF NEW YORK
DEPARTMENT OF STATE

FILED NOV 30 1988

AMT OF CHECK \$ 80
FILING FEE \$ 20
TAX \$
COUNTY FEE \$
COPY \$
CERT \$
REPAIRS \$
SPEC HANDLE \$

CERTIFICATE OF MERGER

OF

- ① OCCIDENTAL ELECTROCHEMICAL CORPORATION
- ② OXYCHEM PROPERTIES CORPORATION
- ③ B.D.M. CHEMICAL CORPORATION

INTO

- ④ OCCIDENTAL CHEMICAL CORPORATION

FOR DEL UNDER SECTION 905 OF THE NEW YORK BUSINESS CORPORATION LAW

① 01/11/86

CG - Drive to Alkali
Company - 11/14/7

MFC
A-4149

L-1124260-3

② NR

③ NR

④ 11/18/82

CG - Hecker Electrochemical
Company - 11/16/89

MFC

671-31

L-1571337-5
3000 TV #5.00

State Office
OCCIDENTAL PETROLEUM CORPORATION
10827 Wilshire Boulevard
Los Angeles, CA 90024

AD

BILLED

ANY PROVISION WHICH IN ANY MANNER DEFERS THE SALE, REWARD, OR USE OF THE RECORDS FROM
BEING AVAILABLE TO ANY PERSON SHALL BE VOID AND WITHOUT EFFECT.

THE STATE OF TEXAS
COUNTY OF HARRIS
The above is a full, true, and correct photographic copy of the original
record now in my hands, custody and possession, as the same is recorded
in the Official Public Records of Real Property in my office and preserved
on the rolls, and having the official identification number of stamps
thereon liberally granted.

JAN 4 1988



ANITA ROGHEAVER
COUNTY CLERK
HARRIS COUNTY, TEXAS

By *James Petty*
Deputy

JAMES PETTY

88 36 335

142-00-0835

CT

CT

CERTIFICATE OF MERGER
OF

OCCIDENTAL ELECTROCHEMICALS CORPORATION
OXYCHEM PROPERTIES CORPORATION
S.D.M. CHEMICAL CORPORATION

INTO

OCCIDENTAL CHEMICAL CORPORATION

Under Section 903 of the
New York Business Corporation Law

6572723

6572723

Pursuant to the provisions of Section 903 of the
New York Business Corporation Law, the undersigned hereby
certify:

FIRST: The name of the constituent parent and
surviving corporation is Occidental Chemical Corporation, a
corporation organized and existing under the laws of the
State of New York (originally formed under the name of
Hooker Electrochemical Company). Occidental Chemical
Corporation owns all of the outstanding shares of the
following constituent subsidiary corporations:

| <u>Name of Subsidiary</u> | <u>Name under which subsidiary was originally formed, if different from present name</u> |
|--------------------------------------------|--------------------------------------------------------------------------------------------------|
| Occidental Electrochemicals Corporation | Diamond Alkali Company |
| Oxychem Properties Corporation | (same) |
| S.D.M. Chemical Corporation | (same) |

SECOND: As to each subsidiary corporation, the
designation and number of outstanding shares and the number
of such shares owned by the surviving corporation are as
follows:

any provision of law which requires the full, correct and true recording of this instrument in the public records of the State of Texas, the County of Harris, Texas, and correct photographic copy of the original record hereon in my book, card and records, at the time it is recorded in the Official Public Records of that County in my office and preserved as a record and being the official record of this instrument, I do hereby certify that I have done so.

JAN 14 1988



ANITA ROGHEAVER
COUNTY CLERK
HARRIS COUNTY, TEXAS

By *James Petty*
Deputy
JAMES PETTY

AK 36 359

742-00-0636

| <u>Name of Subsidiary</u> | <u>Designation and Number of Outstanding Shares</u> | <u>Number of Shares Owned by Occidental Chemical Corporation</u> |
|-----------------------------------------|-----------------------------------------------------|------------------------------------------------------------------|
| Occidental Electrochemicals Corporation | 1,000 Common | 1,000 Common |
| Oxychem Properties Corporation | 1,000 Common | 1,000 Common |
| B.D.M. Chemical Corporation | 100 Common | 100 Common |

None of the shares of these subsidiary corporations is subject to change prior to the effective date of the merger.

THIRD: The certificate of incorporation of Occidental Chemical Corporation was filed in the Office of the Department of State of the State of New York on the 6th day of November, 1969.

FOURTH: The following information is given with respect to the subsidiary corporations:

| <u>Name of Subsidiary</u> | <u>State of Incorp.</u> | <u>Date of Incorp.</u> | <u>Date of Filing Application for Authority to do Business in N.Y.</u> |
|-----------------------------------------|-------------------------|------------------------|------------------------------------------------------------------------|
| Occidental Electrochemicals Corporation | Delaware | 12/28/28 | 1/2/47 |
| Oxychem Properties Corporation | California | 12/10/76 | None |
| B.D.M. Chemical Corporation | Colorado | 1/17/66 | None |

None of these subsidiary corporations uses a fictitious name in New York pursuant to article thirteen of the New York Business Corporation Law.

FIFTH: The merger is permitted by the laws of the state of incorporation of each foreign subsidiary corporation and is in compliance therewith.

SIXTH: The surviving corporation owns all of the outstanding shares of each subsidiary corporation to be merged.

ANY PROVISION OF THIS INSTRUMENT WHICH IS IN CONFLICT WITH THE PROVISIONS OF THE CONSTITUTION OR LAWS OF THE STATE OF TEXAS IS HEREBY REPEALED.
THE STATE OF TEXAS
COUNTY OF HARRIS
 The above is a full, true and correct photostatic copy of the original record now in the custody and possession of the County Clerk in the Office of the Official Public Records of Harris County, Texas, and I, the undersigned, County Clerk, do hereby certify that the same is a true and correct copy of the original record as the same appears in the Official Public Records of Harris County, Texas, and I, the undersigned, County Clerk, do hereby certify that the same is a true and correct copy of the original record as the same appears in the Official Public Records of Harris County, Texas.

JAN 14 1988



ANITA ROOPHEAVER
COUNTY CLERK
HARRIS COUNTY, TEXAS

James Petty
Deputy
JAMES PETTY

RR 36 390

ZBOGRH5006

142-00-0837

SEVENTH: The plan of merger was adopted by the Board of Directors of the surviving corporation.

IN WITNESS WHEREOF, this certificate has been signed on the 25th day of November, 1987 and the statements contained herein are affirmed as true under penalties of perjury.

OCCIDENTAL CHEMICAL CORPORATION

By: *Ronald S. Casriel*
Ronald S. Casriel, Vice President

By: *Stephen P. Parise*
Stephen P. Parise, Assistant Secretary

NOTICE: This document is the property of the County Clerk of Harris County, Texas. It is loaned to you for your use only and it is to be returned to the County Clerk's Office upon completion of your business. It is not to be reproduced or distributed to any other person without the written consent of the County Clerk.

JAN 6 1988



FILED
1988 JAN -6 11 11:39
Rita K. ...
COUNTY CLERK
HARRIS COUNTY, TEXAS

RECORDS MANAGEMENT
THIS IS A COPY OF THE ORIGINAL RECORD AS FILED IN THE COUNTY CLERK'S OFFICE. IT IS NOT TO BE REPRODUCED OR DISTRIBUTED TO ANY OTHER PERSON WITHOUT THE WRITTEN CONSENT OF THE COUNTY CLERK.

an impression of a certain document, to wit, a copy of the original of a
PROPERTY RECORD OF CASE NO. 117000 and corresponding with "Case No.
(THE STATE OF TEXAS)
COUNTY OF HARRIS
The above is a true, and correct photographic copy of the original
record now in my lawful custody and possession, as the same is recorded
in the Official Public Records of said Property at my office and preserved
in accordance with the provisions of the laws of this State and the
provisions of the laws of the State of Texas.

JAN 4 1988



ANITA RODEMEYER
COUNTY CLERK
HARRIS COUNTY, TEXAS
By: *James Petty*
Deputy
JAMES PETTY

Exhibit D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE "AGENT ORANGE"
PRODUCT LIABILITY LITIGATION

MDL No. 381 (JBW)

JOE ISAACSON and PHYLLIS LISA
ISAACSON, his wife,

CV-98-6383

Plaintiffs,

- against -

DOW CHEMICAL COMPANY, MONSANTO
COMPANY; AMERICAN HOME PRODUCTS,
INC.; HERCULES, INCORPORATED;
THOMPSON HAYWARD CHEMICAL CO.; T-
H AGRICULTURE & NUTRITION CO.;
OCCIDENTAL CHEMICAL CORPORATION;
UNIROYAL, INC.; C.D.U. HOLDING, INC.;
UNIROYAL CHEMICAL COMPANY;
HARCROS CHEMICALS INC.; ULTRAMAR
DIAMOND SHAMROCK CORPORATION,
MAXUS ENERGY CORP., and CHEMICAL
LAND HOLDINGS, INC. and DOES 1
THROUGH 100,

**AFFIDAVIT OF ROBERT D. LUSS IN
SUPPORT OF
MOTION FOR SUMMARY
JUDGMENT DISMISSING
COMPLAINT AS AGAINST
DEFENDANTS MAXUS ENERGY
CORPORATION AND CHEMICAL
LAND HOLDINGS, INC. (NOW
KNOWN AS TIERRA SOLUTIONS, INC.)**

Defendants.

STATE OF TEXAS)

: ss.:

COUNTY OF DALLAS)

ROBERT D. LUSS, being duly sworn, deposes and says:

1. I am Associate General Counsel and Assistant Secretary of defendant Occidental Chemical Corporation ("OCC"). This certification is based on knowledge, information, and belief based on my review of documents.

2. OCC is the successor, by merger effective November 30, 1987, to Occidental Electrochemicals Corporation. A true and correct copy of the Certificate of Ownership and Merger is annexed hereto as Exhibit A.

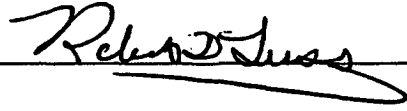
3. Occidental Electrochemicals Corporation was known until on or about December 19, 1967 as Diamond Alkali Company, and successively thereafter as Diamond Shamrock Corporation (until on or about September 1, 1983), Diamond Chemicals Company (until on or about November 1, 1983), and Diamond Shamrock Chemicals Company (until on or about September 29, 1986).

4. On or about September 4, 1986, an affiliate of OCC, Oxy-Diamond Alkali Corporation, acquired from the holding company then known as Diamond Shamrock Corporation (and now known as Maxus Energy Corporation) the stock of the operating company then known as Diamond Shamrock Chemicals Company.

5. Following that acquisition, Diamond Shamrock Chemicals Company changed its name to Occidental Electrochemicals Corporation on or about September 29, 1986. As noted above, Occidental Electrochemicals Company was subsequently merged into OCC effective November 30, 1987.

6. By reason of the foregoing, OCC is the successor by merger to the company which was known until on or about December 19, 1967, as Diamond Alkali Company and eventually thereafter as Diamond Shamrock Chemicals Company and Occidental Electrochemicals Corporation.

7. OCC is being defended, indemnified and held harmless in this action by Maxus Energy Corporation.



Robert D. Luss

Sworn to before me this
7th day of November, 2003.



Notary Public

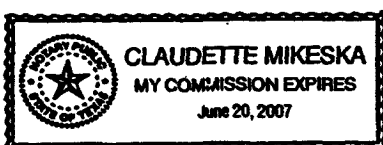


Exhibit E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE "AGENT ORANGE"
PRODUCT LIABILITY LITIGATION

MDL No. 381 (JBW)

JOE ISAACSON and PHYLLIS LISA
ISAACSON, his wife,

CV-98-6383

Plaintiffs,

- against -

DOW CHEMICAL COMPANY, MONSANTO
COMPANY; AMERICAN HOME
PRODUCTS, INC.; HERCULES,
INCORPORATED; THOMPSON HAYWARD
CHEMICAL CO.; T-H AGRICULTURE &
NUTRITION CO.; OCCIDENTAL
CHEMICAL CORPORATION; UNIROYAL,
INC.; C.D.U. HOLDING, INC.; UNIROYAL
CHEMICAL COMPANY; HARCROS
CHEMICALS INC.; ULTRAMAR DIAMOND
SHAMROCK CORPORATION, MAXUS
ENERGY CORP., and CHEMICAL LAND
HOLDINGS, INC. and DOES 1 THROUGH
100,

**AFFIDAVIT OF J. STEPHEN GILBERT
IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT DISMISSING
COMPLAINT AS AGAINST DEFENDANT
VALERO ENERGY CORPORATION (AS
SUCCESSOR TO ULTRAMAR DIAMOND
SHAMROCK CORPORATION)**

Defendants.

STATE OF TEXAS)
 : ss.:
COUNTY OF BEXAR)

J. STEPHEN GILBERT, being duly sworn, deposes and says:

1. I am Managing Counsel of Valero Energy Corporation ("Valero"), the successor by merger to Ultramar Diamond Shamrock Corporation ("Ultramar Diamond Shamrock"), which has been named as a defendant in this action. I make this affidavit in support

of Valero's motion for summary judgment dismissing plaintiffs' Amended Complaint with prejudice as against Valero and Ultramar Diamond Shamrock. I have personal knowledge of the matters set forth herein.

2. In April 1987, the company then known as Diamond Shamrock Corporation (and now known as Maxus Energy Corporation) "spun off" to its shareholders the outstanding stock of one of its subsidiaries, Diamond Shamrock R&M, Inc., a company engaged in the refining and marketing of petroleum products. Diamond Shamrock R&M, Inc.'s assets included the stock of Diamond Shamrock Refining and Marketing Company ("DSR&M").

3. In February 1990, Diamond Shamrock R&M, Inc. changed its name to Diamond Shamrock, Inc. On or about December 3, 1996, Diamond Shamrock R&M, Inc. (then named Diamond Shamrock, Inc.) merged with and into Ultramar Corporation. The merged company then changed its name to Ultramar Diamond Shamrock Corporation.

4. Plaintiffs commenced this action in July 1998, naming Ultramar Diamond Shamrock as a defendant. In both their Complaint and Amended Complaint, plaintiffs allege, incorrectly, that during the period from 1961 to 1972, Ultramar Diamond Shamrock designed, manufactured, marketed, distributed and sold to the United States Government certain phenoxy herbicides, including "Agent Orange."

4. On December 31, 2001, following the commencement of this action, Ultramar Diamond Shamrock was merged into Valero Energy Corporation, with Valero being the surviving corporation.

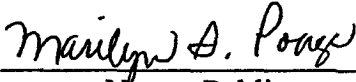
5. Since neither Diamond Shamrock R&M, Inc. nor DSR&M ever manufactured or sold any of the products that are the subject of this lawsuit, no basis exists for naming Diamond Shamrock R&M, Inc.'s successors – Ultramar Diamond Shamrock and Valero – as defendants in this action.

WHEREFORE, I respectfully request that the Court issue an Order granting summary judgment dismissing this action with prejudice as against Valero Energy Corporation, as successor by merger to Ultramar Diamond Shamrock Corporation.



J. Stephen Gilbert

Sworn to before me this
6th day of November, 2003.



Notary Public

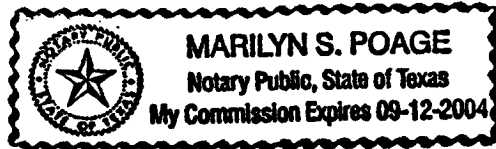


Exhibit F

STATE OF CALIFORNIA)
 : ss.:
COUNTY OF LOS ANGELES)

Stephen P. Parise, being duly sworn, deposes and says:

1. I am an Assistant Secretary and Corporate Manager—Entities Administration of defendant Occidental Petroleum Corporation. This certification is based on my knowledge, information, and belief based on my review of documents.

2. Occidental Petroleum Corporation ("OPC") is the indirect parent of defendant Occidental Chemical Corporation ("OCC"). OCC and OPC are, and at all relevant times have been, separate and distinct corporate entities.

3. OCC is the successor, by merger effective November 30, 1987, to Occidental Electrochemicals Corporation. Occidental Electrochemicals Corporation was known until on or about December 19, 1967, as Diamond Alkali Company, and successively thereafter as Diamond Shamrock Corporation (until on or about September 1, 1983), Diamond Chemicals Company (until on or about November 1, 1983), and Diamond Shamrock Chemicals Company (until on or about September 29, 1986).

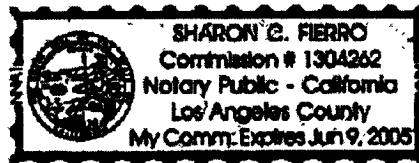
4. On or about September 4, 1986, an affiliate of OCC, Oxy-Diamond Alkali Corporation, acquired from the holding company then known as Diamond Shamrock Corporation (and now known as Maxus Energy Corporation) the stock of the operating company then known as Diamond Shamrock Chemicals Company.

5. By reason of the foregoing, OCC, not OPC, is the successor by merger to the company which was known until on or about December 19, 1967, as Diamond Alkali Company and eventually thereafter as Diamond Shamrock Chemicals Company and Occidental Electrochemicals Corporation. Moreover, OPC neither sold nor manufactured agent orange.

Stephen P. Parise
Stephen P. Parise

Sworn to before me this 2nd day of November, 2004.

Sharon C. Fierro
Notary Public



Certificate of Service

I hereby certify that on November 2, 2004 the foregoing document was filed with the Clerk of the Court and served in accordance with the Federal Rules of Civil Procedure, and/or the Eastern District's Local Rules, and/or the Eastern District's Rules on Electronic Service upon the following parties and participants:

Lueders & Boanerges
9432 Old Katy Road, Suite 100
Houston, TX 77055
(713) 464-3383

Newman Bronson & Wallis
2300 West Port Plaza Drive
St. Louis, MO 63146-3213
(314) 878-8200

Smoger & Associates, P.C.
3175 Monterey Blvd.
Oakland, CA 94602
(510) 531-4529

Williams, Cuker & Berezofsky
Woodland Corporate Park
210 Lake Drive East, Suite 100
Cherry Hill, NJ 08002
(856) 667-0500

Paul W. Flowers, Esq.
50 Public Square
Cleveland, Ohio 44113-2216
(216) 344-9393

Carl J. Zaffiro, Esq.
5555 Mayfield Road
Cleveland, OH 44124-0001
(440) 461-1810

Caroselli Beachler McTiernan & Conboy
312 Boulevard of the Allies, 8th Floor
Pittsburgh, PA 15222
(412) 391-9860

Houssiere, Durant & Houssiere, LLP
1990 Post Oak Boulevard, Suite 800
Houston, TX 77056-3812
(713) 626-3700

Guerriero & Guerriero
2200 Forsythe Avenue
Monroe, LA 71201
(318) 325-4306

Burgos & Evans, LLC
3632 Canal Street
New Orleans, LA 70119-6135
(504) 488-3722

Rochelle M. Jones, Esq.
108 Highgate Avenue
Buffalo, NY 14214
(716) 603-9867

Robert J. Passarelli, Esq.
122 West Main Street, Suite 202
Babylon, NY 11702
(516) 321-8500

Timothy L. Eves, Esq.
418 Eleventh Street, Suite 205
Huntington, WV 25701
(304) 529-0474

Campbell Cherry Harrison Davis Dove
5 Ritchie Road
Waco, TX 76712
(254) 761-3300

Alan S. Levin
P.O. Box 4703
Incline Village, NV 89450
(775) 831-5603

Shanley, Sweeney, Reilly & Allen, P.C.
The Castle at Ten Thurlow Terrace
Albany, NY 12203
(518) 463-1415

Constantine P. Kokkoris, Esq.
225 Broadway, Suite 612
New York, NY 10007
(212) 349-9340

Kathleen Melez
13101 Washington Blvd., Suite 463
Los Angeles, CA 90066
(310) 566-7452

Moore & Goodman, LLP
740 Broadway
New York, NY 10003
(212) 353-9587

Shelby Roden, LLC
2956 Rhodes Circle
Birmingham, AL 35205
(205) 933-8383

Cartee & Morris, LLC
1232 Blue Ridge Boulevard
Birmingham, AL 35259
(205) 263-0333

Davis & Norris, LLP
2151 Highland Avenue, Suite 100
Birmingham, AL 35205
(205) 453-0094

/s/ Michael M. Gordon
Michael M. Gordon (MG8336)
Cadwalader, Wickersham & Taft LLP
100 Maiden Lane
New York, NY 10038
(212) 504-6397