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NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, *et al.*,	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: ESSEX COUNTY
Plaintiffs,	DOCKET NO. L-9868-05 (PASR)
v.	CIVIL ACTION
OCCIDENTAL CHEMICAL CORPORATION, TIERRA SOLUTIONS, INC., MAXUS ENERGY CORPORATION, *et al.*,	**MAXUS ENERGY CORPORATION'S COUNTERSTATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF TRACK III CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT, AND IN OPPOSITION TO PLAINTIFFS' AND OCCIDENTAL CHEMICAL CORPORATION'S TRACK III MOTIONS FOR PARTIAL SUMMARY JUDGMENT**
Defendants.	

Defendant Maxus Energy Corporation ("Maxus"), by and through its undersigned counsel, submits this Counterstatement of Undisputed Material Facts in support of its Track III cross-motion for partial summary judgment, and in opposition to Plaintiffs' and Occidental Chemical Corporation's Track III motions for partial summary judgment.

COUNTERSTATEMENT OF FACTS

A. Old Diamond Shamrock Corporation ("DSC-1")

1. In 1983 Diamond Shamrock Corporation ("Old Diamond" or "DSC-1") was a large diversified corporation, with multiple divisions engaged in different businesses, including chemicals manufacturing, coal production, oil and gas exploration, and petroleum refining. See 1983 Diamond Shamrock Annual Report, attached as Exhibit 60 to the Certification of David L. Bryant In Support of OCC's Motion for Partial Summary Judgment on Cross-Claim ("Bryant Cert") (describing various business units and divisions).

2. Old Diamond, formerly Diamond Alkali Company, had its roots in the chemicals business, with chemical manufacturing plants, sales offices, transportation networks and research facilities located throughout the United States and overseas. See generally 1966 Diamond Shamrock Corporation Annual Report, attached as Exhibit 100 to the Certification of Vincent E. Gentile in Opposition to Plaintiffs' and OCC's Track III Motions for Summary Judgment and in Support of Cross-Motion ("Gentile Cert."); 1981 Diamond Shamrock Corporation SEC Form 10-K, Gentile Cert., Ex. 5; 1983 Diamond Shamrock Annual Report, Bryant Cert., OCC Ex. 60.

3. In 1967, Diamond Alkali merged with Shamrock Oil & Gas Company, an oil and gas producing company, to form Old Diamond, and in 1979 Old Diamond acquired Falcon Coal Company, a coal production company. See Pls.' Statement of Undisputed Material Facts, ¶ 2; 1979 Diamond Shamrock Corporation Annual Report, at MAXUS3817370, Gentile Cert., Ex. 93.

4. The company continued to grow, and by 1983, Old Diamond was a large

diversified corporation, with multiple divisions engaged in different businesses, including chemicals manufacturing, coal production, oil and gas exploration, and petroleum refining. See Diamond Shamrock Annual Report 1983, Bryant Cert., OCC Ex. 60; Certification of Timothy J. Fretthold ("Fretthold Cert.") ¶¶ 3, 6.

5. Because of its many divisions, Old Diamond had become a large and unwieldy corporate conglomerate, with all of its major business units and administrative functions contained within a single corporation. See, e.g., Diamond Shamrock Corporation 1981 Form 10-K, at MAXUS3510544, Gentile Cert., Ex. 5; Certification of Jonathan Macey ("Macey Cert.") ¶ 29; Kelley Aff. ¶ 3.

6. This multi-divisional form had been common among business organization in the United States, but fell out of favor in the late 1970s for fostering empire building by managers and causing other inefficiencies. Under this form, headquarters were unable to allocate capital or evaluate managerial performances in diverse businesses, and shareholders were pressuring firms to shift from prior strategies of diversification to focus instead on core areas of managerial competence. See Certification of Jeffrey N. Gordon ("Gordon Cert.") ¶¶ 17-18.

7. Consistent with the prevailing trends, Old Diamond found that its multi-divisional structure made it more difficult to separate the financial performance of each of its individual business units and to sell business components when advantageous to do so. See Pl. Maxus Corporate Co.'s Resp. to Def. Ivan F. Boesky's 2nd Set of Interrogs., Resp. to Interrog. No. 19, Maxus Corporate Co. v. Kidder, Peabody & Co. Inc., Martin A. Siegel and Ivan F. Boesky, Tex. Dist. Ct., No. 87-15583-M (Aug. 21, 1992), at MAXUS18883911, Bryant Cert., OCC Ex. 56; Fretthold Cert. ¶ 3; Kelley Aff. ¶ 5.

8. In the early 1980s, Old Diamond adopted a long range strategic plan to transform itself into a fully integrated oil and gas and energy company. See Diamond Shamrock Annual Report 1983, at OCCNJ0006533, Bryant Cert., OCC Ex. 60; Macey Cert. ¶ 23; Affidavit of James F. Kelley ("Kelley Aff.") ¶ 16; Fretthold Cert. ¶ 3.

9. At the time, Old Diamond viewed the energy sector and, specifically, oil and gas production, as having the greatest potential for future growth. Kelley Aff. ¶ 16; Diamond Shamrock: Lone Ranger, THE ECONOMIST, Mar. 19, 1983, at p. 87, Gentile Cert., Ex. 3 (noting Diamond Shamrock believed it was "[j]ust the right time...to switch from chemicals to energy").

10. Among other things, this was the period of the 1979 oil price shock that followed the Iranian revolution, when oil prices rose to record levels and segments of the oil industry experienced record profits. Gordon Cert. ¶ 12.

11. Old Diamond viewed the chemicals business, while profitable, as having more limited future growth potential as a result of several factors, including the maturity of the industry, the relatively flat demand for certain industrial chemical products, and increased operating costs. Kelley Aff. ¶ 16; cf. Diamond Shamrock: Lone Ranger, THE ECONOMIST, Mar. 19, 1983, at p. 87, Gentile Cert., Ex. 3 (noting the industry trend in diversifying beyond chemicals and sales of chemical business units).

12. In August 1982, consistent with its more focused business strategy, Old Diamond entered into an agreement for the acquisition of Sigmor Corporation, a major producer and refiner of petroleum products. See Aug. 10, 1982 Diamond Shamrock Corporation Form 10-Q, at p. 8, Gentile Cert., Ex. 4. The acquisition became effective in January 1983. See Diamond Shamrock Annual Report 1983, at OCCNJ0006556, Bryant

Cert., OCC Ex. 60.

13. In light of these broader changes and new acquisitions, Old Diamond's senior management began planning for a corporate reorganization that would shift away from a single corporation containing many varied operating units to a holding company structure with discrete business lines held in separate subsidiaries. See Gordon Cert. ¶¶ 12-13; Kelley Aff. ¶ 9.

14. As of 1976, nearly half of the other Fortune 500 firms underwent this same transformation from corporate conglomerates into parent holding companies and operating subsidiaries. See Gordon Cert. ¶ 22.

15. In January 1985, for example, Occidental Petroleum Corporation ("OPC"), OCC's parent, planned to use a holding company structure in an aborted acquisition of Maxus. See Minutes of Jan. 7, 1985 Special Mtg. of Bd. of Dirs. of OPC, at OCCNJ0044126, Gentile Cert., Ex. 29.

B. The Purpose of the 1983-84 Reorganization

16. Under Old Diamond's planned reorganization (the "Reorganization"), its various business units each would become a separate operating subsidiary, owned by a newly formed parent holding company (New Diamond). See Kelley Aff. ¶ 13; Fretthold Cert. ¶ 5; Possible Structure Diagram, dated Jan. 9, 1983, at MAXUS3202049, Gentile Cert., Ex. 6; Aug. 2, 1983 Letter to Shareholders and Proxy Statement, at p. 1, Gentile Cert., Ex. 90.

17. No operating businesses would be contained in the parent corporation; it would simply hold the stock of the subsidiaries. See Kelley Aff. ¶ 4; Fretthold Cert. ¶¶ 5, 9; Aug. 2, 1983 Letter to Shareholders and Proxy Statement, at p. 1, Gentile Cert., Ex. 90.

18. Old Diamond undertook the Reorganization for specific purposes. See

Kelley Aff. ¶ 5.

19. The first was to rationalize the corporate structure by establishing a separate corporate subsidiary for each business and placing both the assets and the liabilities of each business in its corresponding subsidiary. See Pl. Maxus Corporate Co.'s Resp. to Def. Ivan F. Boesky's 2nd Set of Interrogs., Resp. to Interrog. No. 19, Maxus Corporate Co. v. Kidder, Peabody & Co. Inc., Martin A. Siegel and Ivan F. Boesky, Tex. Dist. Ct., No. 87-15583-M (Aug. 21, 1992), at MAXUS18883911, Bryant Cert., OCC Ex. 56; Kelley Aff. ¶ 5; Gordon Cert. ¶¶ 12, 18. This facilitated more effective management by enabling the managers of each business to have a much greater degree of independence and control over their own operations, expenses and profitability. See id. In turn, this structure made it easier to measure and improve the financial metrics and performance of each business. See Kelley Aff. ¶ 5; Gordon Cert. ¶ 18.

20. The second purpose of the Reorganization was to facilitate future acquisitions and future sales of any of the businesses, both by the individual subsidiaries and by New Diamond. See Kelley Aff. ¶ 5; Gordon Cert. ¶ 12.

21. In addition, the Reorganization would preserve the favorable interest terms of Old Diamond's public debentures (see Macey Cert. ¶ 27(e)) by transferring this long-term corporate debt to the new parent corporation, New Diamond, thereby maintaining the most favorable coverage ratios. See Certification of Craig M. Murrin ("Murrin Cert.") ¶ 3; Macey Cert. ¶ 27(e).

22. Corporate reorganizations such as Old Diamond's are "very common" and "well-accepted corporate activities." Macey Cert. ¶ 19; see also Fretthold Cert. ¶ 5 ("The structures and mechanics of the reorganization followed standard, common forms.");

Kelley Aff. ¶ 4. They are often "necessary" to "maximize value for shareholders" and "are permitted by state corporation laws." Macey Cert. ¶ 19.

23. This Reorganization "served valid business purposes" and was "needed to meet corporate strategic goals." Macey Cert. ¶ 23; see also Fretthold Cert. ¶ 3; Kelley Aff. ¶ 5.

24. "This [R]eorganization was a quite common undertaking by many firms in the period and indeed, subsequently." Gordon Cert. ¶¶ 1, 31. The conversion of a multi-divisional company to a multi-subsidiary form "facilitates mergers and acquisitions activity" as well as "the strategic redirection of the corporate enterprise." Gordon Cert. ¶¶ 1, 31.

25. It was not the purpose of the Reorganization to escape any liabilities or contingent liabilities of Old Diamond. See Kelley Aff. ¶¶ 6, 8; Certification of William C. Hutton ("Hutton Cert.") ¶ 7; Fretthold Cert. ¶ 4; Murrin Cert. ¶ 9.

26. The Reorganization was contemplated by December 1982 and implementation began *before* NJDEP's discovery of any dioxin contamination at the Lister Site in May 1983 and before NJDEP's notification to Old Diamond in June 1983. See May 27, 1983 DEP Funding Authorization re: 80 Lister Avenue, at NJDEP00089456-57, Gentile Cert., Ex. 7; Sept. 26, 1983 Letter from Edward J. Masek (Diamond Shamrock Chemicals Co.) to Michael Catania (DEP) re: Administrative Consent Order, at MAXUS0306150, Gentile Cert., Ex. 8; Kelley Aff. ¶¶ 7, 9.

27. The Reorganization was fully implemented before the extent of that liability was understood. See Nov. 1, 1983 Assignment and Assumption Agreement of Diamond Shamrock Exploration Company and Diamond Chemicals Company, Bryant

Cert., OCC Ex. 20; Nov. 1, 1983 Assignment and Assumption Agreement of Diamond Shamrock Refining and Marketing Company and Diamond Chemicals Company, Bryant Cert., OCC Ex. 21; Nov. 1, 1983 Assignment and Assumption Agreement of Diamond Shamrock Coal Company and Diamond Chemicals Company, at MAXUS022043, Bryant Cert., OCC Ex. 22; Exhibit 54 attached to Certification of William C. Petit in Support of Plaintiffs' Motion for Partial Summary Judgment Against Maxus Energy Corp. ("Petit Cert."), at MAXUS3081825-33; Petit Cert., Pls.' Ex. 55 at MAXUS0208496-502.

28. Reorganizations such as this are "commonplace" and "do not carry the badge of liability avoidance." Gordon Cert. ¶¶ 1, 31.

29. Further, former employees and officers of Old Diamond, including its former general counsel/senior vice president and its former corporate secretary who were personally involved in the Reorganization, stated that the Reorganization had nothing to do with an intent to avoid or "strand" liabilities. See Kelley Aff. ¶¶ 6, 8; Hutton Cert. ¶7; Fretthold Cert. ¶ 4; Murrin Cert. ¶ 9.

C. The Implementation of the 1983-84 Reorganization

30. Implementation of the Reorganization required a series of steps. "The structure of the transaction is entirely consistent with ordinary and customary corporate governance practice," and "the detailed mechanisms and structures used in the Reorganization were standard, well accepted and proper." Macey Cert. ¶¶ 14, 28. Further, Old Diamond had valid business reasons for using these mechanisms and structures, not an intent to "shield[] [assets] from liabilities." See Macey Cert. ¶ 31; see also Kelley Aff. ¶ 5.

31. The "methods and mechanics" of the Reorganization were "quite conventional." Gordon Cert. ¶ 2.

32. In early 1983, at the same time it was planning the Reorganization, Old Diamond decided to further its concentration in the energy sector with the acquisition of Natomas, an oil and gas exploration and geothermal energy company. See Kelley Aff. ¶ 9; Petit Cert., Pls.' Ex. 11 at OCCNJ0026058; Why Natomas Joined Hands with Diamond, CHEMICAL WEEK, Aug. 24, 1983, at p. 12, Gentile Cert., Ex. 9 (noting that the Natomas acquisition "mark[ed] the latest of Diamond Shamrock's moves into energy"). The Natomas acquisition became an integral part of the Reorganization. See Petit Cert., Pls.' Ex. 16; Fretthold Cert. ¶ 6.

33. On May 23, 1983, Old Diamond made a hostile tender offer for Natomas, but then negotiated with Natomas over the terms of an acquisition. See Kelley Aff. ¶ 9; May 31, 1983 News Release, at MAXUS0223432, Gentile Cert., Ex. 10; Why Natomas Joined Hands with Diamond, CHEMICAL WEEK, Aug. 24, 1983, at p. 12, Gentile Cert., Ex. 9.

34. On May 30, 1983, Old Diamond and Natomas entered the Plan and Agreement of Reorganization (the "Reorganization Plan"). See Petit Cert., Pls.' Ex. 16.

35. The next day Old Diamond terminated its tender offer. See May 31, 1983 News Release, at MAXUS0223432, Gentile Cert., Ex. 10.

36. The Reorganization Plan was filed with the SEC and was publicly available. See 1983 Diamond Shamrock Corporation Annual Report, at MAXUS0059215, Petit Cert., Pls.' Ex. 24; 1983 Diamond Shamrock Corporation SEC Form 8-B, Gentile Cert., Ex. 98.

37. In any event, OCC has stipulated that it knew about the Reorganization prior to its entry into the SPA. See Defs. Occidental Chemical Corporation and Maxus

Energy Corporation's Stipulation of Facts for Purposes of Track III Issues Only, Dated March 5, 2012 ("OCC Stip."), at ¶¶ 5, 12-13, Gentile Cert., Ex. 92.

38. Similarly, the NJDEP's files contain a copy of the 1985 Moody's Industrial Manual, describing the Reorganization and the formation of DSC-2/Maxus. See 1985 Moody's Industrial Manual Excerpt, at NJDEP00397360, Gentile Cert., Ex. 11.

39. The Reorganization Plan set the foundation of Old Diamond's restructuring, first providing for the creation of a new parent holding company, initially named New Diamond Corporation ("New Diamond") and eventually renamed Maxus Energy Corporation ("Maxus").[1] See Petit Cert., Pls.' Ex. 16 at MAXUS018632; Petit Cert., Pls.' Ex. 15 at MAXUS0055638; Fretthold Cert. ¶ 5.

40. Parent holding companies such as Maxus are "a very common and standard corporate structure" formed for "valid and strong business reasons." Macey Cert. ¶¶ 20, 35.

41. The holding company structure lowers the cost of capital making it more efficient to fund the business as a whole which, in turn, "support[s] economic growth and employment." Macey Cert. ¶ 22.

42. Old Diamond and Natomas became subsidiaries of Maxus, with the shareholders of Old Diamond owning approximately 56% of the shares of Maxus, and the shareholders of Natomas becoming owners of approximately 44% of the shares of Maxus. See Petit Cert., Pls.' Ex. 15 at MAXUS0055638; Petit Cert., Pls.' Ex. 16 at MAXUS018632; Kelley Aff. ¶ 10.

43. The transaction by which Old Diamond and Natomas became subsidiaries

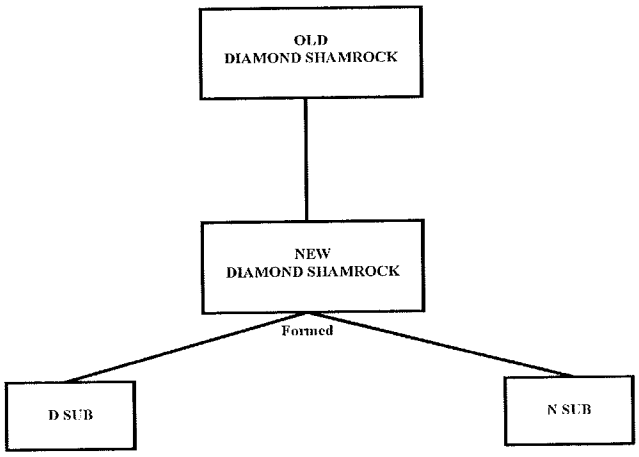
[1] For consistency, we use the name Maxus to refer to this parent corporation, even though that name was not adopted until 1987.

of Maxus was common and well-accepted. See Macey Cert. ¶ 31; see generally Gordon Cert. ¶¶ 1-2, 25.

44. The transaction, known as a "reverse triangular merger," began with the formation of merger subsidiaries (D Sub and N Sub) as subsidiaries of the parent, New Diamond. See Petit Cert., Pls.' Ex. 15 at MAXUS0055634.

Formation of Merger Subsidiaries

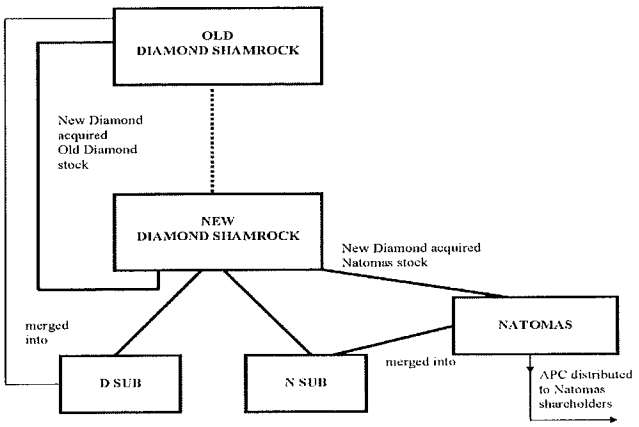
July 19, 1983



45. The "merger subs" then merge into Old Diamond and Natomas, respectively, with Old Diamond and Natomas as the surviving corporations. See Petit Cert., Pls.' Ex. 15 at MAXUS0055635-36.

The Natomas Acquisition

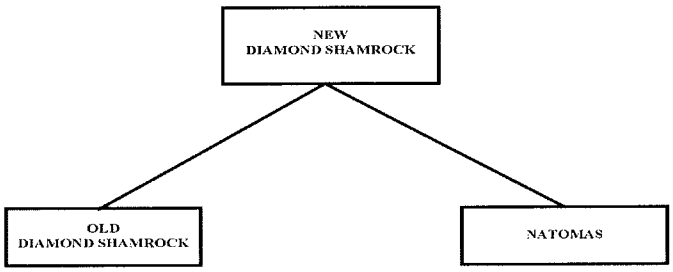
August 31, 1983



46. Old Diamond and Natomas became wholly owned subsidiaries of Maxus (a/k/a New Diamond). See Petit Cert., Pls.' Ex. 15 at MAXUS0055636.

Result of Natomas Acquisition

August 31, 1983



47. There are practical, legal and tax-related advantages for use of the reverse triangular merger. See Gordon Cert. ¶ 25. As a practical matter, it is simpler to effect because the acquisition subsidiary has only one shareholder (here, Maxus), making

shareholder approval less costly to obtain. See Macey Cert. ¶ 33.

48. Legally, reverse triangular mergers do not trigger anti-assignment provisions in the target company's contracts. See Macey Cert. ¶ 33.

49. Reverse triangular mergers allow for stock-to-stock transfer without tax implications for the shareholder. See Kelley Aff. ¶ 10.

50. The nomenclature "triangular" refers to the three corporate entities (parent, merger sub and surviving sub). The term "reverse" refers to the fact that old Diamond and Natomas were the surviving corporations. If the newly formed merger subs, D Sub and N Sub, had been the survivors instead, the transaction would have been a "forward triangular merger." See Macey Cert. ¶ 32.

51. Reverse triangular mergers are a popular deal structure because they have several practical and legal advantages over other forms. See Macey Cert. ¶¶ 32-33; Gordon Cert. ¶ 25. For example, this structure eliminates certain shareholder approvals that would otherwise be required to consummate the merger, and it does not trigger anti-assignment provisions that restrict assignments by operation of law. See Macey Cert. ¶¶ 32-33.

52. The Reorganization Plan, which had been under consideration by Old Diamond since December 1982, and was dated May 30, 1983. See Petit Cert., Pls.' Ex. 15 at MAXUS0055633-36; Petit Cert., Pls.' Ex. 16 at MAXUS018632; Kelley Aff. ¶ 9.

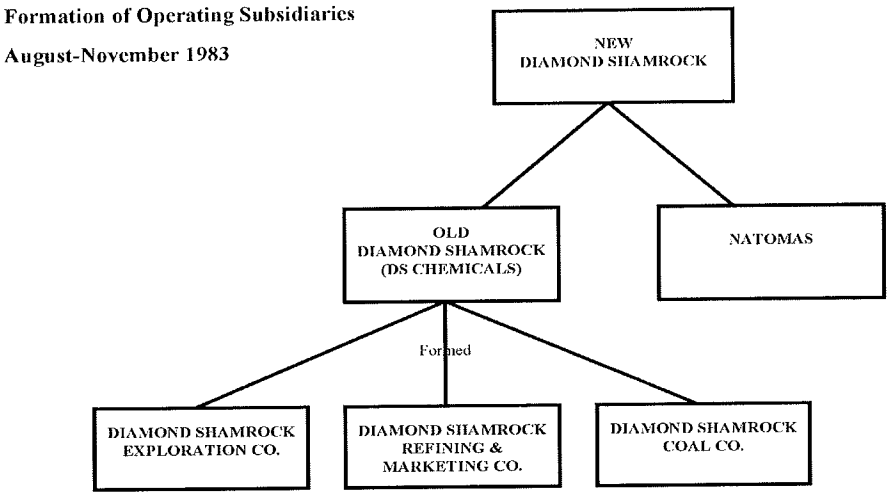
53. The State notified Old Diamond of dioxin contamination at the Lister Site on June 3, 1983. See Pls.' Statement of Undisputed Material Facts, ¶ 10; Answer and Separate Defenses of Maxus Energy Corp. and Tierra Solutions, Inc. to 3rd Am. Compl., ¶¶ 22-23, Bryant Cert., OCC Ex. 3; Kelley Aff. ¶ 7.

54. To carry the plan for a more focused structure for the businesses of Old Diamond (as its directors had intended), the next step in the Reorganization was to separate the major businesses owned by Old Diamond into distinct corporate subsidiaries. See Petit Cert., Pls.' Ex. 16.; Petit Cert., Pls.' Ex. 15 at MAXUS0055640; Fretthold Cert. ¶ 5; Kelley Aff. ¶ 4.

55. Other specific steps in the Reorganization were taken to meet legal, or financial requirements. Weisbach Aff. ¶19.

56. The fact that the tax code "deems" certain reorganization transactions taxable and others not has nothing to do with whether the actual transaction constitutes a de facto merger. See Weisbach Aff. ¶ 19.

57. In the summer and fall of 1983, Old Diamond formed three new corporate subsidiaries: Diamond Shamrock Exploration Company ("DS Exploration"), Diamond Shamrock Refining and Marketing Company ("DS R&M"), and Diamond Shamrock Coal Company ("DS Coal"), corresponding to major lines of business that Old Diamond was then operating. See Petit Cert., Pls.' Ex. 15 at MAXUS0055640; Petit Cert., Pls.' Ex. 34 at MAXUS0061087; Petit Cert., Pls.' Ex. 35 at OCCNJ0021405, ¶ 3; Petit Cert., Pls.' Ex. 36 at MAXUS1885030.



58. Creating separate operating subsidiaries from the original single multi-divisional company necessarily required the transfer of assets and related liabilities from Old Diamond to the new operating subsidiaries. See Gordon Cert. ¶ 24. Thus, the assets and the liabilities of each of these major businesses were placed into its separate subsidiary. See Defs.' Maxus Energy Corp. and Tierra Solutions, Inc.'s Objs. and Resps. to OCC's Track III Disc. Req., dated Nov. 28, 2011, Resp. to RFA No. 7, Bryant Cert., OCC Ex. 63; Nov. 1, 1983 Assignment and Assumption Agreement of Diamond Shamrock Exploration Company and Diamond Chemicals Company, Bryant Cert., OCC Ex. 20; Nov. 1, 1983 Assignment and Assumption Agreement of Diamond Shamrock Refining and Marketing Company and Diamond Chemicals Company, Bryant Cert., OCC Ex. 21; Nov. 1, 1983 Assignment and Assumption Agreement of Diamond Shamrock Coal Company and Diamond Chemicals Company, at MAXUS022043, Bryant

Cert., OCC Ex. 22; Kelley Aff. ¶ 4.

59. The oil and gas exploration and production assets, along with corresponding liabilities, were transferred to DS Exploration; the oil and gas refining and marketing assets, along with their corresponding liabilities, were transferred to DS R&M; and the coal assets, along with their corresponding liabilities, were transferred to DS Coal. See Nov. 1, 1983 Assignment and Assumption Agreement of Diamond Shamrock Exploration Company and Diamond Chemicals Company, Bryant Cert., OCC Ex. 20; Nov. 1, 1983 Assignment and Assumption Agreement of Diamond Shamrock Refining and Marketing Company and Diamond Chemicals Company, Bryant Cert., OCC Ex. 21; Nov. 1, 1983 Assignment and Assumption Agreement of Diamond Shamrock Coal Company and Diamond Chemicals Company, at MAXUS022043, Bryant Cert., OCC Ex. 22; see also Petit Cert., Pls.' Ex. 15 at MAXUS0055641.

60. The amount of liabilities associated with each of the operating units that would have been taken off of Old Diamond's books was at least $450 million, as shown on a September 30, 1983 Unit Balance Sheet. See Gentile Cert., Ex. 132 (showing current liabilities of each of the operating units as of Sept. 30, 1983).

61. Old Diamond retained the assets and liabilities of the chemicals business and was then renamed Diamond Shamrock Chemicals Company ("DSCC"). See Third Am. Compl., ¶ 28, Bryant Cert., OCC Ex. 2; Maxus' Answer to 3rd Am. Compl., ¶ 28, Bryant Cert., OCC Ex. 3; Diamond Shamrock Corp. Corporate Reorganization 1983-1984, at MAXUS61018-32, Bryant Cert., OCC Ex. 12; Fretthold Cert. ¶ 5; Certification of Paul W. Herring ("Herring Cert.") ¶ 3; Kelley Aff. ¶ 4.

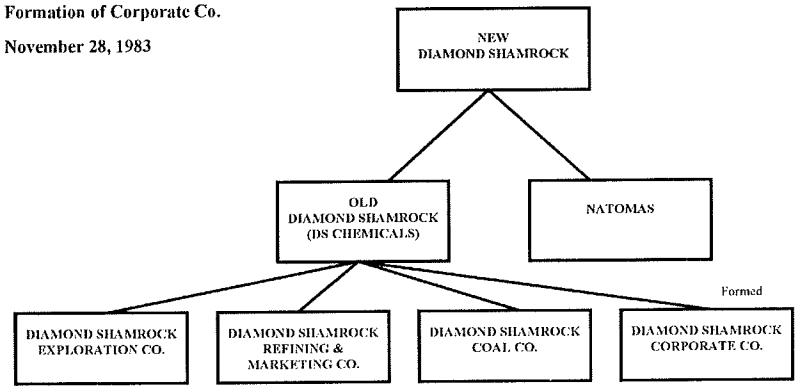
62. After this transaction, DSCC held assets in excess of $760,000,000. See

Gordon Cert. ¶ 15; 1985 Diamond Shamrock Corporation Annual Report, at MAXUS3722850, Gentile Cert., Ex. 85.

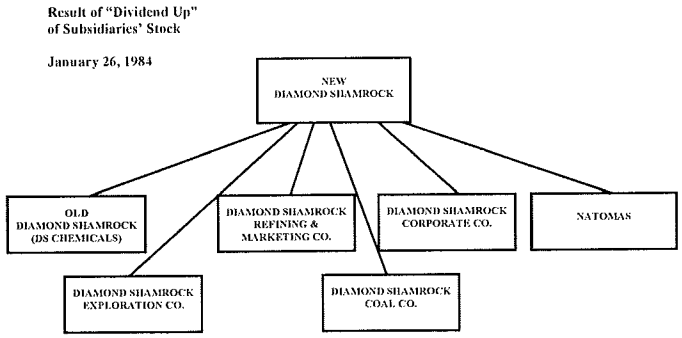
63. On November 28, 1984, New Diamond created another new subsidiary, Diamond Shamrock Corporate Company ("DS Corporate"), was created to perform centralized corporate management, administrative and support functions. See Cert. of Incorporation of Diamond Shamrock Corporate Co., filed Nov. 28, 1983, Bryant Cert., OCC Ex. 23; Petit Cert., Pls.' Ex. 15 at MAXUS0055642; Maxus Interoffice Memorandum from C.M. Murrin to J.F. Kelley, Dec. 7, 1983, at Maxus Priv. Log No. 153605, Bryant Cert., OCC Ex. 70; Fretthold Cert. ¶ 9; Kelley Aff. ¶ 12.

64. Miscellaneous corporate assets not associated with the various businesses (for example, the aviation assets then held by Diamond Shamrock) were transferred from DSCC to DS Corporate along with the liabilities associated with those assets. See Kelley Aff. ¶ 12; Petit Cert., Pls.' Ex. 48 at MAXUS0219185-86.

65. In addition, DS Exploration issued a promissory note to Diamond Chemicals Company, later known as DSCC, in the amount of $788,619,377, DS Corporate issued a promissory note to Diamond Chemicals Company, later known as DSCC, in the amount of $81,636,750, DS R&M issued a promissory note to Diamond Chemicals Company, later known as DSCC in the amount of $361,983,771, and DS Coal issued a promissory note to Diamond Chemicals Company. See Petit Cert., Pls.' Ex. 41, 44, 46; Bryant Cert., OCC Ex. 27 at OCCNJ0002486. As explained in the Assignment and Assumption Agreements, the promissory notes were consideration for the net book value of the assets transferred less the amount DSCC contributed to the capital of the subsidiaries. See Petit Cert., Pls.' Ex. 42, 44.



66. The stock of each of the new subsidiaries was then transferred as a dividend from DSCC to its parent, Maxus, (see Macey Cert. ¶ 12(f); Petit Cert., Pls.' Ex. 15 at MAXUS0055644) and DSCC, DS Exploration, DS R&M, DS Coal, DS Corporate and Natomas were wholly owned subsidiaries of Maxus. See Petit Cert., Pls.' Ex. 15 at MAXUS0055641.



67. As stated above, one aim of the Reorganization was to transfer the favorable public long-term debt obligations then held by Old Diamond up to the new parent holding company, Maxus. See Kelley Aff. ¶ 22; Fretthold Cert. ¶ 7; Gordon Cert. ¶ 27.

68. The Reorganization transferred debentures and other long-term debt totaling $609,219,000 off of DSCC's books. See Gentile Cert. Ex. 108 at MAXUS022730-733 (identifying $609,219,000 owed by DSCC under certain debentures and other long-term notes prior to the Reorganization, with New Diamond/Maxus succeeding to and substituting for Old Diamond/DSCC as the obligor under all of the debentures and other long-term notes).

69. The transferred debentures each had indenture covenants preventing their assignment unless "substantially all" of the assets of the subsidiary, here Old Diamond/DSCC, were also transferred along with the debt to the parent, Maxus. See Maxus and Tierra's Responses to Plaintiffs' Track III Trial Interrogatories, Resp. No. 7, Petit Cert., Pls.' Ex. 12; Petit Cert., Pls.' Ex. 48 at MAXUS0219191; Jan. 7, 1983 Diamond Shamrock Corp. Reorganization Proposal, at Maxus Priv. Log No. 153576, pp. 4-5, Bryant Cert., OCC Ex. 58; Macey Cert. ¶ 27(e); Murrin Cert. ¶¶ 4-7.

70. Even though the substantial assets of the Chemicals Business were left in Old Diamond/DSCC, the Reorganization satisfied the "substantially all" condition by the transfer of the stock of the new operating subsidiaries from Old Diamond/DSCC to Maxus. See Jan. 7, 1983 Diamond Shamrock Corp. Reorganization Proposal, at Maxus Priv. Log No. 153576, pp. 4-5, Bryant Cert., OCC Ex. 58; Macey Cert. ¶ 27(e); Murrin Cert. ¶ 6.

71. There was debate about whether the "substantially all" requirement was actually met given that DSCC retained the chemicals business, a very substantial portion of the overall Diamond Shamrock businesses containing approximately 30% of the total assets (book value). See Jan. 7, 1983 Diamond Shamrock Corp. Reorganization Proposal, at Maxus Priv. Log No. 153576, pp. 5-6, Bryant Cert., OCC Ex. 58; Murrin Cert ¶¶ 7-8.

72. The independent indenture trustee approved the debt transfers in January 1984. See Jan. 16, 1984 Letter from Robert Profusek (Jones Day) to John H. Demmler (Reed Smith) re: Diamond Shamrock Indentures, at MAXUS3964351, Gentile Cert., Ex. 12; Jan. 6, 1984 Letter from Robert Profusek (Jones Day) to John H. Demmler (Reed Smith) re: Diamond Shamrock Indentures, at MAXUS3964367, Gentile Cert., Ex. 13; Dec. 21, 1983 Letter from Robert Profusek (Jones Day) to Edward Bittner (Reed Smith) re: Diamond Shamrock Indentures, at MAXUS3964372, Gentile Cert., Ex. 14; Jan. 25, 1984 Letter from Robert Profusek (Jones Day) to John Demmler (Reed Smith) re: Diamond Shamrock Indentures, at MAXUS3964374, Gentile Cert., Ex. 15 (forwarding paperwork to complete the indenture transfers).

D. Tax Issues Relating to the Reorganization

73. As noted above, after the acquisition of Natomas Company in 1983, Maxus continued to reorganize its corporate structure, and DSCC formed DSR&M, DS Exploration, DS Coal, and DS Corporate. See Petit Cert., Pls.' Ex. 31 at MAXUS3819656, ¶ 4.

74. DSCC continued to operate as a chemical company after the four subsidiaries were spun-off. See generally Petit Cert., Pls.' Ex. 26; Fretthold Cert. ¶ 5; Kelley Aff. ¶ 4.

75. In an Assignment and Assumption Agreement dated December 16, 1983, DSCC assigned to DSR&M all of the assets Old Diamond used in the operation of the refining and marketing business. See Petit Cert., Pls.' Ex. 39 at MAXUS022051, ¶ 3.

76. Maxus' management consulted its Tax Department about the formation of the new subsidiaries. The Tax Department advised that, because the vast majority of DSR&M's assets would be located in Texas, in order to reduce the Texas Franchise Tax liability could be reduced if part of the consideration took the form of a note issued by DSR&M to DSCC in a 3:1 debt equity ratio. See Petit Cert., Pls.' Ex. 31 at MAXUS3819657.

77. Based on this recommendation, the Maxus Legal Department drafted demand notes in a 3:1 debt to equity ratio in the original capitalization of DSR&M. However, the Legal Department neglected to ask the Tax Department for advice on the terms of the notes and instead of drafting the notes to include a 10 year maturity, the Legal Department drafted the notes as demand notes. Id.

78. In the Assignment and Assumption Agreement with DSR&M dated January 16, 1984, DSCC agreed to make a capital contribution of $120,662,157 and DSR&M agreed to execute and deliver to DSCC an unsecured promissory note for the difference between the net book value of the assets assigned to DSR&M and the $120 million capital contribution. See Petit Cert., Pls.' Ex. 40 at MAXUS0055413.

79. It was not intended to require DSR&M to make any principal or interest payments on the note. See Petit Cert., Pls.' Ex. 31 at MAXUS3819657. Maxus argued that since there was no intent to require repayment, the demand notes constituted an investment in the subsidiary and should be treated as a security for tax purposes under

Section 351 of the Internal Revenue Code ("Code"). Id. at MAXUS3819658.

80. Maxus treated the spin-off of DS Exploration, DSR&M, DS Coal, and DS Corporate as a tax-free transaction under §368(a)(1)(D) of the Code. See Petit Cert., Pls.' Ex. 50 at MAXUS3834653, ¶ 4. Maxus remained a stockholder in all of the subsidiaries qualifying the transactions as reorganizations triggering no additional taxes under §355 and §368(a)(1)(D) of the Code. See Weisbach Aff. ¶ 15.

81. Maxus treated the 1983/1984 reorganization under §368(a)(1)(D) because after the other subsidiaries spun out from DSCC each continued their own line of business while DSCC remained a chemicals company worth approximately $760 million. Gentile Cert. Ex. 73 at MAXUS3202607; Weisbach Aff. ¶¶ 15, 17,18.

E. Diamond Shamrock Chemicals Company

82. After the Reorganization, Old Diamond (renamed DSCC) had reverted to a pure chemicals company, much like the one that operated the Lister Site in the 1950s and much of the 1960s. See generally Gentile Cert. Ex. 85 (1985 Annual Report).

83. DSCC's assets included twenty-three domestic and eight international manufacturing facilities, twenty-four domestic and foreign sales offices, it own transportation network and research facilities. See Mar. 19, 1986 Diamond Shamrock Chemicals Company Memo re: Financial Info for Potential Purchasers, at OCCNJ0019905-08, Gentile Cert., Ex. 72.

84. DSCC remained the operator of the chemicals business after the Reorganization; DSCC personnel operated the chemical plants; DSCC management ran the business; the DSCC sales force sold its chemicals; DSCC ran its own administrative, accounting, human resources and legal support services. See Fretthold Cert. ¶¶ 5, 8-9; Herring Cert. ¶ 3.

85. Maxus and DSCC were located at different physical locations, performing different functions. See Fretthold Cert. ¶¶ 8-9.

86. DSCC's chemicals business kept its employees, office space and contracts. See Fretthold Cert. ¶¶ 8-9. None were transferred to Maxus because Maxus had no operations. See Fretthold Cert. ¶¶ 8-9. OCC itself explained this very point to Plaintiffs in writing seventeen years before this litigation commenced:

> 1983-1986 – parent of Diamond Shamrock Chemicals Company ('DSCC') was a newly-formed, non-operating, stock-holding company named Diamond Shamrock Corporation (now Maxus Energy Corporation . . .).

Oct. 25, 1988 Letter from John R. Wheeler (Assistant General Counsel, OCC) to Frank Cardiello (NJDEP), at OCCNJ0132799-801, Gentile Cert., Ex. 70.

87. DSCC retained the ordinary trade debts of the Chemicals Businesses. See Kelley Aff. ¶ 4.

88. In the intervening years up to the Reorganization, DSCC had sold its less profitable components and the DSCC that remained at the conclusion of the Reorganization in early 1984 was a strong, streamlined and profitable international chemicals company. See Macey Cert. ¶ 27(d); Kelley Aff. ¶ 8 (noting that after the Reorganization, DSCC "was a very large and profitable chemical company"); Gordon Cert. ¶ 29; 1985 Diamond Shamrock Corporation Annual Report, at MAXUS3722838, Gentile Cert., Ex. 85.

89. The Reorganization transferred debentures and other long-term debt totaling $609,219,000 off of DSCC's books. See Gentile Cert., Ex. 108 at MAXUS022730-733 (identifying $609,219,000 owed by DSCC under certain debentures and other long-term notes prior to the Reorganization, with New Diamond/Maxus

succeeding to and substituting for Old Diamond/DSCC as the obligor under those instruments).

90. Revenues from the Chemicals Business Unit in 1980, 1981 and 1982 were $1.092 billion, $1.141 billion and $996 million, respectively. See 1982 Diamond Shamrock Corporation Annual Report, at MAXUS3817550, Gentile Cert., Ex. 99.

91. In 1982, its assets were worth over a billion dollars. See 1982 Diamond Shamrock Corporation Annual Report, at MAXUS3817550, Gentile Cert., Ex. 99. Also, 1983 was an especially difficult year for the chemical industry, yet DSCC remained profitable with revenues of $942 million and assets equal to $945 million. See Diamond Shamrock Annual Report 1983, at OCCNJ0006532, Bryant Cert., OCC Ex. 60.

92. The division of the major business units into separate subsidiaries protected DSCC from the volatility of the oil and gas businesses. For example, Maxus recorded a loss of $60.2 million in 1983 when its Exploration division's investment in the Mukluk Alaskan oil field turned out to be a "dry hole." See 1983 Maxus SEC Form 10-K, at OCCNJ0002768, Bryant Cert., OCC Ex. 13; Macey Cert. ¶ 24. Because DSCC was a separate subsidiary, it was shielded from this loss.

93. Maxus sold DSCC to Occidental Petroleum Company ("OPC") less than two years after the Reorganization for over $400,000,000 in "aggregate consideration." See SPA, at OCCNJ0000218, Bryant Cert., OCC Ex. 53.

94. According to one OPC document, OPC valued DSCC at approximately $750,000,000. See Mar. 24, 1986 Occidental Petroleum Corp. Memorandum from D.R. Laurance to Dr. R.R. Irani, at OCCNJ0008293, Gentile Cert., Ex. 16.

95. The transaction was reported as an $850 million transaction, with $740

million paid in cash and assumption of $110 million in debt. Gordon Cert. ¶16.

96. In fact, OCC viewed DSCC as a "[m]arket leader," with an "[e]xtensive, highly trained sales network . . . selling to all key business markets," "[e]xcellent customer reputation" and "[s]trong customer relationships," an "[i]nternational presence" serving "diverse markets on a world-wide basis," "[s]tate of the art production" as a result of "[c]ontinued investment and innovation," "[m]anufacturing facilities [that] can compete on world-wide cost basis," major facilitities in "[s]trategic locations . . .to serve high volume markets," "one of the industries [sic] largest rail and barge fleets," and management with an "[o]utstanding reputation." See Mar. 19, 1986 Diamond Shamrock Chemicals Company Memo re: Financial Info for Potential Purchasers, at OCCNJ0019905-08, Gentile Cert., Ex. 72.

97. As a subsidiary of Maxus, DSCC operated independently from its parent. DSCC personnel managed and performed all of its day-to-day operations. In addition, DSCC maintained its own management, legal, accounting and environmental staffs, budget, financial accounting system, bank accounts, and headquarters building. See Hutton Cert. ¶ 3; Fretthold Cert. ¶¶ 8-9.

98. Maxus played a limited role consistent with its status as a stockholding company. Maxus monitored DSCC's performance, approved its overall budget and set high level corporate policies and procedures. See Fretthold Cert. ¶¶ 8-9.

99. DS Corporate provided certain centralized administrative and support services for all the operating subsidiaries, including DSCC. See Fretthold Cert. ¶¶ 8-9.

F. DSCC and The Lister Site

100. Old Diamond ceased all operations at the Lister Site in 1969 and sold the property in 1971. See Answer and Separate Defenses of Maxus Energy Corp. and Tierra

Solutions, Inc. to 3rd Am. Compl., ¶ 22-23, Bryant Cert., OCC Ex. 3.

101. On June 3, 1983, NJDEP notified Old Diamond that it had discovered dioxin contamination at the Lister Site. See Answer and Separate Defenses of Maxus Energy Corp. and Tierra Solutions, Inc. to 3rd Am. Compl., ¶ 22-23, Bryant Cert., OCC Ex. 3; Kelley Aff. ¶ 7.

102. At that time, Old Diamond had already begun its reorganization pursuant to the Reorganization Plan, which went into effect May 30, 1983. See Petit Cert., Pls.' Ex. 16; Kelley Aff. ¶ 7.

103. Upon receiving notice from NJDEP, Old Diamond immediately responded and never attempted to evade its responsibilities. Old Diamond employees traveled to the Lister Site, met with NJDEP, and undertook immediate response actions to address the dioxin contamination. See June 3, 1983 Letter from DEP to Allan Tomlinson (Diamond Shamrock President), at MAXUS0477435, Gentile Cert., Ex. 17 (noting DEP's recent discussions with Diamond Shamrock personnel); June 7, 1983 Letter from James B. Worthington (Diamond Shamrock Director of Environmental Affairs) to Michael Catania (DEP), at MAXUS3097595, Gentile Cert., Ex. 18; June 10, 1983 Letter From James B. Worthington (Diamond Shamrock Director of Environmental Affairs) to Michael Catania (DEP), at MAXUS1322577, Gentile Cert., Ex. 19 (forwarding overview of history and operations at 80 Lister Avenue and noting that Diamond Shamrock is "ready to meet at your earliest convenience to discuss site remediations").

104. After the Reorganization, DSCC continued to possess its historic liabilities associated with its former chemical manufacturing sites, including those relating to the Lister Site. See Herring Cert. ¶ 9; Kelley Aff. ¶ 11.

105. Former senior officials of Old Diamond confirm that the Reorganization had nothing to do with avoiding the Lister Liabilities. See Hutton Cert. ¶ 7; Kelley Aff. ¶¶ 6, 8; Fretthold Cert. ¶ 4.

106. Old Diamond undertook the Reorganization for the legitimate business purposes set forth above rather than concerns about environmental remediation and clean-up costs. See Hutton Cert. ¶ 7; Kelley Aff. ¶¶ 6, 8; Fretthold Cert. ¶ 4.

107. In 1983 the Lister Liabilities were thought to be relatively small and manageable. See Hutton Cert. ¶ 7; Kelley Aff. ¶ 8.

108. DSCC was a major company in its own right that would be expected to cover those reasonably anticipated costs. See Kelley Aff. ¶ 8; Fretthold Cert. ¶ 8.

109. 1983 was the virtual dawn of Superfund and Spill Act clean-ups; no one in private industry or even in the regulatory community foresaw the size of the potential future clean up liabilities. In addition to the unfamiliarity with the regulatory processes of clean ups and especially clean ups of rivers, scientific knowledge of the environmental hazards of dioxin was far less advanced. See Kelley Aff. ¶ 8.

110. Following the Reorganization, DSCC undertook the remediation of the Lister Site and surrounding properties. In March 1984, DSCC voluntarily entered into an Administrative Consent Order with NJDEP for remediation of the Lister Site ("ACO-I"). See Petit Cert., Pls.' Ex. 54 at MAXUS3081825-33.

111. Later, in December 1984, DSCC entered into a second Administrative Consent Order with NJDEP for remediation of land surrounding the Lister Site ("ACO-II"). See Petit Cert., Pls.' Ex. 55 at MAXUS0208496-502.

112. This type of administrative consent order ordinarily required financial

assurance to secure performance, and DEP set the amount conservatively to cover its estimate of annual remediation costs. Hutton Cert. ¶ 8.

113. In ACO-I, DEP required financial assurance of $12 million, and in ACO II, it required financial assurance of $4 million, for a total of $16 million. See Petit Cert., Pls.' Exs. 54 and 115.

114. These amounts reflected DEP's assessment in 1984, the year after the Reorganization, of the expected size of the costs for the Lister remediation. Hutton Cert. ¶ 8.

115. These relatively small amounts fully support the statements of the former Diamond Shamrock officials that they believed the environmental costs were readily manageable, especially given the large size and profitability of the chemicals company, DSCC. Kelley Aff. ¶ 8.

116. In April 1984, DSCC purchased 120 Lister Avenue, a parcel directly adjacent to the Lister Site solely to facilitate its work remediating the Lister Site. See Apr. 19, 1984 Deed from E.M. Sergeant Pulp and Chemical Co. to Diamond Shamrock Chemicals Company, at MAXUS0478753, Gentile Cert., Ex. 22; Mar. 16, 1983 Agreement of Sale Between E.M. Sergeant Pulp and Chemical Co. to Diamond Shamrock Chemicals Company, at MAXUS1866611-21, Gentile Cert., Ex. 23; Hutton Cert. ¶ 6.

117. DSCC then sought to purchase the Lister Site from Marisol, the then-current owner, but because of claims asserted by Marisol, those negotiations became protracted. See Hutton Cert. ¶ 6; see also Settlement Agreement and Release Between Marisol, Inc. and Diamond Shamrock Chemicals Co., Dec. 31, 1985, at

MAXUS0330147-56, Gentile Cert., Ex. 24 (settling claims asserted by Marisol, Inc.). In January 1986, DSCC purchased the Lister Site from Marisol. See Jan. 27, 1986 Deed from Marisol, Inc. to Diamond Shamrock Chemicals Company, at MAXUS0208347-50, Gentile Cert., Ex. 25.

118. DSCC purchased the Lister Site for the sole purpose of facilitating its work remediating the Lister Site. See Hutton Cert. ¶ 6.

119. All requirements of ACO-I and ACO-II were met, and between 1983 and 1987 the annual costs of Lister Site investigation and remediation were approximately $430,000 in 1983, $2.4 million in 1984, $14.5 million in 1985, $5.6 million in 1986 and $1.0 million in 1987, all well below the financial assurance set by NJDEP. See 1990 Consent Decree Between EPA, DEP, OCC, and CLH MAXUS1323964-4123, at MAXUS1323970-72, Gentile Cert., Ex. 26 (describing activities completed under ACO-1 and ACO-2); Petit Cert., Pls.' Ex. 109 at AA-YPF-0039067.

120. In the midst of the Reorganization, Old Diamond solicited proposals from environmental contractors for the investigation and remediation of the Lister Site, and contractors submitted proposals with cost estimates ranging between $25 million (Ryckman's Emergency Action & Consulting Team) to $1.1 million (Rollins Environmental Service (NJ) Inc.). See July 20, 1983 Proposal for 80 Lister Ave., Prepared by Ryckman's Emergency Action and Consulting Team, at MAXUS1465049-51, Gentile Cert., Ex. 94; July 27, 1983 Proposal for Former Diamond Alkali Plant, Prepared by Rollins Environmental Services, at MAXUS1468979, Gentile Cert., Ex. 95.

121. DSCC selected IT Enviroscience, whose cost estimate ranged from $3.8 million to $8.1 million plus design costs, depending on the remedy selected. See July 21,

1983 Technical Proposal for Diamond Shamrock Corporation, Prepared by IT Enviroscience, at MAXUS2270434-35, Gentile Cert., Ex. 96.

122. An internal cost estimate for 80 Lister Avenue and Newark dated September 4, 1984, gave an estimated range of $11.0 to $14.0 million. See Sept. 4, 1984 Estimate of Costs for 80 Lister Ave. and Newark, at MAXUS0362383, Gentile Cert., Ex. 97.

G. Agricultural Chemicals and SDS Biotech

123. On July 1, 1983, Old Diamond formed a joint venture with Showa Denko K.K. called SDS Biotech Corporation ("SDS"), pursuant to a Transfer and Assumption Agreement ("SDS Agreement"). See July 1, 1983 Transfer and Assumption Agreement between SDS Biotech Corp., Diamond Shamrock Corporation, and Showa Denko K.K., OCCNJ0086946-93, at OCCNJ0086946, Gentile Cert., Ex. 20; 1983 Maxus SEC Form 10-K, at OCCNJ0002513, Bryant Cert., OCC Ex. 13; Kelley Aff. ¶ 13.

124. Old Diamond assigned its active animal health and agricultural chemical products businesses to SDS. See July 1, 1983 Transfer and Assumption Agreement between SDS Biotech Corp., Diamond Shamrock Corporation, and Showa Denko K.K., at OCCNJ0086947-51, Gentile Cert., Ex. 20; Kelley Aff. ¶ 13.

125. The terms of the SDS Agreement make clear that only active operations and the assets associated with those on-going businesses were transferred. See July 1, 1983 Transfer and Assumption Agreement between SDS Biotech Corp., Diamond Shamrock Corporation, and Showa Denko K.K., at OCCNJ0086947-51, Gentile Cert., Ex. 20; Kelley Aff. ¶ 13.

126. SDS did not receive or assume any liabilities for inactive sites, including the Lister Site liabilities. See, e.g., Schedule 3.1.1 (Real Property) of the Transfer and

Assumption Agreement between Diamond Shamrock Corporation and Showa Denko, at OCCNJ0021493, Gentile Cert. Ex. 21; Kelley Aff. ¶ 13.

127. By January 1, 1984, DSCC had transferred the assets and liabilities associated with the non-chemical businesses to the other operating businesses. See Fretthold Cert. ¶ 5. DSCC retained the assets and liabilities associated with the chemicals business (see Herring Cert. ¶ 3; Kelley Aff. ¶ 4), and by an Assignment and Assumption Agreement ("Assignment Agreement"), dated January 1, 1984 (see Jan. 1, 1984 Assignment and Assumption Agreement, at MAXUS0022692-701, Bryant Cert., OCC Ex. 25), DSCC assigned any remaining assets and corresponding liabilities to DS Corporate. See id. at MAXUS0022692-95.

128. The Assignment Agreement did not transfer the Lister Liabilities to DS Corporate because, at the time of the Assignment Agreement, the Lister Site had been sold and was not an asset of DSCC. See Resp. of Defs. Maxus Energy Corp. and Tierra Solutions, Inc. to Def. Occidental Chemical Corp.'s First Set of Interrogs., Resp. to Nos. 3, 6, Bryant Cert., Ex. 55; Kelley Aff. ¶ 12.

H. Occidental Petroleum Corporation ("OPC") and the Purchase of DSCC

129. Beginning in 1983, OPC and Old Diamond discussed a potential merger. Those discussions were led by Dr. Ray Irani, formerly the director of research at Old Diamond's chemicals division, who had become the Chairman of the Board and Chief Executive Officer of OCC in 1983. OPC Director Biographies, http://www.oxy.com/InvestorRelations/Governance/BoardofDirectors/Pages/DirectorBios.aspx, Gentile Cert., Ex. 27. At the time Irani was also the President and Chief Operating Officer of OPC. Id.

130. In January 1985, OPC, the parent of OCC, and Maxus (then still known as

New Diamond) disclosed they were engaged in merger negotiations. See Patrick Boyle, Occidental Petroleum, Diamond Shamrock Call Off Plan to Merge, LOS ANGELES TIMES, Jan. 8, 1985, at p. 1, Gentile Cert., Ex. 28.

131. From its long involvement in the chemical industry and with a former Diamond executive at its helm, OPC recognized Maxus' value and strengths, especially the strengths of its chemical subsidiary, DSCC. At a Special Meeting of OPC's Board of Directors, OPC's Chairman reported on why the acquisition of Maxus would provide major benefits to OPC. Minutes of Jan. 7, 1985 Special Mtg. of Bd. of Dirs. of OPC, at OCCNJ0044122-32, Gentile Cert., Ex. 29.

132. Even though there had been extremely limited due diligence in connection with this proposed acquisition, OPC's Chairman explained that he was comfortable proceeding with a potential merger because OPC was already familiar with Diamond Shamrock. Minutes of Jan. 7, 1985 Special Mtg. of Bd. of Dirs. of OPC, at OCCNJ0044122-32, Gentile Cert., Ex. 29.

133. As the Chairman stated, "Occidental was familiar with [Diamond Shamrock Corporation], being in similar businesses – chemicals, oil and gas, and coal – and also that Dr. [Ray] Irani [OCC's Chairman and CEO at the time], had been an executive of Diamond Shamrock for several years before he joined [an OPC affiliate]." Minutes of Jan. 7, 1985 Special Mtg. of Bd. of Dirs. of OPC, at OCCNJ0044123, Gentile Cert., Ex. 29.

134. Its Chairman referred to "Diamond Shamrock's strengths in chemicals" (Id. at OCCNJ0044126) and another Director thought that "Diamond Shamrock could give [OPC] a strong chemical business." Minutes of Jan. 7, 1985 Special Mtg. of Bd. of

Dirs. of OPC, at OCCNJ0044131, Gentile Cert., Ex. 29.

135. Dr. Irani agreed:

> In chemicals, the acquisition will bring Occidental from the 15th to the 8th largest U. S. chemical company and second, after Dow Chemical, in the production of chlorine-caustic. Diamond Shamrock has strong positions in potassium chemicals with excellent management and technology to improve Occidental's manufacturing base in chemicals. Minutes of Jan. 7, 1985 Special Mtg. of Bd. of Dirs. of OPC, at OCCNJ0044125, Gentile Cert., Ex. 29.

136. OCC planned on using a holding company structure to acquire Maxus, virtually identical to the one used in the Reorganization to acquire Natomas two years earlier. Minutes of Jan. 7, 1985 Special Mtg. of Bd. of Dirs. of OPC, at OCCNJ0044126, Gentile Cert., Ex. 29.

137. According to the Chairman, as part of the acquisition, "OCC would form a new Delaware holding company and that Diamond Shamrock's common stock and OCC's common shares would each be converted on a one-for-one basis into a new common stock of the new Delaware holding company." Id. at OCCNJ0044123; see also id. at OCCNJ0044126.

138. Even though a definitive merger agreement was negotiated between Maxus and OPC, Maxus' board rejected it. Fretthold Cert. ¶ 10; Patrick Boyle, Occidental Petroleum, Diamond Shamrock Call Off Plan to Merge, LOS ANGELES TIMES, Jan. 8, 1985, at p. 1, Gentile Cert., Ex. 28 (describing the collapse of the proposed merger).

139. The following year OPC acquired DSCC from Maxus pursuant to the terms of a Stock Purchase Agreement dated September 4, 1986 (the "SPA"), after performing substantial due diligence. Fretthold Cert. ¶ 10; OCC Stip., Gentile Cert., Ex.

92, ¶¶ 11, 12.

140. OPC's due diligence began by May 1986 and continued until execution of the SPA on September 4, 1986. May 27, 1986 Letter from W.E. Notestine to Jacobs Engineering Group, Inc., at OCCNJ0085600-02, Gentile Cert., Ex. 30; June 3, 1986 Memorandum from T.L. Jennings (OCC) re: Final Due Diligence Report, at OCCNJ0083901, Gentile Cert., Ex. 31.

141. To perform that due diligence, OPC used its own experienced personnel as well as teams from top-tier law firms, financial advisors, engineering firms and consulting firms, including Skadden, Drexel Burnham, Jacobs Engineering Group Inc., Conestoga-Rovers & Associates, Ltd. and Aware Inc. May 27, 1986 Letter from W.E. Notestine to Jacobs Engineering Group, Inc., at OCCNJ0085600-02, Gentile Cert., Ex. 30; June 9, 1986 Letter from David Van Horn (Diamond Shamrock) to Raymond Gill (OPC) re: Confidentiality Agreement for Due Diligence, at OCCNJ0018762, Gentile Cert., Ex. 32; June 9, 1986 Letter from David Van Horn (Diamond Shamrock) to Gerald Stern (OPC) re: Drexel Burnham Lambert, at OCCNJ0018766, Gentile Cert., Ex. 33; OCC Stip., Gentile Cert., Ex. 92, ¶ 11.

142. Maxus afforded OPC and its outside attorneys and experts the opportunity to review all relevant business and corporate records (other than certain proprietary and privileged records) of DSCC, Old Diamond and Maxus, as well of their subsidiaries. OCC Stip., Gentile Cert., Ex. 92, ¶ 11.

143. Maxus also provided OPC access to DSCC's facilities, and OPC did, in fact, perform field visits of DSCC's facilities. June 3, 1986 Memorandum from T.L. Jennings (OCC) re: Final Due Diligence Report, at OCCNJ0083900, Gentile Cert., Ex.

31; Hutton Cert. ¶ 10.

144. As part of its due diligence, OPC, its attorneys and consultants reviewed the documents relating to the Reorganization, as well as detailed financial, accounting and tax records of Maxus, DSCC and the other Maxus subsidiaries. OCC Stip., Gentile Cert., Ex. 92, ¶ 12.

145. They had extensive discussions with DSCC and Maxus personnel and submitted follow up questions and requests for information, all of which were answered. See e.g., June 9, 1986 Letter from David Van Horn to Raymond Gill, at OCCNJ0018762-65, Gentile Cert., Ex. 32; July 11, 1986 Letter from Russell Belinsky to John Nanos , at OCCNJ0061586-600, Gentile Cert., Ex. 109; July 3, 1986 Letter from Michael Woronoff to W.E. Notestine, at OCCNJ0016829-35, Gentile Cert., Ex. 110; Aug.19, 1986 Letter from Barbara McGraw to Marcel Dumeney, at OCCNJ0019486-88, Gentile Cert., Ex. 112.

146. The documents that OPC, its attorneys and consultants reviewed included, among others, the Assignment and Assumption Agreements between DSCC and the four new subsidiaries, corporate resolutions and minutes (or summaries thereof) related to the Reorganization, financial statements, accounting records, bank records, indentures and other records related to debt and bank obligations, tax returns, and agreements relating to the formation and operation of SDS Biotech. OCC Stip., Gentile Cert., Ex. 92, ¶ 12.

147. OPC's due diligence also included a thorough review of environmental issues and liabilities, which involved examinations of environmental permits, hazardous waste manifests, correspondence with regulators, and remediation cost estimates for DSCC active [and inactive] sites. OCC Stip., Gentile Cert., Ex. 92, ¶ 12.

148. OPC instructed its due diligence personnel that "it is most critical that any issue that could have long-term liability implications be identified so that these items can be considered in the final sales agreement." June 3, 1986 Memorandum from T.L. Jennings (OCC) re: Final Due Diligence Report, at OCCNJ0083901, Gentile Cert., Ex. 31.

149. In addition, due diligence personnel were instructed to list, among many other things, "any past or present practices, spills etc. that may indicate the presence of ground and groundwater contamination." They were also instructed that all items "should have an estimated range of cost implications for correction." June 3, 1986 Memorandum from T.L. Jennings (OCC) re: Final Due Diligence Report, at OCCNJ0083901, Gentile Cert., Ex. 31.

150. OPC received complete information about the Reorganization, and understood that the Lister Liabilities remained in DSCC. OCC Stip., Gentile Cert., Ex. 92, ¶¶ 12-13, 15.

151. After performing extensive due diligence, OPC acquired DSCC pursuant to the terms of a comprehensive SPA. OCC Stip., Gentile Cert., Ex. 92, ¶¶ 11-12; Herring Cert. ¶ 3; Kelley Aff. ¶ 17.

152. One of the important issues during the SPA negotiations was DSCC's responsibility for environmental liabilities. Maxus agreed to an indemnity provision for environmental liabilities of the Lister Site and other former manufacturing sites of Old Diamond, but refused to assume direct liability for these liabilities. Kelley Aff. ¶ 17.

153. The representations and warranties in the SPA ensured that assets and liabilities associated with the chemicals business of DSCC went to OCC were not

assumed by Maxus: Section 2.07(e) of the SPA states "no Diamond Company shall have any liability or obligation under any provision of this Agreement, other than Article X [cost sharing for certain environmental obligations] by reason of Seller's representations and warranties," other than for the indemnity obligations. SPA, at OCCNJ0000237-OCNJ0000238, Bryant Cert., OCC Ex. 53.

154. Similarly, Section 8.08 "Assumed Obligations" required OCC to cooperate fully in doing all things necessary to make *DSCC the primary obligor* on each of the Assumed Obligations and have each of the Diamond companies released from any obligations and liabilities under the Assumed Obligations. SPA, at OCCNJ0000312-OCCNJ0000314, Bryant Cert., OCC Ex. 53.

155. OCC clearly understood the Reorganization. OCC Stip., Gentile Cert., Ex. 92, ¶ 15.

156. Section 2.23 of the SPA, entitled "The Reorganization," expressly describes what happened in 1983 and 1984. Stock Purchase Agreement, at OCCNJ0000268-OCCNJ0000269, Bryant Cert., OCC Ex. 53. The section also states that as a result of "*its* prior operations DSCC had liabilities that arose prior to the Reorganization and relate to non-Chemicals Business operations." Id. These are listed in Schedule 2.23 and expressly include the Agent Orange suits and personal injury actions relating to the Lister Site. Schedule 2.23 to Stock Purchase Agreement, at MAXUS017994-98, Gentile Cert., Ex. 34.

157. The SPA is extremely detailed, with more than 300 pages and additional schedules and exhibits, and it spells out all aspects of the sale, the relationship between the parties, and particularly their respective liabilities for all present and future

environmental costs, including liability for the Lister Site. SPA, at OCCNJ0000204-378, Bryant Cert., OCC Ex. 53.

158. Yet nowhere in the SPA is there a single statement that Maxus retains liabilities for the inactive sites or that the purchaser (OPC) does not assume those liabilities. Rather, those liabilities went with DSCC to OPC/OCC and the buyer protected itself by obtaining the indemnity from Maxus under the SPA for such liabilities. SPA, at OCCNJ0000344-OCCNJ0000354, Bryant Cert., OCC Ex. 53.

159. The SPA only imposes an indemnity obligation on Maxus for the Lister Site and does not impose direct liability on Maxus. SPA, at OCCNJ0000344-OCCNJ0000354, Bryant Cert., OCC Ex. 53.

160. For environmental liabilities, Maxus and OPC agreed on limited cost sharing of certain future costs associated with active operations and, subject to the terms of the SPA, an indemnity by Maxus for remediation costs associated with inactive sites. SPA, at OCCNJ00003362-OCCNJ0000367, Bryant Cert., OCC Ex. 53.

161. The Lister Site was specifically listed in Schedule 9.03(a)(iv) as one of the inactive sites covered by the terms of the indemnification provisions. See Schedule 9.03(a)(iv) to Stock Purchase Agreement, at OCCNJ0027214-16, Bryant Cert., OCC Ex. 10.

162. In seeking to rewrite the SPA, OCC relies on parol evidence, specifically an April 4, 1986 letter from James F. Kelley, Maxus' General Counsel, stating that "[t]he closing of the sale of the DSCC shares will pass to the purchaser all liabilities of DSCC . . . except those arising from operations of DSCC which have previously been sold or discontinued or products no longer manufactured or sold, as more fully described below."

Letter From James F. Kelley to Dr. Ray Irani, dated April 4, 1986, at OCCNJ0027239, Bryant Cert., OCC Ex. 114.

163. OCC argues that Mr. Kelley meant that Maxus would "retain" direct liability for the Lister-related environmental liabilities. OCC Brief at 18; OCC Statement of Material Facts ¶ 52. Mr. Kelley denies any such intent in his affidavit, stating that he merely meant that Maxus would protect the buyer against such liabilities through indemnity. Kelley Aff. ¶ 20.

164. In fact, during the negotiations Maxus refused OPC/OCC's request that Maxus assume direct liability for the Lister Site and other inactive sites. Kelley Aff. ¶ 20. Moreover, even accepting OCC's view of the April 4, 1986 letter, any such representation was specifically overridden by the merger clause in Section 12.05 of the SPA. SPA, at OCCNJ0000372, Bryant Cert., OCC Ex. 53 ("This Agreement and the Related Documents constitute the sole and entire agreement among the parties...").

165. Payments under the SPA indemnity obligation were deductible as business expenses because both Maxus and OCC agreed to a tax election and tax "fiction" under which certain transactions are "deemed" to be a sale of assets (rather than a sale of stock, which actually occurred when DSCC was sold in 1986). See Weisbach Aff. ¶¶ 25-28.

166. The tax "fiction" does not control over the real facts. See Weisbach Aff. ¶ 30.

167. In the 1986 SPA Maxus and OCC made a joint election under Section 338(h)(10) of the Code. Section 8.16 of the 1986 SPA states:

> Buyer and Seller shall make a joint election under Section 338(h)(10) of Code and the regulations thereunder . . . and any similar state, local or other law. Pursuant to the Regulations, Buyer and Seller shall jointly execute and file

> IRS Form 8023 and the separate H-10 Election statement pursuant to Section 1.338(h)(10)-IT(d)(6) of the Regulations, and shall take any and all other action necessary to effectuate such election within the time prescribed by such Section 338(h)(10) and the Regulations.

See SPA, at OCCNJ0000326-27, Bryant Cert., OCC Ex. 53.

168. The 1986 SPA also required Maxus to include the deemed purchase and sale of assets of DSCC on its consolidated federal income tax return:

> Pursuant to such H-10 Election, Seller shall include the deemed purchase and sale of the assets of DSCC and "affiliated subsidiaries" . . . in Seller's consolidated federal tax return for 1986."

Id.

169. This §338(h)(10) tax "fiction" enabled Maxus to treat its indemnification obligations under the 1986 SPA as a loss to be deducted when incurred for federal tax purposes only. Section 338 of the Code states that:

> *[a]lthough [a] target is a single corporation under corporate law, if a section 338 election is made, then two separate corporations, old target and new target, generally are considered to exist for purposes of subtitle A of the Internal Revenue Code.* Old target is treated as transferring all of its assets to an unrelated person in exchange for consideration that includes the discharge of its liabilities (see § 1.1001-2(a)), and new target is treated as acquiring all of its assets from an unrelated person in exchange for consideration that includes the assumption of those liabilities. (Such transaction is, without regard to its characterization for Federal income tax purposes, referred to as the deemed asset sale and the income tax consequences thereof as the deemed sale tax consequences.) *If a section 338(h)(10) election is made, old target is deemed to liquidate following the deemed asset sale.*

Reg. §1.33801(a)(1) (emphasis added).

170. The tax treatment under § 338(h)(10) was consistent with Maxus having sold all of its stock in DSCC to OCC. See Weisbach Aff. ¶¶ 29-31. Maxus' only

liability, if any, for DSCC's obligations is under the indemnity provisions of the 1986 SPA. Bryant Cert., OCC Ex. 53 at OCCNJ0000344.

I. The State is Not a Third-Party Beneficiary of the SPA

171. Section 9.03 of the SPA includes a provision in which Maxus agrees to indemnify OCC for certain environmental liabilities. See SPA Section 9.03, at OCCNJ0000344, Bryant Cert., OCC Ex. 53. This provision only gives OCC the right to seek indemnification for certain environmental claims and does not give claimants the right to assert claims directly against Maxus. See 11/28/2011 Def. OCC's Objections and Resps. to Defs.' Maxus Energy Corp.'s and Tierra Solutions, Inc.'s Track III Req. for Admis., Resp. No. 15, Gentile Cert., Ex. 1.

172. Section 12.06 of the SPA includes an express negation of intent to benefit un-named third parties that states:

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

See Bryant Cert., OCC Ex. 53 at OCCNJ000373. Maxus and OCC intentionally included this section because neither party intended the SPA to benefit third parties. See OCC Stip., Gentile Cert., Ex. 92, ¶ 1; Kelley Aff. ¶18.

173. Nowhere in Article IX of the SPA are the Plaintiffs, or a category like the Plaintiffs, expressly recognized as receiving an intended benefit under the SPA. See Bryant Cert., OCC Ex. 53 at OCCNJ000341 (stating that "seller shall indemnify . . . each of OPC, Oxy-Chem, Buyer, each of the DSCC Companies and each Pass-Through Purchaser, each of their respective subsidiaries and affiliates and each of their respective

directors, officers, agents and representatives . . .").

174. Nowhere in Article X of the SPA are the Plaintiffs, or a category like the Plaintiffs, expressly recognized as receiving an intended benefit under the SPA. See Bryant Cert., OCC Ex. 53 at OCCNJ000362 (stating that "seller shall reimburse each DSCC Company and each of OPC, Oxy-Chem, Buyer and each pass-Through Purchaser..."). Further, Article X provides that OCC and Maxus should share the cost of remediation of active sites for a maximum of ten years and $75 million, which time and amount have expired. Id.

175. Nowhere in Section 12.03 of the SPA are the Plaintiffs, or a category like the Plaintiffs, expressly recognized as receiving an intended benefit under the SPA. See Bryant Cert., OCC Ex. 53 at OCCNJ0000371 (stating that the agreement "shall be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns"). Schedule 2.03 of the SPA lists the significant subsidiaries, other subsidiaries, and DSCC officers and directors, and does not include the State or any category like the State. See Gentile Cert., Ex. 71 at OCCNJ0000623.

176. The Plaintiffs, or categories like the Plaintiffs, do not qualify as "Pass-Through Purchasers." Bryant Cert., OCC Ex. 53 at OCCNJ000359-60) (stating that when "Buyer or any DSCC Company has entered into a definitive agreement with any Entity for the purchase by such Entity" that "such Entity (but not its successors-in-interest, whether by sale, other transfer, operation of law or otherwise) shall be deemed, for purposes of this Agreement, a 'Pass-Through Purchaser'").

177. The Plaintiffs are, at most, potential claimants against OCC. Section 12.06 of the SPA explicitly denies a benefit to "any Entity." See Bryant Cert., OCC Ex.

53 at OCCNJ000373. Further, Section 9.03 of the SPA considers an Entity to be a potential claimant. Bryant Cert., OCC Ex. 53 at OCCNJ000344 (stating that Maxus will indemnify OCC for "any and all claims, demands or suits (by any Entity, including, without limitation, any Governmental Agency)").

178. Nowhere in Section 12.11 is any claimant, such as Plaintiffs, identified as a beneficiary. Section 12.11(a) provides that:

> Seller shall . . . use its . . . best efforts to obtain at the earliest practicable date, whether before or after the Closing Date, any amendments, novations, releases, waivers, consents or approvals necessary to have each of the DSCC Companies released from its obligations and liabilities under the Historical Obligations.

Bryant Cert., OCC Ex. 53 at OCCNJ0000375. Section 12.11(b) provides that:

> If reasonably necessary in the circumstances, Seller's obligations to use its best efforts shall include, without limitation, providing its guarantee . . . of the other appropriate Diamond Companies (other than the DSCC Companies) in consideration for the granting or obtaining of any such amendments, novations, releases, waivers, consents or approvals.

Bryant Cert., OCC Ex. 53 at OCCNJ0000375. Again, nowhere is any claimant identified as a beneficiary; instead, DSCC is the beneficiary of any best efforts taken by Maxus to release DSCC from the Lister Liabilities. See Kelley Aff. ¶ 18. Further, the time period for performance under Section 12.11 has long expired. See Bryant Cert., Ex. 53 at OCCNJ000334 (stating that, unless specifically listed in Schedule 9.01, "all covenants . . . shall surviving the Closing and remain in effect indefinitely); 10 Del. C. § 8106 (no action for breach of contract can be brought "after the expiration of 3 years"); N.J.S.A. 2A: 13-1 (breach of contract actions "shall be commenced within 6 years").

179. In 1987, OCC entered into a Supplemental Administrative Consent Order

("Supplemental ACO") regarding the Lister Site. See Gentile Cert., Ex. 88 at OCCNJ0022784. The Supplemental ACO made OCC responsible for the payment of all costs. Id. The Supplemental ACO was binding only on OCC. Id. at OCCNJ0022785. Nowhere in the Supplemental ACO is Maxus mentioned. Id.

180. When OCC entered into the Supplemental ACO, OCC required that Maxus enter into a separate agreement "because of the significant financial commitment to be undertaken by OCC to the State" to reduce the risk of Maxus' delay or default. See July 8, 1987 Letter from J. Alan Mack (OCC) to Edward J. Masek (Maxus) re: Supplemental Administrative Consent Order, at OCCNJ00022855, Gentile Cert., Ex. 89. Maxus agreed with OCC in a separate agreement of July 1987 that Maxus (a) would defend the obligations of OCC under that ACO with respect to the Lister Site pursuant to the SPA and (b) would indemnify the obligations of OCC under that ACO pursuant to the SPA. In addition, Maxus and OCC agreed in that separate agreement of July 1987 that such costs would be the obligation of Maxus and be disbursed directly to the State. Gentile Cert., Ex. 89 at OCCNJ0022855-57.

181. In the SPA, Maxus neither agreed to "pay the State" for the debts of OCC, or any other party, nor agreed to take over the defense of OCC. See SPA, Bryant Cert., OCC Ex. 53. Section 9.04(a) grants Maxus an "election whether to assume the defenses of any Third Party Claim" and does not require Maxus to Defend OCC. See id. at OCCNJ0000354–55. Maxus only agreed to indemnify OCC. See id. at OCCNJ0000354.

182. The material purpose of the indemnification provision was to benefit Maxus and OCC. Maxus benefitted by not retaining any of DSCC's liabilities. See Section 2.07(e) of the SPA, at OCCNJ0000238, Bryant Cert., OCC Ex. 53 (reflecting

Maxus' intent not to retain any liability under the agreement). OCC benefitted by not having to bear the full burden of certain environmental liabilities. See Petit Cert., Pls.' Ex. 128 at Resp. No. 1 (reflecting OCC's intent to have an indemnification provision to protect it from environmental liabilities).

183. Nowhere in the SPA do Maxus and OCC state an intent to benefit the Plaintiffs. See SPA, Bryant Cert., OCC Ex. 53.

184. OCC admitted that, prior to this lawsuit, it had "no communications with any representative of the State of New Jersey in which it was mentioned or suggested that the State was a third party beneficiary to the SPA." See 11/28/2011 Def. OCC's Objections and Resps. to Defs.' Maxus Energy Corp.'s and Tierra Solutions, Inc.'s Track III Req. for Admis., Resp. No. 15, Gentile Cert., Ex. 1.

185. Indeed, OCC neither indicated to Maxus that it considered any person or entity to be a third party beneficiary of the SPA nor indicated to persons or entities asserting claims against OCC that they were third party beneficiaries under the indemnification provisions of the SPA. See 11/28/2011 Def. OCC's Objections and Resps. to Defs.' Maxus Energy Corp.'s and Tierra Solutions, Inc.'s Track III Req. for Admis., Resps. Nos. 13 and 14, Gentile Cert., Ex. 1.

186. OCC stipulates that it had no intent to make Plaintiffs or the State of New Jersey a third party beneficiary of the SPA. OCC Stip., Gentile Cert., Ex. 92, ¶ 1.

187. Maxus, too, had no such intent. Kelley Aff. ¶ 18.

188. Indeed, Maxus clearly told the State in writing at least twice that the SPA did not make the State a third party beneficiary. See Dec. 13, 1988 Letter from W.E. Notestine to Thomas McKee, New Jersey Department of Environmental Protection, at

NJDEP00399943-947, Gentile Cert., Ex. 38 (the SPA "is a private, contractual obligation to pay money and does not constitute a novation or otherwise enure to the benefit of third parties, including the government"); Sept. 26, 1990 Letter from Paul Herring to Richard Engel and Michael Schuit, at NJDEP00399959-61, Gentile Cert., Ex. 39 ("The fact that Maxus, by private agreement with OCC, may perform certain work on behalf of OCC, or indemnify it, does not create any legal liability or responsibility for performance of such work which is enforceable by third parties (such as the state).").

J. Diamond Shamrock Chemical Land Holdings, Inc. (CLH)

189. Prior to the SPA, DSCC had acquired title to 80 Lister Avenue (the Lister Site) and 120 Lister Avenue to facilitate its remediation efforts. OCC Stip., Gentile Cert., Ex. 92, ¶ 7.

190. But OPC was unwilling to take ownership of the Lister Avenue Site or other former manufacturing sites when it acquired DSCC. Herring Cert. ¶ 4.

191. It insisted that these be carved out of the DSCC acquisition. Herring Cert. ¶ 4.

192. Accordingly, in contemplation of the sale of DSCC to OPC/OCC and Maxus' indemnity obligation under the SPA, DSCC transferred ownership of the Lister Site and other inactive DSCC properties to CLH, and Maxus advised OPC that CLH would hold title to these inactive sites. OCC's Objs. and Resps. to Defs. Maxus and Tierra's Reqs. to Admit on Track III Issues, Nov. 28, 2011, No. 9, Gentile Cert., Ex. 1; OCC Stip. Gentile Cert., Ex. 92, ¶ 8.

193. Pursuant to the SPA, Maxus agreed to indemnify OCC for certain environmental activities. Stock Purchase Agreement, at OCCNJ0000344-54, Bryant Cert., OCC Ex. 53.

194. CLH's sole business purpose was to hold title to the Lister Site and other sites transferred from DSCC. Maxus's Stipulation of Facts Regarding Track III Alter Ego Claim in Lieu of Corporate Representative Deposition, ¶ 7, Gentile Cert., Ex. 40.

195. Among the properties transferred to CLH were certain lands associated with the Painesville plant that CLH sold in the early 1990s for several million dollars. See e.g., May 2, 1994 Warranty Deed Conveying Property from CLH to I.S. Traker, Inc. and Chelmsford Properties, Inc., at MAXUS3952404-05, Gentile Cert., Ex. 41; Nov. 4, 1994 Warranty Deed Conveying Property from CLH to Oxford Glen Dev., Inc., at MAXUS3952398-403, Gentile Cert., Ex. 42; Dec. 19, 1994 Warranty Deed Conveying Property from CLH to Michael Bogart, at MAXUS3952406-09, MAXUS3952445-2446, MAXUS3952478, Gentile Cert., Ex. 43.

196. CLH had no business operations and no employees. Maxus's Stipulation of Facts Regarding Track III Alter Ego Claim in Lieu of Corporate Representative Deposition, ¶¶ 8-9, Gentile Cert., Ex. 40. It had only nominal expenses, primarily property taxes, which were initially paid by Maxus and then charged back to CLH, or as it was later named, Tierra. Maxus's Stipulation of Facts Regarding Track III Alter Ego Claim in Lieu of Corporate Representative Deposition, ¶¶ 8-9, 12 & 16, Gentile Cert., Ex. 40.

197. Maxus performed the remediation associated with the Lister Site under its indemnity obligation through its subsidiary DS Corporate Company (later named Maxus Corporate Company). OCC Stip., ¶ 9, Gentile Cert., Ex. 92.

198. The State knew Maxus, not CLH, paid for the remediation, and that CLH had no means to pay for the work. Schuit Dep., at 222:13-16, 224:14-17, Gentile Cert.,

Ex. 91; see, e.g., Sept. 28, 1992 Letter from Scott Burton to NJ DEP, at MAXUS2334493, Gentile Cert., Ex. 44.

199. As the State's representative acknowledged at his deposition, the State was not injured or prejudiced in any way by CLH holding title to the Lister Site:

> "Q: You had Maxus that was performing as an indemnitor of Occidental and paying for the remedial work, correct?
>
> "A Correct."

Schuit Deposition, at 226:15-18, Gentile Cert. Ex. 91.

200. Further, the State's representative acknowledged that OCC was liable as the corporate successor to DSCC, and the State could also look to OCC to pay for the work:

> "Q Occidental was the liable party, Occidental Chemical Corporation, correct, for the Lister site?
>
> "A Correct." Id. at 231:3-6.
>
> "Q The question is, if you're concerned about whether funds will be available to clean up the Lister site contamination – you agree you had Occidental as the liable party, correct?
>
> "A Correct." Id. at 228:11-15.
>
> "Q In other words, if you needed to pursue someone for money because they didn't perform any remedial obligation, you could pursue Occidental, correct?
>
> "A We could pursue Occidental." Id. at 225:6-10.

201. Indeed, because the State had not one but two parties able to fund the remedial requirements, the fact that CLH was simply the title holder of the Lister Site was, according to the State's representative "irrelevant," (Id. at 233:22-23) and "the State is not injured." Id. at 229:10-20.

202. In fact, when asked who was liable, the State admitted:

> "Q It's true, isn't it, that Occidental Chemical Corporation was liable for the cleanup of the Lister site?
>
> "A Correct.
>
> "Q Now, it's true, isn't it, sir, that Maxus was the indemnitor of Occidental Chemical Corporation?
>
> "A That's correct.
>
> "Q It's true that both of those entities were financially viable parties? . . . you don't have any reason to disagree that that's the case, do you?
>
> "A No, I don't.
>
> "Q That being the case, how is the State injured by the fact that CLH, the title holder of the Lister site, may have no money?
>
> "A I don't – I don't know. If the work is proceeding and the work is getting done, then I think that's an irrelevant question.
>
> "Q Irrelevant or relevant? I didn't hear what you said.
>
> "A Irrelevant, as long as the work is getting done. Irrelevant, not relevant." Id. at 232:24-233:23.

203. CLH's financial resources did not concern the state and, although documents from NJDEP files show that it investigated the financial resources of Maxus and OPC, there is no record of any investigation into CLH's financial resources. Excerpt of Moody's Industrial Manual, at NJDEP00397360-362, NJDEP00397523-524, NJDEP00397527, Gentile Cert., Ex. 11; Investigative Summary of Fiber Chemical, at NJDEP00397059-062, Gentile Cert., Ex. 45 (reporting on the financial status of Maxus and OPC).

204. Nonetheless, Maxus respected CLH's corporate separateness and always treated it as a separate entity from Maxus. For example, CLH respected corporate

formalities, had its own directors and officers, bylaws, and maintained corporate records that corresponded with its limited role. E.g., Mar. 6, 1989 Chemical Land Holdings Cert. of Resolution of Bd. of Dirs., at MAXUS3952459-60, Gentile Cert., Ex. 46; Diamond Shamrock Chemical Land Holdings Inc. By-Laws, at OCCNJ0072402-13, Gentile Cert., Ex. 47; Compilation of Resolutions and Actions of Bd. of Dirs., Gentile Cert., Ex. 48.

205. CLH's independent board acted according to CLH's bylaws in electing its directors through written consents and board resolutions, as permitted by Delaware Corporation Law. DEL. CODE ANN. TIT. 8, §211(b) & (c) (permitting written consent to elect directors in lieu of an annual meeting). See also Gentile Cert., Ex. 47 at OCCNJ0072402-413 (CLH's bylaws); Gentile Cert., Ex. 81 at MAC-02-0034-00001076, MAC-02-0034-00001047 & MAC-02-0034-00001034 (examples of unanimous written consents of CLH's Board of Directors in lieu of meetings).

206. Although CLH had no bank account in its own name, Maxus maintained separate accounts for CLH which tracked, among other things, inter-company transfers as credits and debits. Maxus's Stipulation of Facts Regarding Track III Alter Ego Claim in Lieu of Corporate Representative Deposition, ¶ 14, Gentile Cert., Ex. 40.

207. In fact, the tax returns themselves are further evidence of CLH's separateness, showing that separate accounts were kept that identified CLH's net income, gain or loss on the sale of assets, tax depreciation, retained earnings, capital gains and losses, depreciation and amortization, and taxable income. See, e.g., 1988 Federal Income Tax Return, MAXUS3414376, Gentile Cert., Ex. 84, et seq. (specifically, MAXUS3414418), and Form 1120, MAXUS3414696, et seq. (specifically, MAXUS3414709, MAXUS3414739, MAXUS3414724, MAXUS3414754,

MAXUS3414964, MAXUS3414769, MAXUS3414784, MAXUS3414830, MAXUS3414927 & MAXUS3414947).

208. Moreover, CLH was incorporated for a very limited purpose—"to act as a Land Holdings Company." See Aug. 5, 1986 Application for Certificate of Authority, at MAXUS0443917-18, Gentile Cert., Ex. 82; Aug. 4, 1986 Foreign Corporation Application for License, at MAXUS0443931-32, Gentile Cert., Ex. 83.

209. CLH's board appointed its own officers who took actions on CLH's behalf to achieve its limited purpose – selling parcels, granting access, entering lease agreements, and paying its property taxes. E.g., Oct. 31, 1988 Letter re: Real Estate Purchase Agreement, at MAXUS3952456, Gentile Cert., Ex. 49 (referencing a real estate purchase agreement to be executed on behalf of CLH); Apr. 25, 1989 Interoffice Correspondence re: Settlement Statement on Sale of Mentor, OH Property, at MAXUS3952435-37, Gentile Cert., Ex. 50 (memorializing CLH's sale of Mentor, Ohio property); Apr. 14, 1994 Letter to JTO, Inc. re: Purchase of Property from CLH, at MAXUS3952463-64, Gentile Cert., Ex. 51; Oct. 5, 1994 Letter to JTO, Inc. re: Purchase of Property from CLH, at MAXUS3952465, Gentile Cert., Ex. 52.; July 2, 1992 Letter to Chicago Title Ins. Co. re: Warranty Deed, at MAXUS3952410-15, Gentile Cert., Ex. 53 (enclosing warranty deed executed by CLH to real property in Ohio); May 2, 1994 Warranty Deed Conveying Property from CLH to I.S. Traker, Inc. and Chelmsford Properties, Inc., at MAXUS3952404-05, Gentile Cert., Ex. 41; Nov. 4, 1994 Warranty Deed Conveying Property from CLH to Oxford Glen Dev., Inc., at MAXUS3952398-403, MAXUS3952445-2445, Gentile Cert., Ex. 42; Dec. 19, 1994 Warranty Deed Conveying Property from CLH to Michael Bogart, at MAXUS3952406-09,

MAXUS3952445-2446, MAXUS3952478, Gentile Cert., Ex. 43; Dec. 17, 1992 Letter from D.L. Smith (President, CLH) to McDonald, Hopkins, Burke & Haber Co., at MAXUS3952476-77, Gentile Cert., Ex. 54; 1993 Easement for Highway Purposes, Gentile Cert., Ex. 55; Aug. 1, 1988 Lease Agreement Between CLH and Chemical Waste Management of New Jersey, at MAXUS0399655-669, Gentile Cert., Ex.56; July 27, 1990 Letter on behalf of CLH regarding lease of Duralac Property, at MAXUS0399346-347, Gentile Cert., Ex. 57; Description Lease Area Across Tax Map Lot 14 Block 2438, at MAXUS0399356-357, Gentile Cert., Ex. 58; Feb. 7, 1991 Letter from Edwin Leister to Ron Wilson, at MAXUS2838053, Gentile Cert., Ex. 59.

210. CLH required no permanent staff because it had no on-going business operations. Maxus personnel were assigned as needed and signed correspondence "on behalf of Chemical Land Holdings, Inc." See, e.g., Jul. 27, 1990 Letter from Wm. C. Hutton to Edwin Leister, at MAXUS0399346-47, Gentile Cert., Ex. 57.

211. Because Tierra's purpose was limited to holding title to certain real property, its day-to-day activities were very limited. But when it came time to sell its property, deeds were signed by Tierra officers, transferring the property as any other owner would. See, e.g., Gentile Cert., Ex. 41 at MAXUS3952404.

212. For its part, the State received communications from CLH officers and required that CLH be a signatory to the 1990 ACO. April 1990 Administrative Consent Order, at NJDEP00398817-841, Gentile Cert., Ex. 61.

213. The State required CLH to furnish affidavits showing it had been authorized to enter into the ACO. May 17, 1990 Letter from Lori Mills to Thomas McKee enclosing OCC and CLH Resolutions, Gentile Cert. Ex. 62.

214. The State was under no illusions about CLH's resources when it entered into the ACOs that imposed only very limited obligations on CLH (e.g., affording access, recordkeeping, providing deed notice) pertaining to its status as title holder. In contrast, those same ACO's required OCC to perform the remedial and investigative work and bear the financial requirements (which the State knew that Maxus would carry out pursuant to the SPA indemnity provision). 1990 Consent Decree, at MAXUS1323964-4123, Gentile Cert., Ex. 26; 1994 Administrative Order on Consent, at MAXUS0855078-111, Gentile Cert., Ex. 63; Schuit Dep., at 61:17-23; 63:4-8, Gentile Cert., Ex. 91.

215. Similarly, OPC/OCC knew from the very beginning that CLH held title to the Lister Site. OCC's Objs. and Resps. to Defs. Maxus and Tierra's Reqs. to Admit re: Track III Issues, Nov. 28, 2011, at No. 9, Gentile Cert., Ex. 1.

216. In the many years since, OCC has never stated that ownership of the Lister Site by CLH (later known as Tierra) was improper, an injustice, or a misuse of the corporate form, or that it injured OCC in any way. OCC Stip., Gentile Cert., Ex. 92, ¶ 16. OCC itself has employed subsidiaries to hold title to environmentally contaminated properties undergoing remediation. OCC Stip., Gentile Cert., Ex. 92, ¶ 10.

K. The State's Awareness of the Reorganization and the SPA, and its Lack of Any Injury

217. Maxus repeatedly and consistently communicated the corporate changes and distinctions between Maxus and DSCC to the State. In numerous meetings and letters, Maxus representatives explained the corporate history of Old Diamond and Maxus in detail and specifically advised that OCC was the successor to DSCC, and that Maxus was solely the indemnitor of OCC. Aug. 12, 1987 Letter from Ed Masek to

Michael Shuit, at MAXUS3061401-02, Gentile Cert., Ex. 64; Feb. 1, 1988 Letter from Paul Herring to George Cook, at NJDEP00399957-58, Gentile Cert., Ex. 65; Aug. 24, 1988 Letter from Paul Herring to Michael Schuit, at NJDEP00399955-56, Gentile Cert., Ex. 66; Jan. 17, 1990 Letter from W. E. Notestine to Ronald Corcory, at NJDEP0039950-51, Gentile Cert., Ex. 67; May 15, 1994 Letter from W. Warren to Ronald Corcory, at NJDEP00399898-922, Gentile Cert., Ex. 68; Jan. 4, 1995 Letter from Mark Harris to David Paddock, at NJDEP00399332-33, Gentile Cert., Ex. 69.

218. The State's representative acknowledged that the State was aware of these distinctions, and while he took the position that Maxus was liable under the Spill Act, Maxus "consistent throughout this history here, Maxus said that they are not respond – responsible." Schuit Dep., at 174:10-11, Gentile Cert., Ex. 91.

219. As Maxus's lawyer with responsibility at the time for indemnity claims under the SPA has stated:

> In many conversations with various officials of the New Jersey Department of Environmental Protection ("NJDEP") and the United States Environmental Protection Agency ("EPA"), I explained the corporate transactions of 1983 to 1986 and that the only party liable for the Lister Site is OCC (the successor to DSCC), not Maxus or CLH. I also made clear that Maxus was performing and paying for the remediation of the Lister Site on behalf of OCC solely because of Maxus' contractual agreement to indemnify OCC, and not because Maxus is a successor to DSCC (which it is not) or is otherwise liable. This issue arose, for example, in relation to the determination of which entities should be named in legal documents, such as agency orders and directives. Other Maxus employees have made the same points, and we have been consistent in explaining our position. See Herring Cert. ¶ 6.

220. In addition to oral communications, Maxus lawyers and environmental officials explained the corporate transactions and the obligations of the respective parties

in writing to the NJDEP in numerous letters. For example:

a) **February 1, 1988 letter from Maxus to Mr. George Cook (NJDEP), at NJDEP00399957-58, Gentile Cert., Ex. 65:**

"As you requested in our telephone discussion, I am furnishing you a description of the relevant corporate history and structure of the responsible entity in the above matters, Occidental Chemical Corporation ('OCC').

***

"2. On September 4, 1986, Diamond Shamrock Corporation, formed in September 1983, [now Maxus Energy Corporation ("Maxus") pursuant to a name change in April 1987], the parent, holding company of Diamond Shamrock Chemicals Company, sold all the outstanding stock in Diamond Shamrock Chemicals Company to Oxy-Diamond Alkali Corporation, a company under the ownership of Occidental Petroleum Corporation.

"3. Under the stock purchase agreement Diamond Shamrock Corporation (now Maxus) agreed to defend Diamond Shamrock Chemicals Company in regard to claims relating to the above sites [Kearny and Newark]. The stock purchase agreement did not operate as a novation to substitute Maxus for Diamond Shamrock Chemicals Company in these matters and hence OCC, as successor to Diamond Shamrock Chemicals Company, is the proper entity to be a party to the ongoing administrative and legal proceedings concerning these sites. Pursuant to the stock purchase agreement, Maxus personnel are representing OCC in communications with Agency officials and in carrying out any activities required of OCC at these sites."

b) **April 14, 1988 letter from Maxus to Ms. Chris Altomari and Mr. Michael Schuit (NJDEP), at MAXUS0694274-75, Gentile Cert., Ex. 101**:

"The attached provision [indemnity provision of the SPA] permits Maxus (as the indemnifying party) to defend certain claims on behalf of Occidental. Pursuant to this provision, Maxus has elected to defend on behalf of Occidental the claims by the New Jersey Department of Environmental Protection and U.S. EPA in regard to the Newark site."

c) **August 24, 1988 letter from Maxus to Mr. Michael Schuit (NJDEP), at NJDEP00399955-56, Gentile Cert., Ex. 66**:

"Attached is a chart on which I show the name changes, and then sale, of the proper party (which . . . is now, by merger, Occidental

Chemical Corporation). The chart also illustrates the creation, in 1983, of the non-operating stock-holding parent 'Diamond Shamrock Corporation' which changed its name to 'Maxus Energy Corporation' in 1987. Maxus is not a successor to the proper party; it is an independent entity, created only in 1983 as the stock-holder of the proper party."

d) **December 13, 1988 letter from Maxus attention to Mr. Thomas McKee (NJDEP), at NJDEP00399943-947, Gentile Cert., Ex. 38**:

"Maxus is not a successor to Diamond Shamrock Chemicals Company. Maxus is a nonoperating stock holding company which was not in existence prior to 1983; and it has never, itself, engaged in any manufacturing or waste disposal activities. . . . Occidental, not Maxus, is the proper party to respond concerning Diamond Shamrock Chemicals Company operations. . . . "

e) **October 23, 1989 letter from Maxus to Mr. Michael Schuit (NJDEP), at NJDEP0039962-72, Gentile Cert., Ex. 75**:

"Maxus and Chemical Land Holdings, Inc. ('CLH') are not corporate successors to DSCC." "CLH, which was not even incorporated until 1986, has never had any interest in DSCC." "Maxus, as you know, is an entirely different corporate entity from either DSCC or OCC."

f) **September 26, 1990 letter from Maxus to Mr. Richard Engel, NJ Division of Law, and Mr. Michael Schuit (NJDEP), at NJDEP00399959-61, Gentile Cert., Ex. 39**:

"The fact that Maxus, by private agreement with OCC, may perform certain work on behalf of OCC, or indemnify it, does not create any legal liability or responsibility for performance of such work which is enforceable by third parties (such as the state)."

221. In addition to these direct communications, Maxus signed "on behalf of OCC" in hundreds of letters regarding the Liser Site and other inactive sites because Maxus was acting as OCC's indemnitor and because Maxus itself did not have any direct legal obligations. See, e.g., August 24, 1988 Maxus Letter to NJDEP on behalf of OCC Gentile Cert., Ex. 66; see also Gentile Cert., Ex. 103 (index of hundreds of letters produced in this litigation where Maxus signed on behalf of OCC).

222. Similarly, in connection with the performance of certain regulatory

obligations relating to the Lister Site, corporate officers of OCC consistently executed these documents "as successor to DSCC," and no one at OCC ever objected to doing so and no one at OCC ever asserted that Maxus, too, was a successor to DSCC. See, e.g., April 1990 Administrative Consent Order, at NJDEP00398841, Gentile Cert. Ex. 61; 1990 Consent Decree, at MAXUS1324122, Gentile Cert. Ex. 26; Apr. 4, 2001 Memorandum of Agreement between the NJDEP and OCC, at NJDEP00051171-74, Gentile Cert., Ex. 111.

223. OCC admits that prior to this lawsuit it has never asserted that Maxus is the successor to Diamond Alkali, Old Diamond or DSCC in any communication with Maxus or anyone else. OCC's Objs. and Resps. to Defs. Maxus and Tierra's Reqs. to Admit re: Track III Issues, Nov. 28, 2011, at Nos. 5-6, Gentile Cert., Ex. 1.

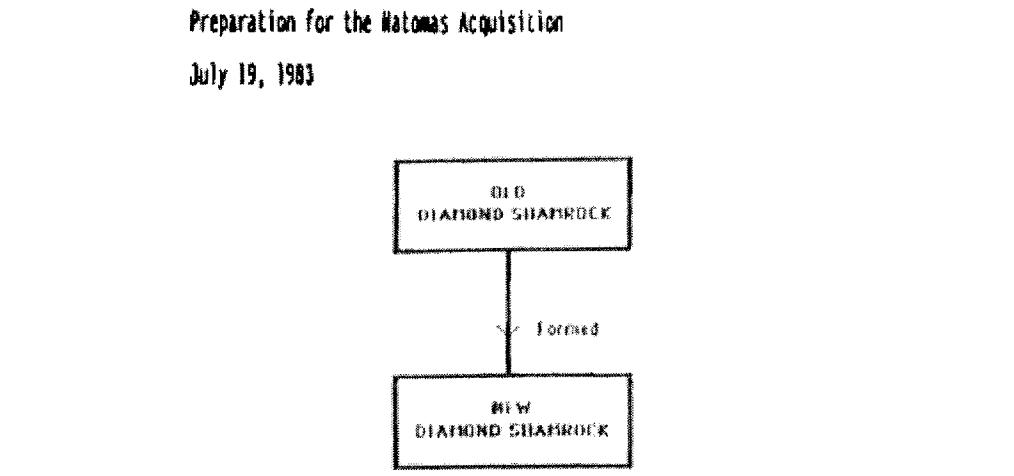
L. Old Diamond's Lister Site Liabilities Were Not Assigned

224. Plaintiffs and OCC also argue that representations by Maxus in a litigation with Kidder Peabody indicate that that Maxus was the successor to Old Diamond. See Pls.' Br. at 20; OCC Br. at 18-19.

225. On January 18, 1983, Old Diamond retained Kidder Peabody as its investment advisor for its acquisition of Natomas Company. See Pls.' Ex. 27 at MAXUS0049783.

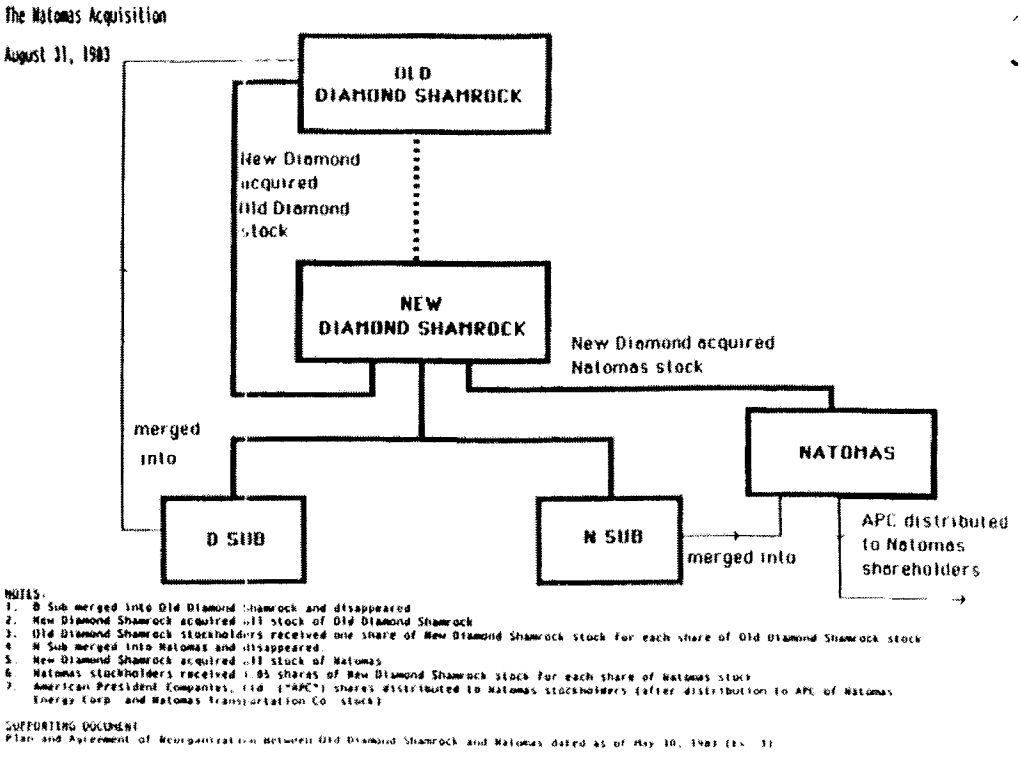
226. On May 30, 1983, Old Diamond and Natomas Company entered in a Plan and Agreement of Reorganization, and as noted above and in the briefing in the Kidder litigation, Old Diamond agreed to a negotiated, tax-free acquisition and created DSC-2/Maxus, N Sub, Inc., and D. Sub, Inc. to effectuate that acquisition. See Gentile Cert., Ex. 78 at MAXUS0049785.

227. As noted above, on July 19, 1983, Old Diamond formed DSC-2/Maxus.

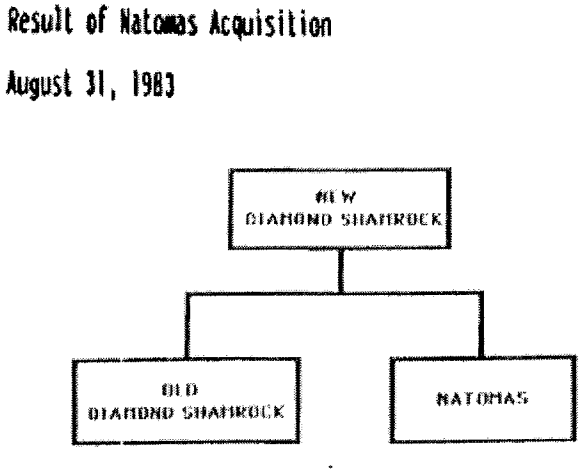


See Pls.' Ex. 15 at MAXUS0055633 (Diagram 1).

228. As described above, on August 31, 1983, Natomas Company became a subsidiary of DSC-2/Maxus through a reverse triangular merger.

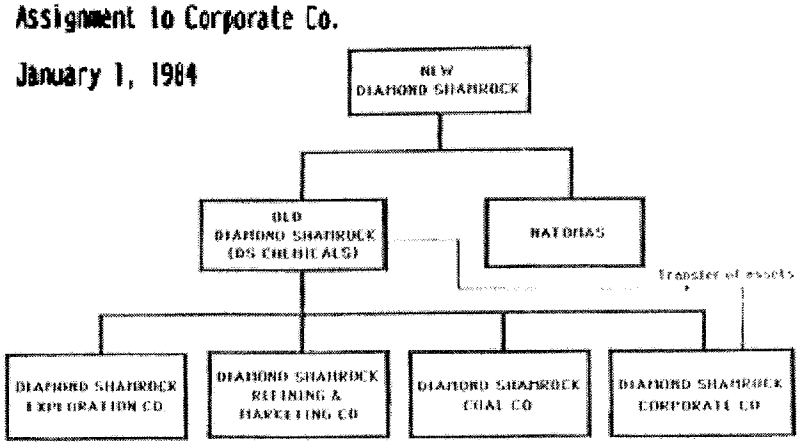


Pls.' Ex. 27 at MAXUS0049790; Pls.' Ex. 15 at MAXUS0055635 (Diagram 3).



Pls.' Ex. 15 at MAXUS0061023.

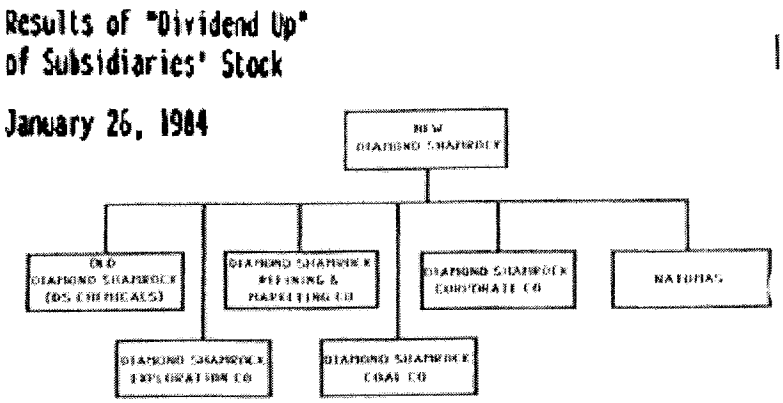
229. As noted above, from August 31, 1983 through January 1, 1984, Old Diamond formed subsidiaries from its operating divisions and created the Diamond Shamrock Corporate Company. Pursuant to a series of three Assignment and Assumption Agreements, Old Diamond transferred assets relating to the operations of each of its former divisions. See Pls.' Ex. 39; Pls.' Ex. 42; Pls.' Ex. 44. On January 1, 1984, Old Diamond then assigned all of its remaining assets to Diamond Shamrock Corporate Co., except its chemical assets and the stock of and notes payable by the other subsidiaries, in a fourth Assignment and Assumption Agreement. See Pls.' Ex. 45.



Pls.' Ex. 15 at MAXUS0055643 (Diagram 11).

230. Excluding all assets relating to the chemicals business, the 1984 Assignment and Assumption Agreement between DSCC and DS Corporate transferred "all assets of whatsoever kind of the Company [Old Diamond] both real and personal, tangible and intangible, wherever situated . . ." to DS Corporate. Pls.' Ex. 45 at MAXUS0055945. The Agreement also stated that Old Diamond transferred to DS Corporate "all rights and benefits of the Company [Old Diamond] under contracts which relate to the assets assigned or to the operations and business activities being transferred" and "all claims, unsatisfied judgments and causes of action which the Company [Old Diamond] may have against any third party based upon rights with the Company has or had in its capacity as the owner of any of the assets and business activities being assigned and transferred." Id. at MAXUS0055946.

231. Later in January 1984, Old Diamond declared a stock dividend payable to its parent, DSC-2/Maxus consisting of the outstanding stock of its four subsidiaries, which included Diamond Shamrock Corporate Company. After the dividend, the subsidiaries became sister subsidiaries to Old Diamond under DSC-2/Maxus as the parent.



Pls.' Ex. 15 at MAXUS0055644.

232. On January 26, 1984, Old Diamond transferred all of the stock and promissory notes of [DS Exploration], [DS R&M], [DS Coal], and [DSCC]" to New Diamond by dividend. Bryant Cert., OCC Ex. 12 at MAXUS0061031.

233. In 1987, Maxus and Maxus Corporate Company sued Kidder Peabody for insider trading during Old Diamond's acquisition of Natomas Company. During the litigation, the court requested Maxus explain how it became the successor in interest to the claims asserted on Old Diamond's behalf by Diamond Shamrock Corporate Company. Gentile Cert., Ex. 76 at MAXUS0049530-31.

234. During the litigation, "[T]he Court asked the parties (1) to trace what happened to [the Kidder] claims in a in a step-by-step fashion and (2) to set forth as simply as possible how those claims were affected by the January 1, 1984 Assignment and Assumption Agreement (the "Assignment") between Old Diamond Shamrock and the Corporate Company. . . . These papers are based on the undisputed facts on Kidder's motion. They also set forth the positions of the parties on the chain-of-title transactions, which make it clear that there is only one key issue on this motion—i.e., did the Assignment transfer the claims from Old Diamond Shamrock to the Corporate Company." Gentile Cert., Ex. 76 at MAXUS0049531.

235. As Maxus explained to the Court, "As the Texas petition sets forth, the claims asserted on behalf of Old Diamond Shamrock arose throughout [sic] the acquisition of Natomas, which was completed on August 31, 1983. . . Such claims are 'choses in action' or 'intangibles' and as such, Old Diamond Shamrock had the right to assign them to another. . . .[The January 1, 1984 Assignment] Transferred the Claims to Diamond Shamrock Corporate Company." Gentile Cert., Ex. 77 at MAXUS0049836-

MAXUS0049837.

236. In the Kidder Litigation, Maxus clearly claimed to be the successor in interest to Old Diamond's claims at issue because Old Diamond assigned the claims against Kidder to Diamond Shamrock Corporate Company. See Pls.' Ex. 27 at MAXUS0049793; Gentile Cert., Ex. 77 at MAXUS0049836-45; Bryant Cert., OCC Ex. 56 at MAXUS1883914.

237. In its memorandum in opposition to Boesky's motion for judgment on the pleadings, Maxus stated that "the claims against Kidder, Siegel and Boesky previously owned by [Old Diamond] were transferred by assignment to Diamond Shamrock Corporate Company, the plaintiff in the Texas Action." Pls.' Ex. 27 at MAXUS0049793.

238. In its supplemental memorandum in opposition to the pending motions for summary judgment or judgment on the pleadings, Maxus states that the 1984 Assignment and Assumption Agreement "transferred the claims to Diamond Shamrock Corporate Company," which made it the successor in interest to the Kidder claims of Old Diamond in the Kidder Litigation. Gentile Cert., Ex. 77 at MAXUS0049836-45.

239. Maxus' Reply Brief in the Kidder litigation clearly explained that Diamond Shamrock Corporate was the "successor in interest" by virtue of an assignment of the claims, not because it or Maxus was a "successor" to Old Diamond. Maxus stated "Diamond Shamrock Corporate Company, *to which claims arising from such injury were transferred*, and Maxus, which owns all of its stock, have standing to assert the claims formerly belonging to Old Shamrock." Pls.' Ex. 52 at MAXUS0209114.

240. Maxus' footnote on the same page made it abundantly clear that it was not stating that Maxus was a corporate successor to Old Diamond Shamrock, "Kidder

concedes that if Diamond Shamrock Corporate Company is the successor to Old Diamond Shamrock, then Diamond Shamrock Corporate Company does have standing to seek recovery of Kidder's fees (Answ. Br. pp. 17-18, n.6). As the undisputed record now shows, Diamond Shamrock Corporate Company is in fact the successor to and holder of all claims of Old Diamond Shamrock against Kidder, including the claim for Kidder's fees." Pls.' Ex. 52 at MAXUS0209114.

241. As Maxus also explained to the Court in the Kidder litigation, "as appears from [the January 1, 1984] assignment, this transfer included 'all claims, unsatisfied judgments and causes of action which [Diamond Shamrock Chemicals Company, i.e., Old Diamond Shamrock] may have against any third party,' except those specifically associated with one of the operating subsidiaries (Notestine Aff., Ex. 3). Old Diamond Shamrock Continued to own the assets of the chemical business. Accordingly the claims against Kidder, Siegel and Boesky previously owned by Old Diamond Shamrock were transferred by assignment to Diamond Shamrock Corporate Company, the plaintiff in the Texas action (Notestine Aff. ¶11). Gentile Cert., Ex. 78 at MAXUS0049792-0049793.

242. Further, OCC has affirmatively admitted, including in affidavits, that it is "the" successor to DSCC. Certification of John R. Wheeler, Trum v. Allied-Signal, Inc., Docket No. W-W014248-89, Superior Court of New Jersey, Hudson County Law Division, ¶ 3, Gentile Cert., Ex. 35; Affidavit of Gerald H. Rubin, ¶ 3, Gentile Cert., Ex. 36.

243. OCC never raised the claim that Maxus was directly liable as an "equitable successor" even when it had an incentive to do so. In the years following the SPA, OCC brought two lawsuits against Maxus regarding certain of the SPA's

indemnification provisions concerning environmental liabilities associated with former manufacturing sites of DSCC's corporate predecessors. *Occidental Chem. Corp. v. Maxus Energy Corp.*, No. 05-96-01101-CV, 1998 Tex. App. LEXIS 3242, at *3 (Tex. App. May 28, 1998); *Occidental Chem. Corp. v. Maxus Energy Corp.*, No. 2002-A-0012, 2004 WL 286 2861025, at *4 (Ohio Ct. App. Dec. 10, 2004). In those litigations, OCC had a clear interest in arguing that Maxus held direct liablity as a successor to DSCC and not simply as an indemnitor. At no time during these litigations did OCC ever raise any of these alleged prior representations or ever assert that Maxus was a successor to DSCC or Old Diamond. OCC's Objs. and Resps. to Defs. Maxus and Tierra's Reqs. to Admit re: Track III Trial Issues, Nov. 28, 2011, No. 6, Gentile Cert., Ex. 1.

244. After entering into the SPA, OCC received numerous third-party claims that it asked DSC-2/Maxus to defend. Herring Cert. ¶ 9.

245. In some cases, Maxus agreed to defend OCC under the indemnity provisions of the SPA. Herring Cert. ¶ 9. In other cases, Maxus declined. Id. OCC never asserted that Maxus bore some independent direct liability for such claims. OCC's Objs. and Resps. to Defs. Maxus and Tierra's Reqs. to Admit re: Track III Trial Issues, Nov. 28, 2011, No. 6, Gentile Cert., Ex. 1.

Respectfully submitted,

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Maxus Energy Corporation

Dated: March 13, 2012

Vincent E. Gentile