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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.*,	**DEFENDANTS MAXUS ENERGY CORPORATION'S OBJECTIONS AND RESPONSES TO PLAINTIFFS' STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST MAXUS ENERGY CORPORATION**
Defendants.	

Pursuant to Rule 4:46-2, Defendant Maxus Energy Corporation ("Maxus") submits the following response to the Statement of Material Facts submitted in support of Plaintiffs' motion for partial summary judgment against Maxus.

By way of general objection, Plaintiffs have inserted argument, innuendo and inferences through their Statement, rather than providing "a concise statement of each material fact as to which the movant contends there is no genuine issue" as required by R. 4:46-2(c). In the event the Court chooses to consider the Statement, despite Plaintiffs' non-compliance with the court rules, Maxus responds to each numbered paragraph of the Statement as follows. For the Court's convenience and ease of reference, Plaintiffs' Statements are included as well.

MAXUS' RESPONSES TO PLAINTIFFS' STATEMENTS OF MATERIAL FACT

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

RESPONSE: Maxus only admits that Kolker Realty Company owned the real property where the Lister Plant was located from January 1947 until March 1950, at which time Kolker Realty Company merged into and consolidated with Kolker Chemical Works, Inc. Diamond Shamrock Corporation is the corporate successor to Kolker Realty Company, Kolker Chemical Works, Inc., Diamond Alkali Organic Chemicals Division, Inc., and Diamond Alkali Company. Pls.' Ex. 127, Consent Order on Track III Kolker-Era Issues, p. 2, ¶¶2-3. Maxus denies the remaining allegations in this paragraph, as they conflict with the Consent Order on Track III Kolker-Era Issues.

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

RESPONSE: Admitted.

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

RESPONSE: Admitted.

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

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

RESPONSE: Admitted.

5. Old Diamond discharged hazardous substances into the Passaic River. See Point I of Plaintiffs' Statement of Undisputed Material Facts In Support of Their Motions for Partial Summary Judgment Against Defendants Occidental Chemical Corporation, Maxus Energy Corporation and Tierra Solutions, Inc., filed May 6, 2011 and incorporated by reference herein, at pp. 4-20; Order Partially Granting Plaintiffs' Motion for Summary Judgment Against Occidental Chemical Corporation, Maxus Energy Corporation and Tierra Solutions, Inc., dated July 19, 2011; Ex. 127, Consent Order on Track III Kolker-Era Issues, p. 2, ¶ 1. Therefore, Old Diamond was a discharger under the Spill Act in addition to being a legal successor.

RESPONSE: Maxus admits the statements contained in the first sentence of Paragraph 5 are accurate. In further response, Maxus states that the second sentence of Paragraph 5 does not contain a statement of material fact but instead argument and a legal conclusion, which Maxus denies.

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

RESPONSE: Admitted.

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

RESPONSE: Maxus admits that Old Diamond continued the oil and gas, chemicals, and coal divisions from 1969 to 1982. However, in further response, Maxus states that with respect to operating profits in 1982, 65 percent was attributable to oil and gas operations, 22 percent to chemicals, and 13 percent to coal. See Pls.' Ex. 5 at OCCNJ0006596.

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

RESPONSE: Admitted.

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

RESPONSE: Maxus admits that the referenced litigations were filed. In further response, Maxus disputes the relevance of the statements contained in Paragraph 9 to any issue raised by Plaintiffs' Motion, and denies Plaintiffs' characterization of the relief sought in the referenced litigations.

10. In early June 1983, dioxin was discovered at the Lister Site. See Ex. 7 at MAXUSO458497, ¶ 2. On June 2, 1983, Governor Kean issued Executive Order No. 40 declaring a state of emergency concerning dioxin discovered at the 80 Lister Avenue, Newark New Jersey. See Ex. 25 at NJDEP00051857-59.

RESPONSE: Admitted.

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

RESPONSE: Admitted.

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

RESPONSE: Admitted.

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

RESPONSE: Admitted.

14. In 1983, Old Diamond developed a plan to transform itself into a new company without the liabilities associated with its ongoing chemicals business. See Ex. 11 at OCCNJ0026058-61. As phrased in Maxus's interrogatory answers, the 1983 reorganization "was a continuation of efforts to transform Diamond Shamrock from a chemicals company to

primarily an energy company." See Ex. 12, Maxus and Tierra's Responses to Plaintiffs' Track III Trial Interrogatories, at Request No. 10.

RESPONSE: Denied. Maxus denies the first sentence of Paragraph 14. In further response, Maxus states that beginning in the early 1980s, Old Diamond Shamrock[2] developed a strategic plan "to focus [its] management energies as well as [its] capital assets [and] capital investment in the oil and gas business[.]" See May 16, 2006 Trial Testimony of James Kelley, Occidental Chemical Corporation v. Maxus Energy Corporation, No. 02-09156, Dallas County, Texas, Pls.' Ex. 11 at OCCNJ0026058; Affidavit of James Kelley ("Kelley Aff.") ¶¶3-8. By way of further response, there was absolutely no effort to "avoid" liabilities. See Kelley Aff. ¶8; Certification of Timothy Fretthold ("Fretthold Cert.") ¶4. As stated by William C. Hutton, who became the direct of the Health and Environmental Affairs Department following the reorganization, the reorganization in 1983 was implemented for strategic business reasons, and was not driven by an effort to avoid environmental liabilities. Certification of William C. Hutton ("Hutton Cert.") ¶7. Maxus admits the statements contained in the second sentence of Paragraph 14 are accurate.

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

RESPONSE: Denied. In further response, Maxus states that the referenced testimony relates to the sale of Diamond Shamrock Chemicals Company ("DSCC") to OCC; at no

[2] Old Diamond Shamrock, or "DSC-1", refers to the company known as Diamond Shamrock Corporation prior to August 31, 1983, and Diamond Alkali Company ("Diamond Alkali") before the 1967 merger with Shamrock Oil & Gas Corporation.

point does Mr. Kelley state that one of the primary reasons for the 1983/1984 reorganization was "new pollution control legislation and federal and state legislation requiring that Old Diamond clean up plant sites, groundwater and address other problems under Superfund and other laws and regulations that came into effect during the early 1980s." Rather, in response to the question "do you have an understanding of why Diamond Shamrock decided to sell its chemical subsidiary [to OCC in 1986]" Mr. Kelley responded as follows:

> There were several reasons. First of all, as I say, we had made a strategic decision to focus on our oil and gas business. That was where we thought we could earn the most returns. We, frankly, thought we had a very good team of people that were engaged in geological matters and exploration and production.
>
> In addition, the chemical business at that point in time, actually beginning before then, had come under numerous new regulations with respect to pollution control that necessitated significant capital expenditures, improving our plants, installing pollution control equipment, and in addition, we were being required by state and federal legislation to clean up a lot of our plant sites, to clean up groundwater and other kinds of problems that had not been -- they weren't illegal, but they were just required to be cleaned up under Superfund and some of the other pollution control regulations that came into effect during the early part of the 1980s.
>
> So we had a business that, as I say, was very management intensive because it involved a number of plants. It was very capital intensive both because of the pollution control regulations that we had to comply with, but then also, frankly, all the safety regulations that were being imposed on us. So there was a lot of additional capital and time being spent, and we just decided that we had to make some choices about what businesses we were going to continue in.
>
> And the strategic decision that was made by the board was to focus on our oil and gas business, to divest our chemical business, to divest our coal business....

See Pls.' Ex. 11, J. Kelley dep. tr., pp. 8:19-10:2. Thus, the increased costs of the chemicals business was not a reason, let alone the primary reason, for the reorganization in 1983/1984. See Kelley Aff. ¶¶5-8; Fretthold Cert. ¶4; Hutton Cert. ¶7.

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

RESPONSE: Maxus admits that as a part of the reorganization, a new holding company was formed, known initially as "New Diamond Corporation," and subsequently renamed "Diamond Shamrock Corporation" ("DSC-2") and then "Maxus Energy Corporation." DSC-2 became the parent company of several subsidiary companies, including DSCC, the successor to DSC-1. A more detailed explanation of the 1983-1984 reorganization is as follows:

On August 30, 1983, the stockholders of DSC-1 approved a corporate reorganization whereby the various operating divisions of DSC-1 – namely, Chemicals, Exploration and Production (of crude oil and natural gas), Refining and Marketing (of petroleum products), and Coal – would become subsidiaries of a newly formed stockholding company. Implementing this plan included the following core steps:

- DSC-1 was renamed DSCC.

- The Exploration and Production, Refining and Marketing, and Coal divisions— along with a "corporate" division to perform financial, legal, certain environmental and other business administration functions—were established as newly created subsidiaries of DSCC. These subsidiaries were named Diamond Shamrock Exploration Company, Diamond Shamrock Refining and Marketing Company, Diamond Shamrock Coal Company, and Diamond Shamrock Corporate Company ("DS Corporate").

- **Through a series of Assignment and Assumption Agreements and related documents, DSCC assigned to each newly formed subsidiary, as a contribution of capital, the assets associated with its particular line of business or function, in consideration of which each subsidiary agreed to assume and indemnify DSCC for the liabilities associated with the assigned assets.**

- **A new corporation, which would adopt the name Diamond Shamrock Corporation (DSC-2), was established to become the parent of DSCC and of the newly formed subsidiaries.**

- **DSCC then transferred ownership of the stock of the newly formed subsidiaries to DSC-2. Concurrently, DSC-2 was assigned and agreed to assume liability for substantially all of DSCC's then outstanding domestic long-term debt, which at the time had an outstanding principal balance of approximately $289 million, as well as numerous other obligations, all as outlined on Schedule II at MAXUS0219191.**

See Maxus and Tierra's Resp. to Plaintiffs' Track III Trial Interrogatories, Resp. to Interrog. No. 10, Pls.' Ex. 12.

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

RESPONSE: Maxus admits that Plaintiffs have selectively quoted from a January 24, 1984 letter from James Kelley, but otherwise denies this paragraph. In further response, Maxus states that Old Diamond was renamed DSCC and continued to operate the chemicals business. Fretthold Cert. ¶5. By way of further response, see Maxus's Response to Statement No. 16, above.

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

RESPONSE: Maxus admits only that between 1983 and 1984, DSC-1 was reorganized and that Timothy Fretthold's chart summarized the steps of the reorganization. Pls.' Ex. 15 at MAXUS0055632-45. Maxus otherwise denies this paragraph. The remainder of this statement is argument and does not contain any citations to any portion of the motion record establishing or demonstrating the statement as uncontroverted. By way of further response, see Maxus's Response to Statement No. 16, above, which provides in narrative form substantially the same information contained in Timothy Fretthold's chart.

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

RESPONSE: Maxus admits that on May 30, 1983, Old Diamond and Natomas executed an agreement for merger. Pls.' Ex. 16. However, in further response, Maxus states that Old Diamond and Natomas became indirect subsidiaries of New Diamond. Maxus further states that they were wholly owned subsidiaries of Diamond Shamrock International Energy Company, which in turn was a wholly owned subsidiary of New Diamond. See Fretthold Cert. ¶5.

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

RESPONSE: Admitted.

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

RESPONSE: Admitted.

22. On or about September 1, 1983, New Diamond changed its name to Diamond Shamrock Corporation (see Ex. 18 at MAXUSO423402), and Old Diamond changed its name to "Diamond Chemicals Company." See Ex. 20 at MAXUS0055648.

RESPONSE: Admitted.

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

RESPONSE: Maxus admits that on October 26, 1983, Diamond Chemicals Company changed its name to Diamond Shamrock Chemicals Company (DSCC).

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

RESPONSE: Admitted.

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

RESPONSE: Maxus denies Plaintiffs' characterization of the cited documents. In further response, Maxus states that, while Old Diamond shares were exchanged for New Diamond shares, stock held by Natomas' shareholders was also exchanged for additional shares of New Diamond. See Pls.' Ex. 13 at MAXUS019717-18.

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

RESPONSE: Maxus admits that DSC-1 and Natomas Company amended their employee stock options and other employee incentive plans to allow for any options under those plans

to be converted to options for New Diamond Corporation stock. Pls.' Ex. 23 at MAXUS020151-52, MAXUS020185. To the extent any further response is required, Maxus denies the remaining allegations of the paragraph.

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

RESPONSE: Admitted.

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

RESPONSE: Maxus admits only that the persons who served as DSC-1's officers became officers of DSC-2. To the extent any further response is required, Maxus denies the remaining allegations of the paragraph.

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

RESPONSE: Maxus admits that as of September 1, 1983, the directors of DSC-1 became directors of DSC-2. In further response, Maxus states that the directors of New Diamond included four new directors designated by Natomas.

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

RESPONSE: Maxus admits only that its corporate headquarters were at the same address as those of DSC-1. To the extent any further response is required, Maxus denies the remaining allegations of the paragraph.

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

RESPONSE: This statement is not supported by any citations to any portion of the motion record establishing or demonstrating the statement as uncontroverted. While the referenced document identifies the assets owned by DSCC following the creation of Maxus/New Diamond, it does not identify the Old Diamond's assets at the beginning of the reorganization.

32. At the same time the Natomas transaction was going forward, New Diamond management, which was the same management of Old Diamond, was planning a second phase of reorganization, including the means to remove Old Diamond's non-chemicals assets from Old Diamond and place them into New Diamond. See Ex. 32 at PL No. 153581, p. 1, ¶ 1.[3]

RESPONSE: Maxus admits only that during the Natomas transaction, it was proposed that the assets of DSC-1 be restructured, such that New Diamond (later DSC-2) would "own two or more new subsidiaries that will own DSC[-1]'s oil and gas-related assets. The chemical business will remain in DSC-1, which will be renamed "Diamond Chemical Company." See Pls.' Ex. 32 at PL No. 153581, p. 1. Maxus otherwise denies this paragraph, particularly the statement that anyone was planning to "remove" non-chemicals assets from Old Diamond and place them into New Diamond. The reorganization changed the business unit form to a corporate subsidiary form with a new parent holding company, named New Diamond. Old Diamond was renamed DSCC and continued to operate the chemicals business. DSCC and Diamond Shamrock Coal Company became wholly owned subsidiaries of New Diamond. The oil and gas businesses, Diamond Shamrock Refining and Marketing Company, Diamond Shamrock Exploration Company and Natomas Company ("Natomas"), became indirect subsidiaries of New-DSC.

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

They were wholly owned subsidiaries of Diamond Shamrock International Energy Company, which in turn was a wholly owned subsidiary of New-DSC. Fretthold Cert. ¶5. Thus, "non-chemicals assets" of Old Diamond, i.e., assets related to business lines other than chemicals, were moved to the new subsidiaries. Id.

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

RESPONSE: Maxus admits that Plaintiffs have selectively quoted the referenced documents.

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

RESPONSE: Maxus denies the first sentence of Paragraph 34, which is an unsupported argument, not a statement of fact. With respect to the second and third sentences of Paragraph 34, Maxus admits only that, at the October 20, 1983 Board of Directors meeting, James Kelley "explained that consistent with the Corporation's decentralized structure each operating unit would eventually become a separate subsidiary of the Corporation." See Pls.' Ex. 33 at MAXUS3375581. This is consistent with the structure of the reverse triangular merger that DSC-1 undertook. See Fretthold Cert. ¶5.

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

RESPONSE: Maxus admits the statements in Paragraph 24, except that Maxus denies that the subsidiaries were created "[b]y direction of New Diamond (Maxus)." Rather, Maxus states that DSC-1's stockholders authorized the 1983-1984 reorganization, including the creation of the subsidiaries, and the reorganizations were implemented by officers and directors of DSC-1, DSC-2, Natomas and their counsel and consultants. 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. 6, Bryant Cert., Ex. 63.

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

RESPONSE: Maxus admits the statement contained in the first sentence of Paragraph 36. With regard to the second sentence, Maxus admits that Plaintiffs have selectively quoted the referenced document, but otherwise denies the second sentence. The purpose of the reorganization was to redeploy assets to the subsidiaries whose businesses to which those assets related--the reorganization resulted in the assets of the business being deployed along functional lines. Certification of Jonathan R. Macey ("Macey Cert.") ¶¶ 13, 23.

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

RESPONSE: Admitted.

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

RESPONSE: Admitted.

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

RESPONSE: Admitted.

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

RESPONSE: Admitted.

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

RESPONSE: Admitted. In further response, Maxus states that Diamond Shamrock Refining and Marketing Company ("DS R&M") also acquired the liabilities relating to the assets that were transferred to it, in addition to executing the promissory note. See Pls.' Ex. 39 & 40, pp. 2-3.

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

RESPONSE: Admitted.

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

RESPONSE: Admitted.

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

RESPONSE: Admitted. In further response, Maxus states that Diamond Shamrock Exploration Company ("DS Exploration") also acquired the liabilities relating to the assets that were transferred to it, in addition to executing the promissory note. Pls.' Ex. 42, pp. 2-3.

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

RESPONSE: Admitted. By way of further response, Diamond Shamrock Coal Company ("DS Coal") also acquired the liabilities relating to the assets that were transferred to it, in addition to executing the promissory note. Pls.' Ex. 44, pp. 2-3.

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

RESPONSE: Admitted.

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

RESPONSE: Admitted. By way of further response, DS Corporate also acquired the liabilities relating to the assets that were transferred to it, in addition to executing the promissory note. Pls.' Ex. 45, pp. 2-3.

48. The result of these agreements was that Old Diamond gave $410,771,907[4] in capital contributions to the subsidiaries, and Old Diamond received $1,232,240,898[5] in unsecured promissory notes from the subsidiaries. See, supra, Statement of Facts, at ¶¶ 40-47.

RESPONSE: Denied. This paragraph is counsel's argument and does not comport with R. 4:46-2, as it is not supported by any citations to any portion of the motion record establishing or demonstrating the statement as uncontroverted. Accordingly, Maxus denies these paragraphs, and incorporates by reference its response to Paragraphs 40-47 above. In further response, DSR&M, DS Exploration, DS Coal and DS Corporate also assumed liabilities relating to the assets that were transferred. Pls.' Ex. 39, 40, 42, 44 & 45, pp. 2-3.

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

RESPONSE: Admitted. In further response, Maxus states that in addition to receiving Old Diamond's/DSCC's stock in the subsidiaries, New Diamond/DSC-2 was assigned and agreed to assume liability for substantially all of Old Diamond's/DSCC's then outstanding domestic long-term debt, which at the time had an outstanding principal balance of approximately $289 million, as well as numerous other obligations, all as outlined on

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[4] ($27,235,750 + $262,874,000 + $120,662, 157)

[5] ($8614,637,750 + 788,619,377 + $361,983,771)

Schedule II at MAXUS0219191. See Maxus and Tierra's Resp. to Plaintiffs' Track III Trial Interrogatories, Resp. to Interrog. No. 10, Pls.' Ex. 12.

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

RESPONSE: Admitted. By way of further response, Maxus states that "substantially all" of the property and assets, as used in the quoted context, is a term of art. While "substantially all" of the assets of Old Diamond were transferred to New Diamond pursuant to the reorganization, the book value of the assets remaining within Old Diamond/DSCC as of December 21, 1983 was valued at approximately $760 million. See Certification of Vincent E. Gentile in Opposition to Plaintiffs' and Occidental Chemical Corporation's Motion for Partial Summary Judgment and In Support of Maxus Energy Corporation's Track III Cross-Motion for Partial Summary Judgment ("Gentile Cert."), Ex. 73 at MAXUS3202607.

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

RESPONSE: Maxus admits that Plaintiffs have selectively quoted the referenced document and notes that "substantially all" of the property and assets, as used in the quoted context, is a term of art, and following the reorganization DSCC held significant assets. See Pls.' Ex. 26 at MAXUS0061687.

52. Old Diamond also transferred to New Diamond the right to receive the payments on the promissory notes executed by the new subsidiaries. See Ex. 48 at MAXUS0219190, ¶ 2. For example, Old Diamond endorsed the DS R&M promissory note to

New Diamond. See Ex. 41 at MAXUS022072, ¶ 2. And Old Diamond endorsed the DS E&P promissory note to New Diamond, as well. See Ex. 43 at MAXUS022082, 2.

RESPONSE: Admitted.

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

RESPONSE: Admitted.

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

RESPONSE: **Maxus admits only that in its response to Plaintiffs' Track III Interrogatories, Maxus and Tierra identified the balance on the indentures listed in Schedule II at MAXUS0219191. See Pls.' Ex. 48 at MAXUS00219191. Maxus otherwise denies this statement. By way of further response, as set forth in the SEC Form 8-K filing relating to the Reorganization, prior to the reorganization, Old Diamond/DSCC owed an aggregate principal amount of $609,219,000 under the debentures and other long-term notes. See Gentile Cert., Ex. 108 at MAXUS022730-731. Pursuant to the Reorganization and supplemental indentures executed on January 26, 1984, New Diamond/Maxus was substituted for Old Diamond/DSCC as the obligor under all of the debentures and other long-term notes, with a new aggregate principal amount of $700,000,000. Gentile Cert., Ex. 108 at MAXUS022731-733.**

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

RESPONSE: Paragraph 55 does not contain a statement of material fact but instead argument. In further response, Maxus denies the statements contained in Paragraph 55 insofar as they fail to take into account the transfer of liabilities, other than the debentures and other long term debt, from Old Diamond/DSCC into the subsidiaries, which liabilities followed the transferred assets. For example, in transferring the assets related to the exploration and petroleum business to DS Exploration, Old Diamond/DSCC also transferred all liabilities and obligations under all contracts and agreements related to the exploration and petroleum business being transferred, all payroll, pension, employee benefits liabilities, and all liabilities for claims and causes of action asserted by third parties arising out of the exploration and petroleum business assets. See Pls.' Ex. 42 at MAXUS022090. The same was done with regard to DSR&M and DS Coal and DS Corporate. Pls.' Ex. 39, 44 & 45, pp. 2-3.

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

RESPONSE: Maxus admits only that the creation of the new subsidiaries and the transfer of certain assets and associated liabilities from Old Diamond/DSCC to the subsidiaries constituted the second phase of the long-planned reorganization, with an effective date of January 26, 1984. See Plan and Agreement of Merger, Pls.' Ex. 16. To the extent any further response is required, Maxus denies the remaining allegations of the paragraph.

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

RESPONSE: Admitted. By way of further response, New Diamond also assumed corporate notes and debentures of Old Diamond. Pls.' Ex. 48 at MAXUS0219191. Additionally, "substantially all" of the property and assets, as used in the quoted context, is a term of art, and following the reorganization DSCC held significant assets. See Pls.' Ex. 26 at MAXUS0061687.

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

RESPONSE: Admitted.

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

RESPONSE: The first sentence of Paragraph 59, which Maxus denies, does not contain a statement of material fact but instead argument. Maxus denies the statements contained in the second sentence of Paragraph 59. In further response, Maxus states that after the reorganization, the oil, gas, and coal assets were owned and operated by individual subsidiaries of New Diamond/DSC-2, not by New Diamond/DSC-2 itself. See Pls.' Ex. 26 at MAXUS0061656-675 (1984 Annual Report showing operations by subsidiaries). Maxus states that, in the third sentence of Paragraph 59, that Plaintiffs have selectively quoted from New Diamond's/DSC-2's 1983 Form 8-B filed with the SEC. To the extent any further response is required, Maxus denies the remaining allegations of the paragraph.

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

RESPONSE: Admitted that the referenced consolidated annual report for Diamond Shamrock Corporation reported the assets of the company and its subsidiaries. See Pls.' Ex. 30 at MAXUS0056387 (noting it relates to the companies and their subsidiaries and predecessors).

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

RESPONSE: Denied as to the first sentence. Maxus admits that the referenced annual report for Diamond Shamrock Corporation reported on a consolidated basis the performance of the company and its subsidiaries. See Pls.' Ex. 30 at MAXUS0056387 (noting it relates to the companies and their subsidiaries and predecessors). By way of further response, Maxus notes that Plaintiffs' assertion that the distinction between Old-DSC and New-DSC is "completely absent" is unsupported and contrary to the facts actually contained in the public filings. Maxus states that the Financial Summary in the 1983 Annual Report of New-DSC contains entire sections detailing the Reorganization and the Acquisition of Natomas Company, including the Plan and Agreement of Reorganization and the Plan and Agreement of Merger, the renaming of Old-DSC as DSCC, DSCC becoming a wholly-owned subsidiary of New Diamond, the renaming of New Diamond as New-DSC, the exchange of common and preferred stock of DSCC and New-

DSC, the transfer by DSCC of ownership of the oil and gas and coal companies, DSCC's assignment to and New-DSC's assumption of DSCC's domestic long-term debt, Natomas becoming a wholly-owned subsidiary of New-DSC, and the exchange of common and preferred stock of Natomas and New-DSC. See Fretthold Cert. ¶¶11-13; 1983 Annual Report of New-DSC, Pls.' Ex. 24 at MAXUS0059215.

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

RESPONSE: Maxus admits only that the 1983 10-K filing defined "Company", *for purposes of that document*, to mean "Diamond Shamrock Corporation" (i.e., New Diamond/Maxus) beginning on August 31, 1983 and "Diamond Shamrock Chemicals Company" (formerly named Diamond Shamrock Corporation (Old Diamond)) prior to August 31, 1983, "as well as their subsidiaries and predecessors." See Pls.' Ex. 30 at MAXUS0056387 (emphasis added).

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

RESPONSE: Maxus admits only that Plaintiffs have selectively quoted from the introduction to DSC-2's 1983 Annual Report. Maxus otherwise denies this paragraph. Plaintiffs are trying to conjure technical legal meanings from what is only common usage of language, as described by Timothy Fretthold, former Secretary and Senior Counsel for Diamond Shamrock. Fretthold Cert. ¶15. In further response, Maxus states that the

language makes clear it was only being used in a general descriptive case: "The past year has been one of the most active and exciting in the history of Diamond Shamrock." In fact, Old-DSC and New-DSC were both part of the "history of Diamond Shamrock," and the Annual Report detailed the legal reorganization of the corporation in a later section. Pls.' Ex. 24 at MAXUS0059215; Fretthold Cert. ¶15.

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

RESPONSE: Maxus admits the general statements contained in Paragraph 64. However, in further response, Maxus states that the report also addressed each of its separate subsidiaries responsible for independent aspects of New Diamond's/DSC-2's subsidiaries' businesses. For example, DSCC's assets, liabilities and performance were described separately from those of DS Coal Company. See Pls.' Ex. 24 at MAXUS0059201-06.

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

RESPONSE: Maxus admits only that plaintiffs have selectively quoted the cited document. Maxus otherwise denies this paragraph. By way of further response, see Maxus' response to Paragraph 63 above.

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

RESPONSE: Admitted.

67. Following the acquisition, New Diamond filed suit against Kidder Peabody, a Kidder Peabody employee named Martin Siegel, and Ivan Boesky, alleging that Siegel gave Boesky confidential information about the upcoming acquisition and that Boesky purchased substantial amounts of Natomas stock, driving up the price Old Diamond was required to pay for Natomas. See id. at MAXUS0049784.

RESPONSE: Admitted.

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

RESPONSE: Maxus admits that Boeskey moved for judgment on the pleadings. However, in further response, Maxus states that Kidder Peabody's argument was that the merger was not in substance an acquisition of Natomas by DSC-1, and instead that Kidder Peabody relied on the technical form of the transaction to argue Natomas was acquired by a third-party (Maxus) and that the claim could only be brought by DSC-1's former shareholders individually. See Pls.' Ex. 27 at MAXUS0049808-09. Maxus also states that the District Court did not address the subsidiary question of whether Maxus, through Diamond Shamrock Corporate Company, was the successor to any such claim, and that the Second Circuit reversed the District Court. See Pollack, J., In re Ivan F. Boesky Securities Lit., 1990 WL 48781 at *2 (March 26, 1990); Kidder Peabody & Co. v. Maxus Energy Co., 925 F.2d 556 (2d Cir. 1991). To the extent any further response is required, Maxus denies the remaining allegations of the paragraph.

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

RESPONSE: Maxus admits that DSC-1 acquired Natomas and that DSC-2/Maxus was one of the entities involved in a reverse triangular merger through which DSC-1 acquired Natomas. See Maxus Counterstatement of Facts ¶¶ 32, 43-44. Maxus denies the remaining allegations in this paragraph. In further response, Maxus states that it made the argument that DSC-1 transferred all Kidder Peabody claims from DSC-1 to Diamond Shamrock

Corporate Company through the specific language of the 1984 Assignment and Assumption Agreement. See Maxus Counterstatement of Facts ¶¶235, 237.

70. New Diamond further explained that the officers and directors moved from Old Diamond to New Diamond, that the stockholders went from Old Diamond to New Diamond, that the assets went from Old Diamond to New Diamond, and that the corporate name—Diamond Shamrock Corporation—went from Old Diamond to New Diamond. Id. at MAXUS0049790- 91.[6]

RESPONSE: Admitted. By way of further response, see Maxus Counterstatement of Facts ¶¶233-241.

71. Seeking a result that would disregard the technical corporate form it had set up, New Diamond urged the court to give effect to "corporate reality" – not technicalities. See Ex. 27 at MAXUS0049808. New Diamond even argued that placing New Diamond instead of Old Diamond at the top of the corporate tree, as the purchaser of Natomas, "would elevate form over substance in a manner contrary to Delaware law." Id. at MAXUS0049809. And, in the footnote following this statement, New Diamond quoted the following language: "Where one person has wronged another in a matter within equity's jurisdiction, equity ... will not suffer the wrongdoer to escape restitution to such person through any device or technicality." Ibid.

RESPONSE: Maxus admits that the footnote language is quoted correctly. Maxus denies the remaining allegations in this paragraph. In further response, Maxus states that the language quoted above was in response to Kidder Peabody's focus on one facet of the damages claimed in the action and has no relevance to the 1983-1984 Reorganization. See Pls.' Ex. 27 at MAXUS0049808-809.

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

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

RESPONSE: Denied as stated. In further response, Maxus states that at the time the referenced ACOs were executed, Old Diamond had changed its name to DSCC, which executed the ACOs.

73. Old Diamond and later DSCC[7] also sought insurance coverage to cover property damage claims brought against it by landowners near the Lister Site and for a settlement of the Agent Orange litigation related to the Lister Site. Diamond Shamrock Chemicals Co. v. Aetna Cas. Sur. Co., 268 N.J. Super. 167 (App. Div. 1992).

RESPONSE: Maxus denies the footnote to the extent it is not supported by any citations to any portion of the motion record establishing or demonstrating the statement as uncontroverted, and inaccurately states that exploration and production, refining and marketing, coal and corporate assets were transferred to New Diamond/Maxus, which was a stock holding company (those assets as described elsewhere were transferred to the subsidiaries of New Diamond/Maxus). See Assignment and Assumption Agreements, Pls.' Exs. 39, 40, 42, 44 & 45. Maxus admits the remaining allegations of this paragraph.

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

> [l]iabilities for cleanup costs mandated by any environmental protection law or regulation are excluded to the extent they arise out of or relate to . . . any site now owned by Diamond Shamrock or DSCC at which manufacturing operations have been permanently abandoned and . . . any site not now owned by Diamond Shamrock or DSCC which has been or may within three

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

years from the date of closing be designated as a Superfund site. . . . [See id. at OCCNJ0001214, ¶ 3.]

RESPONSE: Maxus admits that the cited letter is quoted correctly. In further response, Maxus states that the letter was a proposal and was not intended to address the legal basis for liability. See Kelley Aff. ¶20. In addition, Maxus states that only the later comprehensive SPA negotiated by the parties controls regarding the retention of liabilities. See Pls.' Ex. 57. Following several months of negotiations, the parties agreed only that Maxus would indemnify OCC under Article IX of the SPA and not assume any liabilities of DSCC. Id. To the extent any further response is required, Maxus denies the remaining allegations of the paragraph.

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

RESPONSE: Maxus admits that the cited letter is quoted correctly. In further response, Maxus states that the letter was a proposal and was not intended to address the legal basis for liability. See Kelley Aff. ¶20. In addition, Maxus states that only the later comprehensive SPA negotiated by the parties controls regarding the retention of liabilities. See Pls.' Ex. 57. Following several months of negotiations, the parties agreed only that Maxus would indemnify OCC under Article IX of the SPA and not assume any liabilities of DSCC. Id. at pp. 124 & 127-28. To the extent any further response is required, Maxus denies the remaining allegations of the paragraph.

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

RESPONSE: Maxus admits it agreed to indemnify OCC for certain environmental liabilities pursuant to the terms of the SPA and applicable law. However, in further response, Maxus states that the SPA reflects that both of the parties understood that Maxus did not assume any of the environmental liabilities. Further, Maxus states that the letter was a proposal and was not intended to address the legal basis for liability. See Kelley Aff. ¶20. Finally, the merger clause in the SPA bars any use of the prior letter to change the terms of the SPA. See Pls.' Ex. 57 at pp. 155-56. To the extent any further response is required, Maxus denies the remaining allegations of the paragraph.

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

> Article XII. Section 12.06 Third Parties. Except as specifically set forth or referred to herein (including, without limitation, Articles IX and X and Section 12.03 hereof), nothing herein expressed or implied is intended or shall be construed to confer upon or give any Entity,[8] other than the parties hereto and their successors and permitted assigns, any rights or remedies under or by reason of this Agreement. [Ex. 57 at OCCNJ0000373.]

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

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

RESPONSE: Maxus admits that the Lister Site is an "Inactive Site" as defined by the SPA and that OCC is entitled to indemnification for the Lister Liabilities to the extent provided by Article IX of the SPA and the limitations of law that apply as argued by Maxus in opposition to OCC's prior motion for summary judgment in this case. Pls.' Ex. 57 at pp. 124 & 127-28. Maxus also admits that the language of Section 12.06 of the SPA is quoted correctly but states that such quote omits other language stating that any such obligations are to be on a "best efforts" basis only for the benefit of DSCC and OCC as parties to the agreement and that the language of Section 12.11 is quoted correctly. However, in further response, Maxus states that Section 12.11 is unrelated to the express negation of intent to benefit third-parties in Section 12.06, confers no benefit on anyone other than DSCC, and is not a mandatory obligation. Id. at pp. 158-159. To the extent any further response is required, Maxus denies the remaining allegations of the paragraph.

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

RESPONSE: Maxus admits that it was aware of certain liabilities associated with the Lister Site and that the Lister Liabilities were a factor in the negotiations. However, Maxus denies that the indemnification of the Lister Liabilities was a material consideration in the sale of DSCC to OCC. In further response, Maxus states that the indemnification offered a material benefit to OCC by protecting it from certain environmental liabilities associated with DSCC. See Kelley Aff. ¶17. Maxus also states that the Plaintiffs are not identified anywhere in the SPA nor are any potential claimants against DSCC stated or

implied to be beneficiaries of the SPA. See Pls.' Ex. 57. To the extent any further response is required, Maxus denies the remaining allegations of the paragraph.

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

RESPONSE: Maxus admits that OCC admitted to Plaintiff's Request for Admission No. 1, which stated "Admit that You would not have executed the Stock Purchase Agreement without indemnification for the Environmental Liabilities associated with the Lister Plant." See Pls.' Ex. 128 at Request No. 1. In further response, Maxus states that the indemnification offered a material benefit to OCC by protecting it from certain environmental liabilities associated with DSCC. See Kelley Aff. ¶17. Maxus also states that the Plaintiffs are not mentioned anywhere in the SPA nor are any potential claimants against DSCC state or implied to be beneficiaries of the SPA. See Pls.' Ex. 57. To the extent any further response is required, Maxus denies the remaining allegations of the paragraph.

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

RESPONSE: Maxus admits that Exhibit 8.13 includes the quoted language. In further response, Maxus states that the appointment applies to "any Existing Claims (as defined in the [SPA]) against any Current Carrier (as defined in the [SPA]) under any of the Existing Policies with respect to a matter for which Seller has liability directly or pursuant to the

provisions of the Stock Purchase Agreement." See Pls.' Ex. 59 at OCCNJ0018321. Maxus also states that the *Aetna* litigation related to the current carriers of insurance policies connected to the Lister Site and that the *Aetna* Litigation fell under Exhibit 8.13 to the SPA because it was a claim against a current carrier. See id.; Pls.' Ex. 57 at p. 108. In addition, Maxus states that James Kelley and W.E. Notestine of Maxus Energy Corporation and the law firm Cahill Gordon & Reindel were designated Of Counsel in the *Aetna* Litigation and that Pitney, Hardin, Kipp & Szuch were the attorneys for DSCC. See Pls.' Ex. 60 at MAXUS0964734. Maxus also states that the SPA reflects that both parties understood that environmental liabilities stayed with DSCC. Further, Maxus states that the letter was a proposal and was not intended to address the legal basis for liability. See Kelley Aff. ¶20. To the extent any further response is required, Maxus denies the remaining allegations of the paragraph.

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

RESPONSE: Maxus admits that it represented to the DEP that under the SPA, Maxus "agreed to administer the consent orders relating to the Newark site" and that "the role of Maxus with respect to the Newark site is to respond to the consent orders on behalf of OEC [OCC]." See Pls.' Ex. 67 at MAXUS3061401. Maxus also admits that it provided Section 9.04 to the NJDEP, which gave Maxus the option "to elect to assume the defense of any Third-Party Claim" that fell under the indemnification provision in Section 9.03 of the SPA. See Pls.' Ex. 129 at MAXUS0694725. Maxus admits that it did not provide the NJDEP with a full copy of the SPA with the letter. Id. at MAXUS0694274. In further

response, Maxus states that it told the NJDEP "we are not in the position to furnish the entire Stock Purchase Agreement, as it is a very large document which, for the most part, covers areas of business agreement wholly unrelated to environmental concerns." Id. To the extent any further response is required, Maxus denies the remaining allegations of the paragraph.

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

RESPONSE: Maxus denies that it ever viewed the discharges from the Lister Site as being discharges of Maxus, or that it viewed the associated liabilities as anything other than an obligation to OCC under the SPA. Maxus admits only that the language above is quoted accurately. In further response, Maxus states that its responsibilities for the Lister Liabilities were pursuant to the indemnity terms of Article IX of the SPA and the limitations of law that apply as argued by Maxus in opposition to OCC's prior motion for summary judgment in this case, that Maxus never assumed the Lister Liabilities under the SPA, and that the references to "manufactured by the Company" which the context of the cited paragraphs in Maxus' 10-Ks indicates, were references to DSCC. See Gentile Cert., Ex. 104 at OCCNJ003653 (the copy of the 1988 SEC 10-K attached by Plaintiffs failed to include the second page of the filing, which clarifies that "[i]n this report, the term 'Company' means Maxus Energy Corporation, its subsidiaries and their predecessors

unless the context otherwise indicates.") See **Pls.' Ex. 57. To the extent any further response is required, Maxus denies the remaining allegations of the paragraph.**

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

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

RESPONSE: Maxus admits that the cited portion of the 1989 10-K is quoted correctly. To the extent any further response is required, Maxus denies the remaining allegations of the paragraph.

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

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

RESPONSE: Maxus admits that the cited portion of the 1989 10-K is quoted correctly. To the extent any further response is required, Maxus denies the remaining allegations of the paragraph.

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

RESPONSE: Maxus admits that any action taken in the *Aetna* Litigation was pursuant to the Section 8.14 of the SPA. Pls.' Ex. 60. In further response, Maxus states that James Kelley and W.E. Notestine of Maxus Energy Corporation and the law firm Cahill Gordon & Reindel were designated Of Counsel in the *Aetna* Litigation and that Pitney, Hardin, Kipp & Szuch were the attorneys for DSCC. See Pls.' Ex. 60 at MAXUS0964734. Additionally, Maxus states that nowhere in the SPA did Maxus agree to assume DSCC's liabilities. See Pls.' Ex. 57. To the extent any further response is required, Maxus denies the remaining allegations of the paragraph.

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

RESPONSE: Maxus admits that the indemnification provision of the SPA required Maxus to indemnify OCC for its expenses for the Lister Site to the extent provided by Article IX of the SPA and the limitations of law that apply as argued by Maxus in opposition to OCC's prior motion for summary judgment in this case. Pls.' Ex. 57 at pp. 124 & 127-28. In further response, Maxus states that it never assumed financial responsibility for the Lister Liabilities. Rather prior to the SPA on behalf of DSCC, Maxus' corporate environmental staff coordinated the response to those liabilities. After the SPA, OCC as successor to DSCC became liable, as evidenced, among other things by OCC being named the sole party obligated under the 1987 Supplemental Administrative Consent order between the NJDEP

and OCC. See Gentile Cert., Ex. 88 at OCCNJ0022784; Certification of Paul W. Herring ("Herring Cert.") ¶6. Maxus also states that any direct payments made by Maxus to the NJDEP were on behalf of OCC pursuant to a July 1987 agreement between OCC and Maxus. See Gentile Cert., Ex. 89 at OCCNJ0022855-56. In further response, Maxus states that it was acting on behalf of DSCC or OCC as their indemnitor when corresponding with the NJDEP. See Herring Cert. ¶6; Gentile Cert., Ex. 89 at OCCNJ0022855-56. To the extent any further response is required, Maxus denies the remaining allegations of the paragraph.

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

RESPONSE: Denied. In further response, Maxus states that its role with respect to the Lister Site is limited to that of a financial indemnitor. See Herring Cert. ¶6. Maxus also states that it never assumed financial responsibility for the Lister Liabilities and that OCC remained the sole party obligated under the 1987 Supplemental Administrative Consent order between the NJDEP and OCC. See Gentile Cert., Ex. 88 at OCCNJ0022784. Maxus further states that any direct payments made by Maxus to the NJDEP were on behalf of OCC pursuant to a July 1987 agreement between OCC and Maxus. See Gentile Cert., Ex. 89 at OCCNJ0022855-56.

88. On August 12, 1987, Maxus wrote a letter to DEP explaining Maxus's post-SPA role with respect to the Lister Plant: "Under the agreement by which the stock of [DSCC] was sold, [Maxus] agreed to administer the consent orders relating to the Newark site. Accordingly, the role of Maxus with respect to the Newark site is to respond to the consent orders on behalf of [OCC]." See Ex. 67 at MAXUS3061402, ¶ 3.

RESPONSE: Maxus admits that the cited portion of the August 12, 1987 letter was quoted correctly. The quoted language refers to Maxus' role as indemnitor under Article IX of the SPA and subject to applicable law. See Herring Cert. ¶6. To the extent any further response is required, Maxus denies the remaining allegations of the paragraph.

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

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

RESPONSE: Maxus admits that in connection with its indemnity responsibilities under the SPA that Edward Noble was Manager for the Lister Site in 1987, that Hadley Bedbury was designated as Project Coordinator with the EPA, and that Richard McNutt was Project Manager in the early 1990s. In further response, Maxus states that it acted on behalf of DSCC or OCC when corresponding with the NJDEP or EPA and consistently identified its role in all communications with those agencies. See, e.g., Gentile Cert., Ex. 89 at OCCNJ0022855-56; Herring Cert. ¶6. To the extent any further response is required, Maxus denies the remaining allegations of the paragraph.

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

RESPONSE: In response to the first sentence, Maxus admits only that it has conducted remediation activities relating to the Lister Site on behalf of OCC, in response to claims under the indemnity provision of the SPA. See Gentile Cert., Ex. 89 at OCCNJ0022855-57. The second sentence is not supported by any citations to any portion of the motion record establishing or demonstrating the statement as uncontroverted, and Maxus denies that it is directly responsible for Lister Plant liabilities.

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

RESPONSE: Maxus disputes the relevance of the statements contained in Paragraph 92 to any issue raised by Plaintiffs' Motion, and denies Plaintiffs' characterization of requirements under the SPA. The cited document speaks for itself.

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

RESPONSE: Maxus disputes the relevance of the statements contained in Paragraph 92 to any issue raised by Plaintiffs' Motion. By way of further response, Maxus admits only that, as noted in the referenced document, which did not relate to the Lister Site, Maxus stated its belief that the matter at issue did not constitute an "Indemnifiable Loss" under the SPA.

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

RESPONSE: Admitted. In further response, Maxus notes that OCC at no point claimed that Maxus was directly liable for any of these liabilities.

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

RESPONSE: Admitted. In further response, Maxus notes that OCC at no point claimed that Maxus was directly liable for any of these liabilities.

95. Maxus sought review by the Texas Supreme Court, but the court declined to hear the appeal. See Ex. 77, Maxus Energy Corp. v. Occidental Chemical Corp., 244 S.W.3d 875, 878 (Tex. App. 2009, pet. denied).

RESPONSE: Admitted.

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

RESPONSE: Admitted.

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

RESPONSE: The first sentence fails to comport with R. 4:46-2(b) as it is not supported by any citations to any portion of the motion record establishing or demonstrating the statement as uncontroverted. In further response, Maxus states that it has not used the fact it was formed in 1983 alone as a defense in any matters; rather, Maxus has only stated the fact that it was a stock holding company created in 1983 and it was not the operator or successor to the operator of the Lister Site, and it was not a liable party. See, e.g., Gentile Cert., Ex. 65, Feb. 1, 1988 P. Herring letter to NJDEP at NJDEP00399957. In response to the second sentence, Maxus admits that Plaintiffs selectively quote the referenced

document, and affirm that the reorganization took place for business reasons unrelated to alleged environmental liabilities. In further response, Maxus states that facilitating future dispositions was one of two main purposes for the reorganization, with the other being "to rationalize a business structure that had become increasingly complex." Bryant Cert., Ex. 56 at MAXUS1883911.

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

RESPONSE: Denied. Although Maxus admits that the term "slender" was used, Maxus states that it was hardly seeking to "extricate Maxus from another New Jersey environmental problem caused by Old Diamond's activities in New Jersey." Pls.' Ex. 81 at MAXUS2539029. Indeed, Maxus states that at that time Maxus was continuing to perform investigation and remediation in the State of New Jersey in response to indemnity claims by OCC, and through 1995, Maxus states that it spent approximately $70 million in addressing Lister Site and Passaic River contamination. See Pls.' Ex. 109 (Project Summaries by Year) at AA-YPF-0039067.

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

RESPONSE: Denied. In further response, Maxus states that the cited documents merely describe the 1983/1984 reorganization and activities leading up to the reorganization, and that Plaintiffs' characterization of the same is not supported by those documents.

100. Maxus also has taken contradictory positions on other issues, including the characterization of the massive promissory notes that were given by DS E&P and DS R&M in

exchange for Old Diamond's assets. When it would lead to a reduced federal tax bill, Maxus argued that the notes were equity because there was no intention that the notes would be repaid or that any interest would be paid on the notes. See Ex. 31 at MAXUS3819658, ¶ 2. When DS E&P, by then named Midgard Energy, appeared in front of the Texas tax authorities, however, Maxus's position changed by arguing that the same notes were not equity because that position was the one that would result in lower taxes. See Ex. 82 at MAXUS3202515, ¶¶ 2-4.[9]

RESPONSE: Denied. In further response, Maxus states that Maxus consistently described the promissory notes despite the notes having different treatment for separate tax purposes. Maxus admits that it had not established a repayment date for the notes or that any interest be paid on the notes and that Maxus understood the notes were issued in the form of a demand note. See Pls.' Ex. 31 at MAXUS3819657. Maxus further states that in its 1996 Brief to the IRS, Maxus did not disagree with the facts laid out by the Auditor and acknowledged that its "Legal Department drafted the notes as 'demand notes'" thus constituting a debt. Id. Maxus explained that it never intended to have the notes repaid or interest be paid on the notes and it did not intend to request repayment, so that the notes constituted a long-term investment and should be treated as a security for tax purposes. Maxus stated accurately to the Texas tax authorities that the notes were "created [as] a demand note when [the subsidiary] was originally capitalized." See Pls.' Ex. 82 at MAXUS3202516. In addition, Maxus determined "that a debt/equity ratio of 3:1 was sufficient when it was capitalized as part of group [in the] reorganization in 1983 so [R&M] was capitalized at approximately that ratio with an intercompany demand note." Id. Maxus understood that by being demand notes, even though a demand may never be made, they remained a debt for purposes of the Texas Franchise Tax Act. As such, Maxus was using the differing tax law treatment afforded under the U.S. Tax Code and the Texas

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

Franchise Act available for the same demand notes where each jurisdiction used different aspects of the instrument (investment intent under the U.S. Tax Code and being a demand note under the Texas Franchise Tax Act) to determine the tax treatment.

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

RESPONSE: Admitted.

102. Tierra was formed in March 1986 as Diamond Shamrock Process Chemicals, Inc. ("DSPC"), a subsidiary of DSCC. See Ex. 89 at MAXUSO44390-03; Ex. 88, Maxus Stipulation of Facts, at ¶ 1; Ex. 90, Tierra's Objections and Responses to Plaintiffs' First Set of Interrogatories on Successor, Contract and Indemnification Issues, at Request Nos. 2, 15.

RESPONSE: Admitted.

103. Just three months later in July 1986, before being capitalized, DSPC changed its name to Diamond Shamrock Chemical Land Holdings ("DSCLH"). See Ex. 91 at MAXUSO443862-64; Ex. 88, Maxus Stipulation of Facts, at ¶ 2; Ex. 90, Tierra's Objections and Responses to Plaintiffs' First Set of Interrogatories on Successor, Contract and Indemnification Issues, at Request Nos. 2, 15.

RESPONSE: Admitted.

104. Its name was changed again in December 1987 to Chemical Land Holdings, Inc. ("CLH"), before eventually becoming known as Tierra Solutions, Inc. ("Tierra") in February 2002. For clarity, these entities are referred to as "Tierra" unless specifically stated otherwise. See Ex. 92 at MAXUSO443848-54; Ex. 93 at MAXUSO443833-35; Ex. 88, Maxus Stipulation of Facts, at ¶¶ 3-4; Ex. 90, Tierra's Objections and Responses to Plaintiffs' First Set of Interrogatories on Successor, Contract and Indemnification Issues, at Request Nos. 2, 15.

RESPONSE: Admitted.

105. While Tierra was originally formed by DSCC, its stock was transferred only months later on September 4, 1986 to DS Corporate, Maxus's former subsidiary, at the time of and in connection with the SPA. See Ex. 90, Tierra's Objections and Responses to Plaintiffs' First Set of Interrogatories on Successor, Contract and Indemnification Issues, at Request No.

2; Ex. 57 at OCCNJ0000763-66; Ex. 94 at OCCNJ0018401, ¶(v); Ex. 95, Deposition Testimony of David Rabbe, at p. 56:1-12.

RESPONSE: Admitted.

106. In 1986, when Maxus and OCC were negotiating the SPA that would allow OCC to buy DSCC's stock, one of the issues addressed in the negotiations and in the ultimate transaction was legacy environmental liability. The SPA between OCC and Maxus was dated as of September 4, 1986. See Ex. 57 at OCCNJ0000346-49. Environmental legacy liability, including legacy liability for the Lister Site, was addressed in the SPA. See id.

RESPONSE: Maxus denies Plaintiffs' characterization of the SPA, the terms of which speak for themselves. Pls.' Ex. 57 at p. 145.

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

RESPONSE: Denied. As stated in the referenced document, DS Corporate "was created as a subsidiary of DSCC in November 1983 and subsequently became a subsidiary of DSC-II [Maxus]. Corporate Company's Name was changed to Maxus Corporate Company in March 1988. Corporate Company was merged into Maxus in December 1998." Pls.' Ex. 19. Maxus further responds that this proposed statement of fact goes beyond the Track III stipulated period (1986-1994).

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

RESPONSE: This statement is not supported by any citations to any portion of the motion record establishing or demonstrating the statement as uncontroverted. By way of further response, Maxus admits only that Tierra became a wholly owned subsidiary of DS Corporate in September 1986, and that subsequently, many years later in a wholly unrelated transaction, after Tierra was no longer its subsidiary, DS Corporate was merged

into Maxus. See Pls.' Ex. 96, response to Interrogatory no. 19. Maxus denies Plaintiffs' characterization of these events.

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

RESPONSE: Admitted.

110. Tierra was formed as a land holdings company as part of Maxus's "overall environmental defense strategy" relating to the Lister Site and other legacy contaminated sites. See Ex. 97 at YPF0210163, ¶ 3; Ex. 98 at MAXUSO443916-18.

RESPONSE: Denied. This statement is not supported by any citations to any portion of the motion record establishing or demonstrating the statement as uncontroverted. The cited document makes no statement with regard to the purpose of Tierra's formation. In further response, Tierra was created because OCC refused to include in its purchase of DSCC the former plant sites that were then owned by DSCC. See Pls.' Ex. 88, Stipulation, ¶¶ 7-7.1; Maxus' Resps. to OCC's Reqs., Resp. to Interrogs. No. 3, Bryant Cert., Ex. 63. In furtherance of the sale of DSCC, the parties agreed that those sites would be "carved out" of the acquisition. Id. Tierra was thus created "to hold title to certain real property, principally former chemical plants operated by Diamond Shamrock Corporation (DSC-1)," namely, "(i) the former chemical plant site located at 80 Lister Avenue and 120 Lister Avenue in Newark, New Jersey (the "Lister Site"), (ii) the former chemical plant site located in Kearny, New Jersey (the "Kearny Site"), (iii) a large block of land that included the former chemical plant site located in Painesville, Ohio (the "Painesville Site"), and uncontaminated contiguous parcels not used for chemicals manufacturing, and (iv) certain brine fields associated with the operations at the Painesville Site." Id.

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

RESPONSE: Admitted.

112. The real property Tierra held title to during the Time Period consisted of (i) the former chemical plant site located at 80 Lister Avenue and 120 Lister Avenue in Newark, New Jersey (the Lister Site), (ii) the former chemical plant site located in Kearny, New Jersey (the "Kearny Site"), (iii) a large block of land that included the former chemical plant site located in Painesville, Ohio (the "Painesville Site"), and uncontaminated contiguous parcels not used for chemicals manufacturing, and (iv) certain brine fields associated with the operations at the Painesville Site. The Lister Site, the Kearny Site and the Painesville Site are collectively referred to as the "Sites." See Ex. 88, Maxus Stipulation of Facts, at ¶ 7.1. Certain parcels formerly associated with the Painesville Site were later sold by Tierra for more than $2,000,000.

RESPONSE: Admitted.

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

RESPONSE: Admitted.

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

RESPONSE: Maxus admits that Plaintiffs have selectively quoted from the referenced documents. Maxus otherwise denies this statement. By way of further response, see Maxus' response to Paragraph 107 above.

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

RESPONSE: Admitted.

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

RESPONSE: Admitted.

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

RESPONSE: Admitted.

118. Tierra never charged Maxus any kind of rent, access fees or service fees in connection with any activities that it performed to "facilitate Maxus's remediation of former DSCC properties on OCC's behalf in response to claims for indemnity under the SPA." See Ex. 28, Track III Admissions, at Request No. 14; Ex. 88, Maxus Stipulation of Facts, at ¶ 13; Ex. 95, Deposition Testimony of David Rabbe, at pp. 68:6-14, 68:24-69:7.

RESPONSE: Admitted.

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

RESPONSE: Maxus admits that Plaintiffs have selectively quoted from the referenced documents. To the extent any further response is required, Maxus denies the remaining allegations of the paragraph.

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

RESPONSE: Admitted.

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

RESPONSE: Admitted. In further response, Maxus notes that certain parcels formerly associated with the Painesville Site were later sold by Tierra for more than $2,000,000. See, e.g., Gentile Cert., Exs. 49, 50 & 53.

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

RESPONSE: Admitted. In further response, Maxus states that instead Tierra's expenses were paid from Maxus's funds, with intercompany transfers tracked as credits and debits. Stipulation, ¶15, Pls.' Ex. 88.

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

RESPONSE: Admitted. In further response, Maxus states that Tierra had its own officers and a board of directors.

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

RESPONSE: Admitted. In further response, Maxus states that instead Tierra's expenses were paid from Maxus's funds, with intercompany transfers tracked as credits and debits. Pls.' Ex. 88, Stipulation, ¶15.

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

RESPONSE: Maxus admits that there was no written agreement. However, in further response, Maxus states that Tierra's expenses were paid from Maxus's funds, with intercompany transfers tracked as credits and debits. Pls.' Ex. 88, Stipulation, ¶15.

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

RESPONSE: Maxus admits only that Mr. Rabbe testified that between 1986 and 1994, to his knowledge, Tierra did not reimburse Maxus for any of the expenses that Maxus paid on Tierra's behalf. By way of further response, Maxus tracked intercompany transfers as credits and debits. See Pls.' Ex. 88, Stipulation, ¶14. With regard to Plaintiffs' footnote claiming by the end of 1994, Tierra had accrued $2,896,729.09 in intercompany payables, "nominal expenses" paid by affiliated companies that had not been offset by "credits," Maxus responds that this statement is not material to the issues in dispute. Tierra had sufficient capitalization to hold title to land, which was its stated purpose at its inception. It was incorporated for a very limited purpose—"To act as a Land Holdings Company." See Gentile Cert., August 5, 1986 Application for Certificate of Authority, Ex. 82 at MAXUS0443917-18; Gentile Cert., August 4, 1986 Foreign Corporation Application for License, Ex. 83 at MAXUS0443931-32.

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

RESPONSE: Admitted. In further response, Maxus states that the tax returns themselves are further evidence of Tierra's separateness, showing that separate accounts were kept

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

that identified Tierra'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, Gentile Cert., Ex. 84 at MAXUS3414418; Form 1120, Gentile Cert., Ex. 84 at MAXUS3414709, MAXUS3414739, MAXUS3414724, MAXUS3414754, MAXUS3414964, MAXUS3414769, MAXUS3414784, MAXUS3414830, MAXUS3414927 & MAXUS3414947.

128. In its Certificate of Incorporation, Tierra had authority to issue 1,000 shares of Common Stock with a $1.00 par value. See Ex. 89 at MAXUSO443902, ¶ 4.

RESPONSE: Admitted.

129. At the time of its name change to DSCLH in July 1986, Tierra "[had] not received any payment for any capital stock[.]" See Ex. 91 at MAXUSO443863, ¶ 4.

RESPONSE: Admitted.

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

RESPONSE: Admitted.

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

RESPONSE: Admitted.

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

RESPONSE: Maxus admits the first sentence of this paragraph. In response to the second sentence, Plaintiffs refer back to Paragraphs 134 through 147 below, and Maxus similarly

refers to its responses thereto, and denies the second sentence of this paragraph. By way of further response, Tierra did not need to possess financial resources at its inception to address alleged liabilities it faced as landowner, because its liability as a subsequent purchaser of contaminated land was secondary to the liability of the operator of the Lister Site – DSCC -- which had merged with OCC, and was the beneficiary of an indemnity from Maxus. And "at the time Tierra acquired the Lister Site parcels, it was understood that the remediation liabilities would be borne not by Tierra, but by DSCC/OCC, and that Maxus would incur remediation costs in response to claims by OCC for indemnification under the SPA." See Maxus Resp. to Pls.' RFA, Resp. to RFA No. 8, Bryant Cert., Ex. 62. As noted by Maxus' in-house counsel, Paul Herring, following the reorganization and SPA, (1) OCC became liable for the environmental remediation of the Lister Site as the direct successor of DSCC; (2) Maxus became liable to OCC for the environmental remediation of the Lister Site as indemnitor of OCC under the terms of the SPA and subject to applicable law; (3) Maxus was not a successor to DSCC and was not directly liable for the Lister Site; and (4) CLH was also not liable under the Spill Act for the Lister Site, either as a successor to DSCC or as the landowner. Herring Cert. ¶5. Moreover, Plaintiffs admitted Tierra had only nominal expenses, such as property taxes. Pls.' Ex. 88, Stipulation, ¶ 13.

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

RESPONSE: Admitted.

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

RESPONSE: Admitted.

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

RESPONSE: Denied. The properties were not burdened with significant environmental liabilities. Rather, the environmental liabilities were OCC's, with Maxus liable to OCC for the environmental remediation of the Lister Site as indemnitor of OCC pursuant to the SPA and subject to applicable law as argued by Maxus in opposition to OCC's prior motion for summary judgment in this case. Herring Cert. ¶5. In further response, Maxus notes that certain parcels formerly associated with the Painesville Site were not burdened with significant environmental liabilities, and in fact were later sold by Tierra for more than $2,000,000. See, e.g., Gentile Cert., Exs. 49, 50 & 53.

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

RESPONSE: Denied. By way of further response, see Maxus' response to Paragraph 132 above.

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

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

RESPONSE: Denied. By way of further response, see Maxus' responses to Paragraphs 138-147 below.

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

RESPONSE: Maxus denies the statement in this paragraph, which does not comport with R. 4:46-2, as it is not supported by any citations to any portion of the motion record establishing or demonstrating the statement as uncontroverted. In further response, Maxus states that the cited appraisal does not establish a negative net worth for the site; it provides an "as clean" appraisal.

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

RESPONSE: Admitted. In further response, see Maxus' response to Paragraph 132 above.

140. On August 11, 1986, New Diamond/Maxus, on behalf of DSCC (the property was transferred to Tierra on August 28, 1986), appealed the real property valuation of $191,400 for the Lister Site for 1986, claiming the real property had no value for tax purposes because "[t]his property contains dioxin in the soil and in the subject building. The property is completely encapsulated and quarantined by order of the NJDEP. It is unusable for any purpose, unsaleable [sic] and the cost to cure the present condition is far above the value set by the assessor." See Ex. 105 at MAXUSO478710-14. Mr. Rabbe agreed with these statements. See Ex. 95, Deposition Testimony of David Rabbe, at pp. 74:3-75:7.

RESPONSE: Maxus admits that Plaintiffs have selectively quoted from the cited document and that Mr. Rabbe testified that he had no reason to disagree with the statements in that appeal. In further response, Maxus notes that this statement is irrelevant to whether

Tierra was sufficiently capitalized. Further, Maxus states that Tierra did not need to possess financial resources to address remedial measures at the Lister Site in 1986, as set forth in Maxus' response to Paragraph 132 above.

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

RESPONSE: Maxus admits that Plaintiffs have selectively quoted from the cited document. In further response, Maxus notes that this statement is irrelevant to whether Tierra was sufficiently capitalized. Tierra did not need to possess financial resources to address remedial measures at the Lister Site in 1986, as set forth in Maxus' response to Paragraph 132 above.

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

RESPONSE: Maxus admits that Plaintiffs have selectively quoted from the cited document. In further response, Maxus notes that this statement is irrelevant to whether Tierra was sufficiently capitalized. Tierra did not need to possess financial resources to address remedial measures at the Lister Site in 1986, as set forth in Maxus' response to Paragraph 132 above.

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

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

RESPONSE: Maxus admits that Plaintiffs have selectively quoted from the cited document. In further response, Maxus notes that this statement is irrelevant to whether Tierra was sufficiently capitalized. Tierra did not need to possess financial resources to address remedial measures at the Lister Site in 1986, as set forth in Maxus' response to Paragraph 132 above.

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

RESPONSE: Maxus admits that Plaintiffs have selectively quoted from the cited document. In further response, Maxus notes that this statement is irrelevant to whether Tierra was sufficiently capitalized. Tierra did not need to possess financial resources to address remedial measures at the Lister Site in 1986, as set forth in Maxus' response to Paragraph 132 above.

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

RESPONSE: Maxus admits that Plaintiffs have selectively quoted from the cited document. In further response, Maxus notes that this statement is irrelevant to whether Tierra was sufficiently capitalized. Tierra did not need to possess financial resources to

address remedial measures at the Lister Site in 1986, as set forth in Maxus' response to Paragraph 132 above.

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

RESPONSE: Admitted.

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

RESPONSE: As to the first sentence, Maxus admits only that Mr. Rabbe testified that it was never intended that Tierra would be able to satisfy the cost of remediating the Lister Site. However, in further response, Maxus notes that this is irrelevant to whether Tierra was sufficiently capitalized at its inception. Tierra did not need to possess financial resources to address remedial measures at the Lister Site in 1986, as set forth in Maxus' response to Paragraph 132 above. Maxus objects to the second sentence, which posits facts outside of the Track III time period (1986-1994), which are not relevant to the Track III issues.

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

RESPONSE: This statement contains only argument and does not comport with R. 4:46-2, as it is not supported by any citations to any portion of the motion record establishing or demonstrating the statement as uncontroverted. Accordingly, Maxus denies this paragraph, and refers back to its responses to Paragraphs 110-133 above.

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

RESPONSE: Admitted.

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

RESPONSE: Admitted.

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

RESPONSE: Admitted.

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

RESPONSE: Admitted.

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

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

RESPONSE: This statement constitutes a purported statement of law, and does not comport with R. 4:46-2, which requires that the moving party set forth material facts in support of its motion. In further response, Maxus states that the cited cases and statutes speak for themselves, and Maxus denies Plaintiffs' characterization of same.

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

RESPONSE: This statement constitutes a purported statement of law, and does not comport with R. 4:46-2, which requires that the moving party set forth material facts in support of its motion. In further response, Maxus states that the cited Order and statutes speak for themselves, and Maxus denies Plaintiffs' characterization of same. By way of further response, Maxus denies that in 1986 the Spill Act was believed to impose liability on a current owner of contaminated property who had no responsibility for discharges of hazardous substances.

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

RESPONSE: This statement constitutes a purported statement of law, and does not comport with R. 4:46-2, which requires that the moving party set forth material facts in support of its motion. In further response, Maxus states that the cited cases and statutes speak for themselves, and Maxus denies Plaintiffs' characterization of same.

156. In April 1985, before Tierra acquired the Lister Site, New Diamond/Maxus understood the risk and potential liabilities of owning the Lister Site that ECRA imposed. In an inter-company communication, Bill Hutton wrote to James Kelley, both of New Diamond/Maxus, explaining that "[t]he recent development (1984) by New Jersey (ECRA) to require cleanup of all manufacturing facilities before a sale can be made would now be a considerable liability to [Marisol] if he should attempt to sell on the open Market. It would cost him what it is going to cost us." See Ex. 113 at MAXUS0330031-32. Marisol was the then owner of 80 Lister Avenue. See id.

RESPONSE: Maxus denies the first sentence, which does not comport with R. 4:46-2, as it is not supported by any citations to any portion of the motion record establishing or demonstrating the statement as uncontroverted. Maxus admits only that Plaintiffs selectively quoted the referenced document in the second sentence, and admits the third sentence. To the extent any further response is required, Maxus denies the remaining allegations of the paragraph.

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

RESPONSE: Denied. The referenced document is a March 13, 1984 ACO with DSCC and Marisol, Incorporated, at which time DSCC did not own the Lister Site, and the document makes no reference to any alleged understanding of New Diamond/Maxus as to liabilities of owning the Lister Site. Moreover, as noted by Maxus' former in-house counsel, following the reorganization and SPA, (1) OCC became liable for the environmental remediation of the Lister Site as the direct successor of DSCC; (2) Maxus became liable to OCC for the

environmental remediation of the Lister Site as indemnitor of OCC pursuant to the terms of Article IX of the SPA and subject to the limitations of applicable law as argued by Maxus in opposition to OCC's motion for summary judgment in this case; (3) Maxus was not a successor to DSCC and was not directly liable for the Lister Site; and (4) CLH was also not liable under the Spill Act for the Lister Site, either as a successor to DSCC or as the landowner. Herring Cert. ¶5. Maxus and Tierra were consistent in this position and repeatedly expressed it to Plaintiffs. Herring Cert. ¶¶6-7.

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

RESPONSE: Maxus admits that Plaintiffs selectively quoted the referenced document. To the extent any further response is required, Maxus denies the remaining allegations of the paragraph.

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

RESPONSE: Admitted.

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

RESPONSE: Admitted.

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

RESPONSE: Denied. The letters of credit were provided in favor of the New Jersey Department of Environmental Protection at the request and for the account of Chemical Land Holdings, Inc. on behalf of Occidental Chemical Corporation. See July 31, 1990 NCNB Texas National Bank Corr., Gentile Cert., Ex. 105.

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

RESPONSE: Admitted.

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

RESPONSE: Maxus denies the implication that Tierra was required or had a duty to possess financial resources to address remedial measures at the Lister Site in 1986, for the reasons set forth in Maxus' response to Paragraph 132 above. Maxus otherwise admits this paragraph.

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

RESPONSE: Denied. The referenced document is a draft letter relating to financial assurances for the Lister Site. While it references a Guaranty, Maxus and Tierra's corporate designee was unable to state whether it had ever been executed and had never

seen the document. Thus, Plaintiffs cannot support the statement in this paragraph. In any event, it is undisputed that the required financial assurance was posted and the ACO obligations were carried out, and Plaintiffs have conceded they were not injured or harmed in any way as a result of Tierra's holding title. Gentile Cert., Ex. 91 at 203:23-209:11.

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

RESPONSE: Denied as stated. Maxus admits only that Mr. Herring's letter stated that while Tierra "may arguably be responsible for remediation of [the property it owns], it has no such liability with respect to sites to which [contaminants from its property] was transported...." Pls.' Ex. 123. As Mr. Herring explained, following the reorganization and SPA, (1) OCC became liable for the environmental remediation of the Lister Site as the direct successor of DSCC; (2) Maxus became liable to OCC for the environmental remediation of the Lister Site as indemnitor of OCC under the terms of the SPA and subject to applicable law; (3) Maxus was not a successor to DSCC and was not directly liable for the Lister Site; and (4) CLH was also not liable under the Spill Act for the Lister Site, either as a successor to DSCC or as the landowner. See Herring Cert. ¶5.

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

RESPONSE: Denied as stated. Maxus admits only that the cited document is quoted accurately. As Mr. Herring explained, following the reorganization and SPA, (1) OCC became liable for the environmental remediation of the Lister Site as the direct successor of DSCC; (2) Maxus became liable to OCC for the environmental remediation of the Lister

Site as indemnitor of OCC under the terms of the SPA and subject to applicable law; (3) Maxus was not a successor to DSCC and was not directly liable for the Lister Site; and (4) CLH was also not liable under the Spill Act for the Lister Site, either as a successor to DSCC or as the landowner. See Herring Cert. ¶5.

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

RESPONSE: Admitted.

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

RESPONSE: Maxus admits that Plaintiffs selectively quoted the referenced document. Maxus otherwise denies this paragraph.

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

RESPONSE: Maxus admits that Plaintiffs selectively quoted the referenced document. To the extent any further response is required, Maxus denies the remaining allegations of the paragraph.

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

RESPONSE: Maxus admits only that Plaintiffs selectively quoted the referenced document. To the extent any further response is required, Maxus denies the remaining allegations of the paragraph.

Respectfully submitted,
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Maxus Energy Corporation

Vincent E. Gentile

Dated: March 13, 2012