A&G | ARCHER & GREINER, P.C.
ATTORNEYS AT LAW

ROBERT T. LEHMAN

ONE CENTENNIAL SQUARE
HADDONFIELD, NJ 08033-0968
856-795-2121
FAX 856-795-0574

www.archerlaw.com

Email Address:
rlehman@archerlaw.com

Direct Dial:
(856) 354-3070

Direct Fax:
(856) 673-7070

June 24, 2011

VIA HAND DELIVERY

Superior Court of New Jersey
Veterans Courthouse
50 West Market St., Room 131
Newark, NJ 07102

RE: New Jersey Department of Environmental Protection, *et al.* v. Occidental Chemical Corporation, *et al.*
ESX-L-9868-05 (PASR)

Dear Sir/Madam:

This firm represents Occidental Chemical Corporation ("OCC") in the above-captioned matter. Enclosed please find an original and two copies of the following:

1. OCC's Response To Plaintiffs' Statement Of Material Facts;

2. OCC's Counterstatement Of Material Facts In Opposition To Plaintiffs' Motion For Partial Summary Judgment;

3. OCC's Brief In Opposition To Plaintiffs Motion For Partial Summary Judgment;

4. Proposed Form of Order;

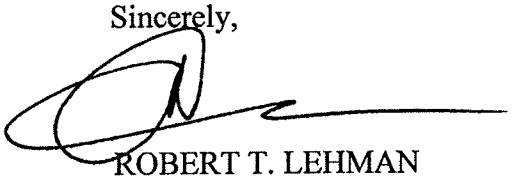
5. Certification Of David L. Bryant In Support Of OCC's Opposition To Plaintiffs' Motion For Partial Summary Judgment along with a Certification Of Authenticity Of Electronic Signatures; and

6. Certificate Of Service.

Kindly file these documents and return a copy stamped "filed" to the courier who has been instructed to wait for the file-stamped copy.

Thank you.

Sincerely,



ROBERT T. LEHMAN

RTL/law
Enclosures

cc: Honorable Marina Corodemus, J.S.C. (Ret.) (via hand delivery and e-mail)
Michael Gordon, Esq. (via hand delivery & e-mail)
William L. Warren, Esq. (via regular mail & e-mail)
William J. Jackson (via regular mail & e-mail)
Andrew A. Kassof, Esq. (via regular mail & e-mail)
Mark H. Sobel, Esq. (via regular mail & e-mail)
Richard J. Dewland, Esq. (via regular mail)
John P. McGovern, Esq. (via regular mail)
Frank G. Capece, Esq. (via regular mail)
All counsel of record (via CT Summation)

6870056v1

ARCHER & GREINER
A Professional Corporation
One Centennial Square
P.O. Box 3000
Haddonfield, NJ 08033-0968
(856) 795-2121

BY: ROBERT T. LEHMAN, ESQUIRE

GABLE & GOTWALS
1100 ONEOK Plaza
100 West Fifth Street
Tulsa, OK 74103-4217
(918) 595-4990

BY: OLIVER S. HOWARD, ESQUIRE
DAVID L. BRYANT, ESQUIRE

Attorneys for Defendant Occidental Chemical Corporation

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE COMMISSIONER OF THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION and THE ADMINISTRATOR OF THE NEW JERSEY SPILL COMPENSATION FUND, Plaintiffs, v. OCCIDENTAL CHEMICAL CORPORATION, TIERRA SOLUTIONS, INC., MAXUS ENERGY CORPORATION, MAXUS INTERNATIONAL ENERGY COMPANY, REPSOL YPF, S.A., YPF, S.A., YPF HOLDINGS, INC., YPF INTERNATIONAL S.A. (f/k/a YPF INTERNATIONAL LTD.) AND CLH HOLDINGS, INC., Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION - ESSEX COUNTY DOCKET NO.: L-009868-05 (PASR) Civil Action **OCCIDENTAL CHEMICAL CORPORATION'S OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

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Defendant Occidental Chemical Corporation ("OCC") submits this Brief in support of its Opposition to the Motion for Partial Summary Judgment Against Occidental Chemical Corporation and Maxus Energy Corporation and supporting brief (collectively, the "Motion") filed herein by Plaintiffs on May 6, 2011.

SUMMARY

In their Motion, Plaintiffs purport to seek three discrete forms of relief: (1) a finding that the company known as Diamond Shamrock Chemicals Company ("DSCC")[1] had liability under the Spill Act for all cleanup and removal costs associated with its discharges of hazardous substances into the Passaic River; (2) a finding that OCC should bear any such Spill Act liability as successor to DSCC; and (3) a finding that OCC is estopped from denying that the alleged discharges into the Passaic River were intentional. Although each argument is premised on a different set of facts (addressed separately in each section below), they share a common

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[1] As described in OCC's Counterstatement of Material Facts ("OCC SOF"), filed herewith and incorporated herein for all purposes, the names of the corporations involved in this case have been changed numerous times and several of them ultimately merged into other corporations. For clarity and simplicity, in this response OCC uses the following designations:

- "Old Diamond Shamrock" or "DSC-1" refers to the corporation which was known as Diamond Shamrock Corporation prior to September 1983.
- "Diamond Shamrock Corporation" refers to the corporation which held that name beginning in September 1983, the corporation now known as Maxus Energy Corporation.
- "Maxus" refers to Maxus Energy Corporation, formerly known as Diamond Shamrock Corporation (September 1983-March 1987) and originally known as New Diamond Corporation (July-August 1983).
- "DSCC" refers to the Maxus wholly-owned subsidiary known as Diamond Shamrock Chemicals Company when acquired by OCC in September 1986. As discussed below, OCC disputes Plaintiffs' claim that DSCC, which became Occidental Electrochemicals Corporation ("OEC") and was merged into OCC, is the successor to any Lister liabilities of Old Diamond Shamrock/DSC-1.
- "DS Corporate" refers to Diamond Shamrock Corporate Company, subsequently renamed Maxus Corporate Company and thereafter merged into Maxus.
- "Tierra" refers to Tierra Solutions, Inc., formerly known as Diamond Shamrock Chemical Land Holdings, Inc., formerly known as Chemical Land Holdings, Inc.

purpose—to obtain a judgment against OCC well before the completion of document discovery and before even a single fact or expert deposition has been taken in this case.[2]

Although summary judgment motions always serve the purpose of short-circuiting a trial, the situation here is novel and troubling because Plaintiffs essentially seek to skip the rest of the litigation process as well. In effect, they attempt to ride the coattails of others all the way to a judgment against OCC that they have claimed to be in the range of hundreds of millions to billions of dollars. To do so, they rely on evidence obtained and introduced by insurance companies in litigation that occurred 25 years ago to which OCC had no opportunity to object or contradict. They base their "successorship" argument on the fact that OCC is the corporate successor to Maxus' former subsidiary, DSCC, but ignore highly material facts and relevant corporate law indicating, as Plaintiffs themselves have alleged, that Maxus succeeded to and retained any Lister Site liabilities of Old Diamond Shamrock. They also ignore the fact that OCC has yet to receive requested discovery from Maxus of at least 30 boxes of documents that are essential to a full and fair determination of which corporation actually succeeded to any Lister liabilities. Finally, Plaintiffs invoke findings—presumably as a predicate for punitive relief against OCC—that were made in a lawsuit in which neither Plaintiffs nor OCC was present. In short, Plaintiffs seek a short-cut to a finding that could impose untold (and so far unspecified) liability against OCC.

Although it was filed over five years ago, this case is really in its preliminary discovery and fact-finding stages. Jurisdictional and third-party issues have dominated the case to date, and the Court only recently adopted a Trial Plan laying the framework for fact and expert deposition discovery to commence and for a trial of the issues raised in this Motion in May 2012.

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[2] This excludes a limited number of preservation depositions that have been conducted to date.

Summary judgment motions at such a preliminary stage typically seek interpretation of a contract or another conclusion of law.[3] However, Plaintiffs now seek partial summary judgment on three inherently fact-based issues to ***impose liability*** against a party (OCC) that has never had any opportunity to defend itself against such allegations. Principles of fairness and due process dictate that Plaintiffs cannot circumvent the litigation process in this way.

ARGUMENT AND AUTHORITIES

I. PLAINTIFFS ARE NOT ENTITLED TO PARTIAL SUMMARY JUDGMENT ON THEIR SPILL ACT CLAIM.

Plaintiffs' request for partial summary judgment on their Spill Act claim should be denied because they have failed to establish that Old Diamond Shamrock—which Plaintiffs equate with DSCC[4]—is strictly liable, jointly and severally, under the Spill Act. Plaintiffs simply cannot meet their burden of proving a causal nexus between discharges from the Lister Site and the purported injuries throughout the vast Newark Bay Complex for which Plaintiffs seek cleanup and removal costs and damages—a prerequisite to establishing Spill Act liability. Importantly, no discovery has been conducted on whether this vital link between the discharges and the damage exists, thus precluding a grant of summary judgment on Spill Act liability. Moreover, Plaintiffs' requested summary judgment would result in a meaningless, ill-defined order subject to misinterpretation. The more prudent course is for the Court to employ *R.* 4:46-3 and make an express finding of fact that there were discharges of hazardous substances from the

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[3] OCC's Motion for Partial Summary Judgment regarding the contractual indemnification obligations owed by Maxus is an example of such a motion.

[4] Although OCC disputes Plaintiffs' claim that DSCC was the successor to any Lister liabilities of Old Diamond Shamrock and contends that Maxus succeeded to them, for simplicity's sake, OCC will not make that distinction in this section or in Part III of its response but will refer to DSCC as if it were the same as or successor to Old Diamond Shamrock with respect to that entity's ownership and operation of the Lister Site and Lister Plant. OCC does so, however, without prejudice to the discussion of successorship liability in Part II of this response.

Lister Site in the 1950s and 1960s. Such a finding would be binding in the case, yet not suffer from the same deficiencies as entry of partial summary judgment.

In their Motion, Plaintiffs claim they are entitled to "a traditional partial summary judgment on the issue of DSCC's strict liability under the Spill Act for decades of intentional discharges of dioxin, DDT and other hazardous substances into the Passaic River." (Motion at 12.) Plaintiffs methodically lay out the elements to establish strict, joint and several liability under the Spill Act, including establishing (1) that the Passaic River is a waterway of the State of New Jersey, (2) that DSCC and OCC are "persons" within the meaning of the Spill Act, (3) that DSCC "discharged hazardous substances" into the Passaic River, and (4) that DSCC is liable for all past and future cleanup and removal costs associated with its discharges. (*Id.* at 11-17.) However, conspicuously absent from Plaintiffs' analysis is any discussion of a "nexus" between the discharges that occurred at the Lister Site and the cleanup and removal costs the State says it has incurred or may incur.

As recently affirmed by the Appellate Division in *Dep't of Envt'l Prot. v. Dimant*, 418 N.J. Super. 530 (App. Div. 2011), a "nexus between the . . . discharge of a substance and its contamination of the surrounding area is needed to support a finding of Spill Act liability." *Id.* at 544. There, the NJDEP and Spill Fund Administrator claimed that the defendant was strictly liable for a discharge of PCE from an outside pipe in 1988. *Id.* at 540. At the conclusion of proofs, the trial court found that the plaintiffs did "not establish by a preponderance of the direct and circumstantial evidence that there is a nexus between any discharge by defendant . . . and the groundwater contamination at issue." *Id.* at 539. The trial court dismissed NJDEP's complaint, finding that "[b]ecause there are other alternative sources of PCE contamination . . . the plaintiff has not established by a preponderance of the evidence that this defendant contributed to

contamination of the groundwater." *Id.* at 540. The trial court reasoned that "even though the Spill Act establishes strict liability for the consequences of a hazardous substance discharge . . . there is nevertheless a requirement of a 'nexus between the discharge and the need for remediation and consequent damages.'" *Id.*

On appeal, the Appellate Division agreed, finding that it is not enough for NJDEP to merely prove the "necessary connection between the offending discharge and the discharger and/or owner of the property." *Id.* at 543. Implicit in prior holdings under the Spill Act, and "evident from the Spill Act's very definition of a 'discharge,'[5] which explicitly refers to resultant 'damage[s],'" is "the necessity for . . . proving a 'nexus' between a discharge and damages resulting from the contaminated discharge . . . ." *Id.* at 544; *see also N.J. Turnpike Auth. v. PPG Indus., Inc.*, 197 F.3d 96, 106 (3d Cir. 1999). According to the court, absent evidence of a nexus between the discharge and the damages alleged, "the circumstances are devoid of the critical factor that triggers Spill Act liability, namely that defendant must be in any way responsible for the discharge that ***caused*** the contamination." *Dimant*, 418 N.J. Super. at 545 (emphasis added). Because the trial court correctly found that plaintiffs failed to meet their "burden to demonstrate that defendant had some connection to the damages caused by the PCE contamination," the Appellate Division affirmed the trial court's dismissal with prejudice of the plaintiffs' case. *Id.*

Such is the case here. Plaintiffs' Motion is "devoid of the critical factor that triggers Spill Act liability." *Id.* Here, even more so than in *Dimant*, there are countless alleged sources of contamination in the Newark Bay Complex. Plaintiffs have made no attempt to connect the Lister Site's discharges from over fifty years ago with the State's past or future cleanup costs of

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[5] "A 'discharge' is 'any intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of hazardous substances into the waters or onto the lands of the State, or into waters outside the jurisdiction of the State ***when damage may result*** to the lands, waters or natural resources within the jurisdiction of the State[.]'" *Id.* at 542 (quoting *N.J.S.A.* 58:10–23.11b (alteration in original)).

the 17 mile-long stretch of the Passaic River much less the rest of the massive Newark Bay Complex. Given the various potential sources, the fluidity of the Passaic River and Newark Bay Complex and the sheer size and indefiniteness of the proposed cleanup area, it would be inappropriate to rely on discharges from over fifty years ago made into one specific area of the Passaic River to impose indeterminate Spill Act liability for miles and miles of water bodies without evidence of a "nexus." Absent proof of a "nexus," Plaintiffs' motion for Spill Act liability is premature, particularly since no discovery—including any expert discovery on causation—has been conducted on whether or not there is a causal link between the discharges from the Lister Site and the vast areas for which the NJDEP seeks cleanup and removal costs and damages. *See Velantzas v. Colgate-Palmolive Co.*, 109 N.J. 189, 193 (1988) (summary judgment inappropriate when the matter is not yet "ripe" for such consideration such as where discovery has not been completed); *Wilson v. Amerada Hess Corp.*, 168 N.J. 236, 253-54 (2001) (where discovery on material issues is not complete the respondent must, therefore, be given the opportunity to take discovery before disposition of the motion).

Moreover, the Spill Act liability judgment sought by Plaintiffs lacks any real definition. While OCC has never contested the fact that there were discharges from the Lister Site to the Passaic River in the 1950s and 1960s, the relief sought by Plaintiffs is devoid of specificity as to the identity of the chemicals discharged,[6] when they were discharged, their amounts and concentrations, and their fate and transport, *i.e.*, what happened to the chemicals and where in the vast Newark Bay Complex they have come to rest and at what depth in the sediments. All of

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[6] The Order sought by Plaintiffs speaks only generically as to "hazardous substances" and fails to specify the contaminants that were discharged. Although Plaintiffs' Motion mentions discharges of dioxin and DDT, it quickly defaults to the catch-all category of "other hazardous substances." Even as to dioxin, Plaintiffs fail to define which congeners of dioxin were released. Importantly, it is only in a footnote that Plaintiffs make reference to 2,3,7,8 tetrachlorodibenzo-p-dioxin ("TCDD"), the congener highlighted in the Third Amended Complaint. (Motion at 16, n.4.) And, while the footnote mentions TCDD, the record support cited by Plaintiffs is to an entirely different chemical—dichlorobenzo-p-dioxin. (*Id.*)

these factors are essential predicates to resolving the issue of what cleanup and removal costs are "associated with" discharges from the Lister Site, an issue that cannot be resolved until fact and expert discovery have been conducted much later under the Court's trial plan. As a result, Plaintiffs are asking the Court to issue a liability finding without any meaningful boundaries. Even if the sought-after Order were entered, it would not be clear what chemicals would have been found to have been discharged or when, how much was discharged, what happened to those chemicals, what areas have been affected by those discharges, and what types of damage have resulted from the discharges.

Entry of such an order of uncertain scope and meaning is clearly not the prudent course. *See PPG Indus., Inc.*, 197 F.3d at 106 ("[h]owever remote a party's responsibility under the Spill Act may be, the statute nevertheless requires some degree of particularity"). Any party subjected to such an ill-defined partial judgment of liability will have no meaningful understanding as to the "liability" that has been assessed against it. Moreover, it is foreseeable that Plaintiffs will later assert that the Court's partial judgment means more than was actually adjudicated; indeed, since the Order will be devoid of any particularity, it would be difficult for Plaintiffs not to assert that it stands for more than was actually determined. At the very least, such an undefined partial judgment would almost certainly guarantee further disputes over its meaning and scope.

That is not to say that Plaintiffs must go away empty handed. Rather, there is no contest of fact that there were discharges of hazardous substances from the Lister Site in the 1950s and 1960s. Employing *R.* 4:46-3, the Court can make an express finding to that effect that will be binding in the case. By providing relief in this form, there will be no question as to what the Court has found to be uncontroverted and no realistic possibility of a future dispute over the

meaning of an amorphous judgment of Spill Act liability that provides no signal as to what liability has been declared.

II. THE EVIDENCE DISCOVERED TO DATE POINTS TO MAXUS AS THE SUCCESSOR TO ANY LISTER SITE LIABILITY.

Plaintiffs seek a summary adjudication to which they are clearly not entitled, that OCC is strictly liable under the Spill Act as the successor to any Lister-related environmental liabilities. The Motion practically scoffs at OCC's defense to alleged successor liability for decades of discharges from the Lister Site by Old Diamond Shamrock and its predecessors. This is puzzling, considering that the entity named "New Diamond Corporation" (n/k/a Maxus) was created as part of a combination of Old Diamond Shamrock with Natomas Company, publicly reported as a ***"transaction of succession"*** (OCC SOF ¶ 15, Ex. 16);[7] that from the moment of its birth *sub nom* New Diamond Corporation, ***Maxus proclaimed that it was "incorporated . . . as" successor*** to the company previously known as "Diamond Shamrock Corporation" (Old Diamond Shamrock) (*Id.* ¶ 50, Exs. 13, 14, 33-35); and that Plaintiffs themselves allege herein that "Maxus was created and incorporated as" the successor to Old Diamond Shamrock (*Id.* ¶¶ 54, Ex. 2).

Plaintiffs' argument to stick OCC with untold Lister liability boils down to one simple fact that OCC has freely acknowledged for years: *i.e.*, that OCC is the successor by merger to Diamond Shamrock Chemicals Company ("DSCC"), the company which was a wholly-owned and wholly-controlled subsidiary of Maxus when an affiliate of OCC acquired its stock through its September 4, 1986 Stock Purchase Agreement with Maxus ("SPA"). To be absolutely clear,

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[7] References to "Ex. __" are to exhibits to the Certification of David L. Bryant filed herewith. References to "Pl. Ex. __" are to Plaintiffs' Exhibits offered in support of their Motion.

there is no dispute that OCC is the successor by merger to DSCC and thus also to the liabilities ***actually held by that entity*** on September 4, 1986.[8]

However, Plaintiffs conveniently overlook or ignore the legal impact of the evidence OCC has discovered in this case about the complex, multi-faceted corporate "reorganization" of Old Diamond Shamrock/DSC-1 in 1983-1984 (the "DSC-1 Reorganization"). Specifically, what the ***currently known*** facts show is that immediately after New Diamond Corporation (n/k/a Maxus) was created from nothing and with nothing, it masterminded, directed, controlled and implemented the DSC-1 Reorganization through which Maxus:

- Swapped its originally worthless stock for the stock of DSC-1;
- Occupied the headquarters of DSC-1;
- Made the directors of DSC-1 its own directors;
- Made the executive officers of DSC-1 its own;
- Carved up the assets (and related liabilities) of DSC-1 and placed them in newly created drop-down subsidiaries including one to own and hold all of DSC-1's "corporate" assets and liabilities;
- ***Expressly*** assumed "substantially all" of DSC-1's long-term debt; and
- Moved off DSC-1's balance sheet, and onto its own, what Maxus deemed to be "substantially all" of DSC-1's assets, having a ***net book value*** (in 1983) of at least **$1.643 billion,** leaving DSCC with less than 30% of DSC-1's former assets accounting for less than 20% of DSC-1's income.

Maxus even appropriated the ***name*** "Diamond Shamrock Corporation." (OCC SOF ¶ 17, Ex. 3.) That was Maxus' name when it sold what remained in DSCC (DSC-1's industrial and process chemicals business) to OCC's affiliate for a purchase price of over $411 million. (Pl. Ex. 46.) Thus, when OCC's affiliate entered into the SPA, the company then known as "Diamond Shamrock Corporation" (n/k/a Maxus) not only deemed itself the "successor" to

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[8] As explained below, ***this*** is what OCC has always acknowledged, and all ***it*** has ever acknowledged.

DSC-1 and a long line of predecessor companies but also resembled Old Diamond Shamrock/DSC-1 in practically every way. By contrast, aside from still holding the same certificate of incorporation as Old Diamond Shamrock, the company bought by OCC's affiliate bore little resemblance to the historical owner/operator of the Lister Site.

Today, Maxus (f/k/a Diamond Shamrock Corporation) portrays itself as a mere "holding company" of Old Diamond Shamrock/DSC-1 and claims that it stuck DSCC/OCC with Old Diamond Shamrock's untold Lister liabilities despite having appropriated the vast majority of the Old Diamond Shamrock's assets, expressly assumed most of its liabilities, and taken its name. Given Maxus' ***post-reorganization*** representations that it was "incorporated as" Old Diamond Shamrock's successor, and that a sale of the stock of its subsidiary *DSCC* would ***not*** "pass" the Lister liabilities to the purchaser because Maxus had "retained" them (OCC SOF ¶ 51, Pl. Ex. 56), Maxus' current position—a position Plaintiffs parrot but only when seeking summary judgment against OCC—hardly passes the red-face test.

Importantly, the Spill Act itself does not dictate whether OCC, or Maxus, is the corporate successor to any Lister-related environmental liabilities of Old Diamond Shamrock. Indeed, nothing in the Spill Act purports to address how corporate successorship is determined. Rather, as Plaintiffs' own Motion makes clear, successor liability is determined by principles of corporate law independent of the Spill Act. (Motion at 18-20.)

The motion for partial summary judgment against OCC must be denied because, although they correctly describe certain fundamental principles of corporate successorship law, Plaintiffs completely ignore other, equally important principles of corporate law and completely ignore the impact of such principles on the determination of successor liability in this case considering the facts summarized above. Specifically, relevant corporate law includes court-made equitable

doctrines that represent exceptions to the general rule that a company (Maxus) which acquires the assets of another company (Old Diamond Shamrock) through sale or transfer does not succeed to the liabilities of the latter. These doctrines penetrate the mere ***form*** of corporate transactions like the Reorganization and place successor liability where it really belongs given the true ***substance*** and effect of such transactions. Those doctrines, including "express or implied assumption of liability," "*de facto* merger," "mere continuation" or "continuity of the enterprise," and "fraud," are well-established in New Jersey, Delaware, and elsewhere.

As discussed below, the facts thus far discovered and currently known, even without more, would ***fully support*** a determination that Maxus is the successor to the Lister liabilities of Old Diamond Shamrock, and Plaintiffs' Motion must be denied for this reason alone. However, we emphasize that OCC's response is based on facts ***currently known*** because to this day, Maxus still has not produced tens of thousands of pages of its documents from the period of the DSC-1 Reorganization. This includes such obviously vital information as documents showing how Maxus planned and executed the DSC-1 Reorganization, what it knew, believed or intended about the true nature and substance of the DSC-1 Reorganization and its legal impact on Maxus' successor status, and thus also why Maxus represented itself as the successor to Old Diamond Shamrock and as the entity which retained the Lister-related environmental liabilities. Remarkably, Maxus has not even produced its own ***board minutes*** for that period. OCC's discovery of such information is essential to a fair and fully-informed analysis of the corporate successor issues by OCC and by this Court, rendering Plaintiffs' Motion for a summary determination of OCC's liability premature at best. *See* comments to *R.* 4:46-2 and cases therein at ¶ 2.3.3. For this reason, too, Plaintiffs' Motion against OCC must be denied.

A. Based on the Facts Currently Known, Equitable Doctrines of Successor Liability Support a Determination That Maxus Succeeded to Any Lister Environmental Liabilities.

1. Summary of the DSC-1 Reorganization

The relevant facts so far discovered about the DSC-1 Reorganization are set forth in detail in OCC's Counterstatement of Facts ("OCC SOF"), but are summarized as follows.

Beginning in or about July 1983 and continuing through approximately January 26, 1984, Old Diamond Shamrock/DSC-1 underwent a complete corporate reorganization, implemented through a complex series of transactions and events. (OCC SOF ¶¶ 10-30.) Maxus was originally incorporated in July 1983 under the name "New Diamond Corporation." (*Id.* ¶ 14, Ex. 15.) It was created pursuant to a Plan and Agreement of Reorganization between DSC-1 and Natomas Company, under which those entities were combined in what was reported to the SEC as a "transaction of succession." (*Id.* ¶ 15, Ex. 16.) As part of that "transaction of succession" New Diamond Corporation (Maxus), which was created from nothing and owned nothing, swapped its newly-issued stock for the stock of DSC-1 and became the sole stockholder of DSC-1 for no cash consideration. (*Id.* ¶ 18.1, Ex. 15.) Then, on September 1, 1983, New Diamond Corporation (Maxus) appropriated for itself the name "Diamond Shamrock Corporation" and promptly renamed DSC-1 "Diamond Shamrock Chemicals Company" (DSCC). (*Id.* ¶ 18.5, Exs. 2, 3, 12.) As sole shareholder of DSCC (DSC-1), Maxus completely controlled DSCC and made all of the fundamental decisions affecting the business, operations and structure of the company. (*Id.* ¶ 18.6, Ex. 15.) Specifically, Maxus orchestrated, directed and controlled every transaction and step in the complete reorganization of the company that had been DSC-1. (*Id.*)

For purposes of this Court's determination of successorship to DSC-1's environmental liabilities, important features and effects of the DSC-1 Reorganization included the following:

- All of the shareholders of DSC-1 became shareholders of Maxus. (OCC SOF ¶ 18.1, Ex. 15.)

- The executive officers and directors of DSC-1 became executive officers and directors of Maxus. (*Id.* ¶ 18.3, Ex. 15.)

- Maxus occupied the former headquarters of DSC-1. (*Id.* ¶ 18.4, Ex. 15.)

- Maxus moved from DSC-1's balance sheet, onto Maxus' own balance sheet, over **$1.643 billion** in former assets of DSC-1, or approximately 71% of DSC-1's assets—what Maxus deemed to be "substantially all" of DSC-1's assets—accounting for approximately ***80% of DSC-1's income***, excepting ***only*** the assets comprising the industrial and process Chemicals Business formerly owned by DSC-1, not the former Ag Chem business of which Lister was a part. (*Id.* ¶ 25.3.2, Ex. 25; ¶ 28, Ex. 27.)

- Maxus expressly assumed what it described as "substantially all" of the outstanding long-term debt of DSC-1. (*Id.* ¶ 29, Ex. 13.)

- Pursuant to a Maxus-directed January 1, 1984 Assignment and Assumption Agreement between DSCC and Diamond Shamrock Corporate Company ("DS Corporate), a wholly-owned subsidiary of Maxus later ***merged into Maxus***, DS Corporate received and held all of the "corporate" assets formerly owned by DSC-1, and expressly assumed and held all of the associated "corporate" liabilities formerly held by DSC-1, including any and all Lister-related environmental liabilities. (*Id.* ¶ 30, Ex. 3.)

- Maxus clearly intended that DS Corporate's assumption of the legacy liabilities of DSCC (DSC-1) reflect the reality that DS Corporate was the successor and sole obligor as to those liabilities. Thus, the agreement provided for DS Corporate to indemnify DSCC with respect to any liability assumed by DS Corporate "if a consent to transfer any liability ... is required to relieve the [DSCC] from liability thereunder and such consent has not been received." (*Id.* ¶ 25.6, Ex. 25.)

- Although DS Corporate (later merged into Maxus) actually held the obligations and liabilities associated with DSC-1's former agricultural chemicals ("Ag Chem") business, including those associated with the Lister Site, Maxus subsequently "defended" those obligations and liabilities (its ***own*** obligations and liabilities) ***using the name of DSCC***. (*Id.* ¶ 33, Pl. Ex. 10; ¶ 34, Exs. 29-30; ¶ 36; ¶ 39, Ex. 31.)

- DSCC, the company later acquired by OCC's affiliate, was a wholly-owned subsidiary of Maxus on par with Maxus' other wholly-owned subsidiaries, holding only what had been DSC-1's industrial and process chemicals business and the related liabilities, not including any assets or related legacy liabilities of DSC-1's former Ag Chem business. (*Id.* ¶ 42, Pl. Ex. 46.)

2. Maxus has repeatedly admitted its own status as the successor to DSC-1.

The facts presented by OCC indicate that Maxus knew the DSC-1 Reorganization it designed, directed and controlled made Maxus the successor to DSC-1 in respect of any Lister-related liabilities, that is, that Maxus "retained" those liabilities. Specifically:

- In 1984, Maxus adopted the DSC-1's 1975 Employee Shareholding and Investment Plan and continued that plan as its own. In a January 9, 1984 letter to the SEC, Maxus relied on certain IRS determination letters the IRS had previously issued to DSC-1 and asserted that DSC-1 was "the predecessor to the Company (Maxus)." (OCC SOF ¶ 47, Ex. 32.)

- In 1984, Maxus publicly represented and held ***itself*** out to be the former owner/operator of the Lister Plant. (*Id.* ¶ 49, Ex. 33.)

- For ***five consecutive years*** after completing the DSC-1 Reorganization—including periods before and ***after*** Maxus sold DSCC to OCC's affiliate—***Maxus publicly represented and held itself out to be the successor to DSC-1*** and its corporate predecessors including ***Diamond Alkali Corporation***, the predecessor owner/operator of the Lister Site. (*Id.* ¶ 50, Exs. 4, 13, 14, 33-35.)

- In 1986, some two years after completing the DSC-1 Reorganization, ***Maxus expressly and specifically represented*** to Occidental Petroleum Corporation and other potential purchasers of DSCC—which by then was a wholly-owned subsidiary of "Diamond Shamrock Corporation" (Maxus) owning only the industrial and process chemicals business—that ***"Diamond Shamrock Corporation" (Maxus) "retained" all Lister-related environmental liabilities***, such that a purchase of the stock of this subsidiary would ***not*** "pass to the purchaser" any Lister-related environmental liabilities. (*Id.* ¶ 41, Pl. Ex. 56.)

- In 1987, after selling the stock of DSCC to OCC's affiliate, Maxus publicly represented that certain liabilities were "retained by the Company after the sale of Chemicals" including "certain environmental costs and contingencies, the outcome of which is unknown at this time." (*Id.* ¶ 52, Ex. 34.)

- In 1987 (after it sold DSCC), in a federal lawsuit Kidder Peabody brought against Maxus relating to the merger of Maxus, DSC-1 and Natomas Company consummated in August 1983, Maxus represented to the court in a memorandum opposing Kidder Peabody's motion for summary judgment, that "Maxus Energy Corporation ('Maxus') submits this memorandum ***on behalf of itself and its wholly owned subsidiary, Diamond Shamrock Corporate Company*** [DS Corporate, merged into Maxus], ***as the successor in interest to Diamond Shamrock Corporation ('Old Diamond Shamrock')***." (*Id.* ¶ 53, Ex. 36.)

Indeed, while Plaintiffs seek a partial summary judgment that OCC is the successor to DSC-1, in this litigation they continue to assert that ***Maxus*** is liable as successor to DSC-1, alleging that "Maxus was ***created*** and ***incorporated*** as the ***corporate successor-in-interest*** to certain operations and liabilities" of DSC-1. (*Id.* ¶ 54, Ex. 2.)

3. Under New Jersey law, these facts alone would clearly support a judicial determination that Maxus is the successor to any Lister-related liabilities of DSC-1.

The general rule of corporate successor liability is that when a company sells its assets to another company, the acquiring company does not become liable for the debts and liabilities of the selling company merely because it has taken ownership of the assets of the seller. *See Lefever v. K.P. Hovnanian Enters., Inc.*, 160 N.J. 307 (1999); *Jackson v. N.J. Mfrs. Ins. Co.*, 166 N.J. Super. 448, 454 (App. Div. 1979); *Jackson v. Diamond T. Trucking Co.*, 100 N.J. Super. 186, 192 (Law Div. 1968) (purchasing corporation becomes liable for claims against the acquired company if the acquisition was in the form of a statutory merger or consolidation, but not where one entity sells or otherwise transfers all of its assets to another company).

However, many courts in New Jersey and elsewhere have developed and applied several exceptions to the general rule of corporate successor liability (or non-liability), exceptions that turn on the true substance and effect of a corporate transaction as opposed to its mere form. In the leading case of *Wilson v. Fare Well Corp.*, 140 N.J. Super. 476 (Law Div. 1976), the court explained:

> There are basically three types of corporate transfers: the sale of stock, the sale of assets, and merger or consolidation. Merely naming a transfer a particular type does not make it so. Courts consider substance over form, and look to the nature of the transaction as a whole as reflected in the sale agreement and its actual consequences. . . .
>
> "It is the general rule that where one company sells or otherwise transfers all its assets to another company the latter is

> not liable for the debts and liabilities of the transferor, including those arising out of the latter's tortious conduct, ***except*** where: (1) the ***purchaser expressly or impliedly agrees to assume*** such debts; (2) the ***transaction amounts to a consolidation or merger of the seller and purchaser***; (3) the purchasing corporation is ***merely a continuation*** of the selling corporation, or (4) the transaction is entered into ***fraudulently*** in order to escape liability for such debts. (citations omitted). A fifth exception, sometimes incorporated as an element of one of the above exceptions, is the absence of adequate consideration for the sale or transfer."

Id. at 484 (emphasis added) (quoting *McKee v. Harris-Seybold Co.*, 109 N.J. Super. 555 (Law Div. 1970), *aff'd per curiam*, 118 N.J. Super. 480 (App. Div. 1972)). *Accord*, *Lefever*, 160 N.J. 307.[9]

In *Wilson*, where the court held one defendant liable pursuant to the de facto merger doctrine, and another defendant liable under the continuity of business or "mere continuation" exception, the court described the characteristics of a transaction that constitutes a de facto merger or leads to application of the continuity of business exception, as follows:

> The characteristics that are considered in determining whether a De facto merger or consolidation has taken place include transfer or sale of all assets, exchange of stocks, change of ownership whereby stockholders, officers and creditors go to the surviving corporation, and assumption of a variety of liabilities pursuant to previously negotiated agreements.
>
> A continuation of a business may be said to occur where the operations of the selling corporation become those of the buying corporation. The primary elements of continuation include use of the same name, at the same location, with the same employees and common identity of stockholders and directors.

140 N.J. Super at 485 (citations omitted). Subsequent New Jersey cases have identified the same or similar factors as relevant to the application of the de facto merger or mere continuation

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[9] "Traditionally, there have been only four exceptions: (1) the successor expressly or impliedly assumes the predecessor's liabilities; (2) there is an actual or de facto consolidation or merger of the seller and the purchaser; (3) the purchasing company is a mere continuation of the seller; or (4) the transaction is entered into fraudulently to escape liability." *Lefever*, 160 N.J. at 310 (citing 15 William & Fletcher, *Cyclopedia of the Law of Corporations* § 70, 122 nn. 9-15 (1990)).

exceptions, but have also made clear that their application does not turn on any narrow or mechanical application or depend on the presence of every potentially relevant factor.[10]

Indeed, while the early case of *McKee* may have suggested a relatively narrow application of the "mere continuation" exception, *Wilson* later rejected any such approach in favor of a "more modern approach" under which "the most relevant factor is the degree to which the predecessor's business entity remains intact." *Id.* at 490. Simply put, ***"[t]he more a corporation physically resembles its predecessor, . . . the more reasonable it is to hold the successor fully responsible.***" *Id.* (emphasis added). The rationale for this "more modern" approach to the issue is straightforward: "When an ongoing business assumes all the benefits of its predecessor and continues to function in the same manner as its predecessor, tort liability should attach." *Id.* at 491.

Although New Jersey courts have not extensively analyzed the "express or implied assumption" exception or the "fraud" exception,[11] the contours of those exceptions are well-established. Express assumption means exactly that, and implied assumption is typically found

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[10] *Woodrick v. Jack J. Burke Real Estate, Inc.*, 306 N.J. Super. 61 (App. Div. 1997) indicates that "[i]n determining whether a particular transaction amounts to a de facto consolidation or mere continuation, most courts consider four factors: (i) continuity of management, personnel, physical location, assets, and general business operations; (ii) a cessation of ordinary business and dissolution of the predecessor as soon as practically and legally possible; (iii) assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the predecessor; and (iv) continuity of ownership/shareholders." *Id.* at 73. However, "[n]ot all of these factors need be present for a de facto merger or continuation to have occurred." *Id.* at 74. In that case, the court applied the mere continuation exception where the transaction "resulted in nothing more than a change of hat" for the asset seller. *Id.* at 77; *see also Russell-Stanley Corp. v. Plant Indus., Inc.*, 250 N.J. Super. 478, 504 (Ch. Div. 1991) (listing the factors to be considered for mere continuation as "less than adequate consideration, common directorships or management, and whether the transaction rendered the predecessor entity incapable of satisfying its liabilities . . . .").

[11] In briefly discussing these exceptions, *McKee* only noted that "a contract must be interpreted, if possible, so as to give effect to the general purpose and intention of the parties." 109 N.J. Super. at 562. Though it found "no hint of fraud in the transaction [since] the consideration paid for the transfer was in excess of the value of the assets received," the court stated that "[t]he main reason why the courts impose liability upon the purchasing corporation when it has not given adequate consideration is that the seller will be thereby rendered insolvent and unable to pay its debts." *Id.* at 571.

whenever the express assumption of certain liabilities implies the assumption of others.[12] The fraud exception will be applied whenever a court is faced with what amounts to a corporate shell game to escape liability.[13]

All of the court-made exceptions to the general rule of successor non-liability elevate substance over form, imposing successor liability consistent with the practical effects of corporate transactions regardless of their formal characteristics:

> [T]he doctrine of corporate-successor liability is an example of a doctrine previously "resting on formalistic and conceptual foundations" that has become a doctrine "with functional and pragmatic roots rather than conceptual roots." The new doctrines "focus[ ] on the economic realities of the enterprise rather than on the [involved] entity."

Lefever, 160 N.J. 307, 312-13 (1999) (quoting Phillip I. Blumberg, The Continuity of the Enterprise Doctrine: Corporate Successorship in United States Law, 10 Fla. J. Int'l L. 365, 366-67 (1996)) (first alteration added). Thus, "[s]trict interpretation of the traditional corporate law approach leads to a narrow application of the exceptions to non-liability, and places unwarranted emphasis on the form rather than the practical effect of a particular corporate transaction." *Id.* (quoting *Ramirez,* 86 N.J. at 341-42);[14] *see also Knapp v. N. Am. Rockwell Corp.*, 506 F.2d 361

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[12] *See, e.g., Kessinger v. Grefco, Inc.*, 875 F.2d 153 (7th Cir. 1989) (asset purchaser impliedly assumed a seller's unforeseen liability for certain tort claims where the purchaser agreed "to pay, perform and discharge all debts, obligations, contracts and liabilities" of the seller); *Carlos R. Leffler, Inc. v. Hutter*, 696 A.2d 157 (Pa. Super. Ct. 1997) (asset purchaser impliedly assumed a liability where other liabilities were expressly assumed).

[13] *See, e.g., Reddy v. Gonzalez*, 8 Cal. App. 4th 118, 122 (1992) (under Uniform Fraudulent Transfer Act, actual intent and inadequate consideration are alternative requirements for successor liability based upon fraudulent transfer); *Schmoll v. ACandS, Inc.*, 703 F. Supp. 868, 873 (D. Or. 1988) (finding corporate restructuring was undertaken to avoid liabilities from asbestos claimants and imposing liability on transferee), *aff'd*, 977 F.2d 499 (9th Cir. 1992); *see also Husak v. Berkel, Inc.*, 341 A.2d 174, 176 (Pa. Super. Ct. 1975) (using inadequate consideration paid as alternative factor implying fraudulent purpose, much like constructive fraudulent conveyance theories of recovery).

[14] *Ramirez v. Amsted Industries, Inc.*, 86 N.J. 332 (1981) is the seminal New Jersey case adopting another well-recognized exception to the corporate successor rule, the so-called "product-line exception," which is similar to the de facto merger and mere continuation or "continuing enterprise" doctrines and imposes liability on an asset purchaser that continued production of the transferor's product line with the assets purchased.

(3d Cir. 1974) (finding de facto successor liability based upon the nature and actual consequences of the transaction, even though it lacked the formal characteristics of a merger).

Moreover, application of one or more of the exceptions to the general rule of successor non-liability is not confined to any particular kind or type of claim or case. They apply with equal force in matters involving alleged liability under the New Jersey Spill Act. *See Dep't of Transp. v. PSC Res., Inc.*, 175 N.J. Super. 447 (Law Div. 1980) (applying successor liability in the context of a DOT Spill Act claim, finding that public policy rationales of *Wilson* and *Ramirez* also apply to Spill Act claims).

The facts presented in OCC's Counterstatement of Facts, summarized above, would clearly support this Court's determination that the DSC-1 Reorganization was a de facto merger of DSC-1 into Maxus; that Maxus was a mere continuation of DSC-1 wearing a slightly different hat; that Maxus "retained" or assumed the Lister liabilities both expressly ***and*** impliedly; and/or that Maxus' dizzying and circuitous movement of the vast majority of DSC-1's assets out of that entity and onto its own books was—if Maxus' current denial of successor status is taken seriously—nothing but an elaborate corporate shell game to escape Lister liability. And this is without the benefit of Maxus' long-overdue production of documents, likely to reveal other facts highly relevant to application of one or more of these exceptions. This absolutely precludes a ***summary adjudication*** that OCC is the successor to any Lister liabilities.

B. The Known Facts Indicate That Maxus Is the Successor Liable for Any Lister-Related Liabilities, *Not* Because DSCC "Transferred Out" Those Liabilities But *Because Maxus Is the Sole Survivor of a De Facto Merger* or Its Equivalent.

Plaintiffs make a lengthy argument that OCC has Spill Act liability regardless of whether DSCC "transferred out" those liabilities pursuant to its Assignment and Assumption Agreement with DS Corporate, culminating in Plaintiffs' assertion that DSCC cannot have "liberated itself

from its Lister Plant liabilities by niftily moving them into a subsidiary company." (Motion at 24.) That argument is misguided and wrong because it completely misses the relevance and legal significance of DS Corporate's express assumption of the liabilities at issue.

The relevance of DS Corporate's express assumption is ***not*** that it proves DSCC shed the liabilities by ***assigning*** them to DS Corporate, but that it is one of the material facts currently known about the DSC-1 Reorganization that would support a finding of ***de facto merger of DSC-1 into Maxus***. When an entity like Maxus is found to have successor liability under the de facto merger doctrine or any of the other court-made exceptions to the general rule of successor liability, the legal effect is the same as if the entity (Maxus) were the survivor corporation in a statutory merger with the predecessor. *See Wilson,* 140 N.J. Super. at 485 ("A merger of corporations is the absorption by one corporation of one or more usually small corporations, which lose their identity by becoming part of the large enterprise."); *McKee,* 109 N.J. Super. at 563-64 (same); *Dep't of Transp.,* 175 N.J. Super. at 467 ("where the successor corporation acquires all or substantially all the assets of the predecessor corporation for cash and continues essentially the same operation as the predecessor corporation . . . the successor incurs liability for the damages resulting from any discharges of hazardous substances by its predecessor").

That is, as Plaintiffs themselves recognize,[15] the survivor in a merger is liable for all the obligations and liabilities of each of the corporations with which it has merged. *See N.J.S.A.* 14A:10-6(a) ("The parties to the plan of merger or consolidation shall be a single corporation, which, in the case of a merger, shall be that corporation designated in the plan of merger as the surviving corporation, and, in the case of a consolidation, shall be the new corporation provided for in the plan of consolidation"); *Id.* 14A:10-6(e) ("The surviving or new corporation shall be

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[15] (*See* Motion at 19 n.6 ("New York law, like New Jersey law and Delaware law, requires the surviving corporation in a merger to assume all liabilities of the merged corporations.").)

liable for all the obligations and liabilities of each of the corporations so merged or consolidated; and any claim existing or action or proceeding pending by or against any of such corporations may be enforced as if such merger or consolidation had not taken place."); *Dep't of Envtl. Prot. v. Ventron Corp.*, 94 N.J. 473, 503 (1983) ("Through the merger of Wood Ridge into Ventron, the latter corporation assumed all of Wood Ridge's liabilities, including those arising out of the pollution of Berry's Creek."); *Stayton v. Clariant Corp.*, 10 A.3d 597, 599 n.1 (Del. 2010) (the surviving corporation in a merger assumes liabilities of the merged corporation).

Consequently, when Plaintiffs essentially pose the question, "how can DSCC/OCC have been ***absolved*** of the Lister liabilities?", they are asking the ***wrong question***. The relevant question is simply this: assuming, as the evidence indicates, that the DSC-1 Reorganization constituted a de facto merger of DSC-1 into Maxus or its legal equivalent, how can any entity other than Maxus be the successor? The answer is as clear as it is undeniable. As a matter of corporate law, Maxus is the successor to any Lister environmental liability.

Finally, OCC makes no bones about the fact that in the SPA, Maxus also agreed to indemnify the purchaser indefinitely and without financial limits with respect to any Lister-related liabilities. (*See* SPA § 9.03(a), Pl. Ex. 46.) In fact, Maxus also promised in the SPA to use its "best efforts . . . to obtain at the earliest practicable date . . . any amendments, novations, releases, waivers, consents or approvals necessary to have each of the DSCC companies released from its obligations and liabilities under the Historical Obligations" of DSCC, which were defined to include any Lister-related liabilities. (*Id.* § 12.11(a).) Those "best efforts" were to include providing Maxus' own corporate guarantee in consideration for such a release. (*Id.* § 12.11(b).) Maxus never fulfilled those obligations and now denies any obligation to indemnify OCC. None of this remotely suggests that Maxus is not the successor to Lister liabilities. Even

if a purchaser had known all the material facts known today, no well-advised purchaser would have paid over $411 million for DSCC without also getting Maxus' unlimited indemnity. In fact, Maxus' agreement to use best efforts to obtain novations and releases of DSCC strongly suggests Maxus fully understood that Maxus was the successor to Old Diamond Shamrock's Lister liabilities.

C. OCC Has Not Made Any Judicial Admissions That It Has Successor Liability for DSC-1's Operation of the Lister Plant or Ownership of the Lister Site.

Plaintiffs' argument (at 21-23) that OCC is bound by prior "admissions" that it succeeded to DSC-1's Lister-related liabilities proceeds from their basic contention that "prior assertions made in pleadings or evidence which are inconsistent with or contradictory of present claims can be treated as an admission in subsequent litigation." (Motion at 23.) While that may be true as a general proposition of law, it does not apply to any of the cited statements attributed to OCC. Again, Plaintiffs' contention that OCC's prior statements are inconsistent with its position in this case is false, apparently because they fail to understand OCC's position in this case.[16] To repeat, OCC does ***not*** deny that it is the successor by merger to whatever liabilities were ***actually held*** by DSCC when OCC's affiliate purchased it in September 1986. What OCC does deny in this case is that its predecessor in interest was the successor to Old Diamond Shamrock's Lister-related environmental liabilities. As demonstrated in OCC's response to Plaintiffs' Statement of Facts, and notwithstanding Plaintiffs' interpretations of OCC's prior statements and their frequent omission of relevant qualifications and reservations, none of OCC's cited statements in this or other prior proceedings are contrary to its position in this case.

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[16] As shown by OCC's response to Plaintiffs' Statement of Facts, Plaintiffs' argument is based on characterizations of documents almost entirely authored or entered into by counsel retained by Maxus under the SPA to represent both Maxus and OCC.

Furthermore, even if OCC had previously taken a position truly contrary to its position in this matter, that would not be the stuff of which a summary judgment of strict liability for untold damages is made. To the contrary, an admission made in pleadings or proof submitted in another proceeding at most would constitute an ***evidentiary*** admission to be considered along with other relevant facts now known, ***not*** a binding judicial ***determination*** that could be dispositive of a matter asserted in the present litigation. *See Fid. & Deposit Co. of Md. v. Hudson United Bank*, 493 F. Supp. 434 (D.N.J. 1980), *rev'd on other grounds*, 653 F.2d 766 (3d Cir. 1981); *Saltsman v. Corazo*, 317 N. J. Super. 237, 244-45 (App. Div. 1998) (A judicial admission is: "An express waiver made in court or preparatory to trial by the party or his attorney conceding for the purposes of the trial that [sic] the truth of some alleged fact.").

In *Hudson United Bank*, the court considered whether judicial admissions in pleadings and proofs from previous matters "are dispositive of the assertions made by [a party] and whether [that party] is estopped from asserting a contrary legal and factual position in this proceeding." 493 F. Supp. at 442. Applying New Jersey law, and relying on much of the same New Jersey authority Plaintiffs cite, the court opined that pleadings may be considered ***judicial*** admissions "only in the cause in which they are made." *Id.* at 443. "The vital feature of a judicial admission is universally conceded to be its conclusiveness upon the party making it, *i.e.*, the prohibition of any further dispute of the fact by him and of any use of evidence to disprove or contradict it." *Daily v. Somberg*, 49 N.J. Super. 469, 480 (Law Div. 1958) (citing 4 *Wigmore on Evidence*, §§ 1064, 2590 (3d ed. 1940)), *rev'd on other grounds*, 28 N.J. 372 (1958). But representations in pleadings and evidence "when used in other causes as ordinary admissions, . . . are of course . . . ***not conclusive***." *Hudson United Bank*, 493 F. Supp. at 443 (quoting *Wigmore on Evidence*, § 1066 at 86). "This is especially true where the party has taken a position

inconsistent with a prior unadjudicated proceeding where he never had an opportunity to prove the allegations or recitals." *Id.*

Prior to this case, OCC has never had any realistic opportunity to prove that Maxus is indeed the successor to DSC-1's Lister-related environmental liabilities. But OCC fully intends to avail itself of that opportunity now, based on the evidence discovered to date but also with the benefit of the long-overdue discovery it has sought and is entitled to obtain in this matter. Nothing OCC has previously stated in any other proceeding precludes it from doing so.

D. Maxus' Appropriation of DSCC's Name to Acquire Legal Title to the Lister Site, for Maxus' Benefit as Successor to DSC-1's Liabilities, Did Not Make DSCC Liable Under the Spill Act.

Plaintiffs' Statement of Facts notes that after NJDEP issued its March 13, 1984 Administrative Consent Order ("ACO") requiring investigation and remediation work upon the Lister Site itself, DSCC acquired legal title to 80 Lister Avenue and 120 Lister Avenue to facilitate access to the entire Lister Site as required to comply with the requirements of that ACO. However, Plaintiffs do not argue that this alone renders OCC strictly liable for decades of agricultural chemicals manufacturing at the Lister Plant by DSC-1 or its predecessors. Nor should they, since that is not the law.

In *Litgo New Jersey, Inc. v. Martin*, No. 06-2891 (AET), 2010 WL 2400388 (D.N.J. June 10, 2010), the defendants brought a counterclaim against plaintiffs for contribution costs under the Spill Act. Judge Thompson found that "[a]t the time the Agreement of Sale was reached, Goldstein [the Plaintiff] was aware that there was a soil contamination problem at the Litgo property." *Id.* at *15; *see also id.* at *34 ("Goldstein knew that hazardous substances had been discharged on the Litgo Property when he agreed to purchase it."). Goldstein subsequently sold the property to Litgo. As the sole shareholder of Litgo, Goldstein's knowledge at the time of the subsequent transfer was imputed to Litgo. *Id.* at *34. On this basis, the court found Litgo liable

in contribution to the defendants as a ***current property owner*** unable to satisfy the elements of the "innocent purchaser" defense. *Id.* However, the court also held:

> Plaintiff Goldstein cannot be liable under the Spill Act on the same grounds as Litgo because he is not the current owner of the Litgo Property. Goldstein only owned the property for a short period before transferring it to Litgo. There have been no allegations that a discharge of hazardous substances occurred during that brief period. . . . There are therefore no grounds for holding Plaintiff Goldstein liable in contribution to the [defendants] under the Spill Act.

Id. at *35 (internal citations omitted).

The same is true here. Under Maxus' direction and control, in 1984-1986, DSCC became an interim purchaser of the Lister Site for a brief period before making an "intra-holding company" transfer of the Lister Site to Tierra for nominal consideration and "as part of [Maxus'] reorganization" of DSC-1. (OCC SOF ¶ 39, Ex. 31.) Plaintiffs have presented no evidence to show that any discharges of hazardous substances occurred during the brief period that DSCC held title. Therefore, under *Litgo*, DSCC's acquisition of title to the Lister Site in 1984-1986 did not make it liable under the Spill Act.

Moreover, OCC's Counterstatement of Facts shows (i) that Maxus ***internally*** acknowledged that the environmental issues at the Lister Site were the responsibility of "Corporate" (*i.e.*, Maxus) (*Id.* ¶ 32, Ex. 28); (ii) that all steps taken with respect to the Lister Site after execution of the 1984 ACO were taken under the direction and supervision of NJDEP and/or the U.S. EPA, solely to facilitate environmental response actions in compliance with regulatory directives (*Id.* ¶ 35, Exs. 2-3); and (iii) that when Maxus caused its wholly-owned and controlled subsidiary DSCC to acquire legal title to 120 Lister Avenue (1984) and legal title to 80 Lister Avenue (1986), it did so for the sole benefit of Maxus as the acknowledged successor to any Lister-related environmental liabilities (*Id.* ¶ 36). Maxus simply used (abused) DSCC's

name as a nominee for Maxus pending a transfer of legal title to another entity (Tierra) within the Maxus corporate family for Maxus' administrative convenience. (*Id.*)

OCC is unaware of any New Jersey decision imposing strict liability for decades of alleged discharges of hazardous substances upon an interim purchaser like DSCC (or upon its ultimate corporate successor, OCC), under the unique circumstances of this case: where the interim purchaser was a mere nominee which took bare legal title to an environmental site already under the direction and supervision of NJDEP and for the specific and sole purpose of facilitating compliance with regulatory directives by or for the benefit of the nominee's parent corporation. Certainly, nothing in the Spill Act itself dictates such a draconian result.

For all the foregoing reasons, Plaintiffs' motion for a summary adjudication that OCC has successor liability must be denied.

III. OCC IS NOT COLLATERALLY ESTOPPED BY ANY FINDINGS IN *AETNA*.

Plaintiffs also seek partial summary judgment holding that OCC and Maxus are "estopped from denying the fact of DSCC's intentional discharges of dioxin, DDT and other hazardous substances into the Passaic River." (Motion at 27.) As shown in Part I above, OCC does not contest the fact that some hazardous substances were discharged from the Lister Site in the 1950s and 1960s. Thus, for purposes of Plaintiffs' collateral estoppel argument, the narrow issue remaining before this Court is whether the *Aetna* case can be used to establish as a matter of law that such discharges occurred ***intentionally***. The clear answer is that it cannot be so used against OCC.

A. The SPA and the *Aetna* Litigation.

OCC's Counterstatement of Facts fully sets forth the relevant facts regarding the *Aetna* case and OCC's lack of involvement therewith. These facts are summarized below.[17]

In 1986, Diamond Shamrock announced its intention to sell DSCC. (OCC SOF ¶ 40, Ex. 3.) Prior to this time, DSCC had discontinued its ownership, leasing, or operation of certain businesses, facilities, and plant sites, and its production of certain products (collectively, the "Discontinued Operations") that were unrelated to DSCC's then-ongoing chemicals business. (*Id.* ¶ 9; *see* SPA § 9.03(a)(iv), Pl. Ex. 46.) These Discontinued Operations included the Lister Site and DSCC's former Ag Chem business, which had owned, leased, or operated plants at the Lister Site and elsewhere. (OCC SOF ¶ 9; *see* Schedules 2.23 and 9.03(a)(iv) of SPA, Exs 10-11.) In anticipation of the sale, Diamond Shamrock Corporation's (Maxus') then-General Counsel assured prospective buyers of DSCC's then-ongoing chemicals business, including OCC's parent, that Diamond Shamrock Corporation retained and would continue to retain responsibility for liabilities relating to the Discontinued Operations. (OCC SOF ¶ 41, Pl. Ex. 56.) Specifically, Diamond Shamrock Corporation (Maxus) stated:

> 1. The closing of the sale of the DSCC shares will pass to the purchaser all liabilities of DSCC . . . , ***except*** those arising from operations of DSCC which have previously been sold or discontinued or products no longer manufactured or sold, as more fully described below.
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> * * *
>
> 3. Also ***excluded*** are damages, judgments and costs, including attorneys fees, which arise out of the following litigation against Diamond Shamrock or DSCC (whether now pending or filed in the future); . . .

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[17] Portions of these facts are also included in support of OCC's Motion for Partial Summary Judgment Against Defendant Maxus Energy Corporation, which was filed on May 9, 2011, and is scheduled to be argued on the same date as this Motion. Given the likely order in which the Court will consider these motions, these facts are also set forth in detail here.

> (b) ***All litigation arising out of DSCC's manufacturing operations at 80 Lister Avenue, Newark, New Jersey***, and other sites where manufacturing operations have been permanently abandoned, including claims for property damage and personal injury arising from the cleanup of such sites.

(*Id.* at OCCNJ0027239 (emphasis added).) In the next paragraph of the letter, Diamond Shamrock Corporation (Maxus) noted that it also would retain the right to any insurance proceeds paid as a result of the liabilities that Diamond Shamrock Corporation (Maxus) retained:

> Excluded from the transaction are all damages, judgments and recoveries which Diamond Shamrock or DSCC may secure as a result of any litigation, whether now or pending or subsequently filed, brought by them against Aetna Insurance Company or any of their other insurers to recover for any liability retained by them pursuant to paragraphs 1, 2 and 3 above.

(*Id.* at OCCNJ0027240.)

On September 4, 1986, an affiliate of OCC entered into the SPA with Diamond Shamrock (n/k/a Maxus) by which OCC ultimately acquired DSCC and its active, ongoing "Chemicals Business." (OCC SOF ¶¶ 42, 44, Pl. Ex. 46.) In the SPA, Maxus agreed to indemnify OCC indefinitely and without financial limits for certain DSCC liabilities, including liabilities resulting from DSCC's prior ownership and operation the Lister Site.[18] (OCC SOF ¶¶ 57-58; *see* SPA § 9.03(a), Pl. Ex. 46.) Specifically, the SPA required Maxus to indemnify OCC with respect to losses relating to, *inter alia*, "Superfund Sites," "Inactive Sites," and "Historical Obligations" of DSCC. (*Id.* at § 9.03(a)(iii), (iv), and (viii).) The Lister Site clearly falls within each of these categories:

1. The SPA lists the "Diamond Alkali (#488), Newark, New Jersey" site as a "Superfund Site." The EPA has deemed the "Diamond Alkali Superfund

[18] Maxus' contractual obligation to indemnify OCC relating to the Lister Site is the subject of OCC's Motion for Partial Summary Judgment Against Defendant Maxus Energy Corporation, which was filed herein on May 9, 2011 and is scheduled to be argued on the same date as this Motion. OCC's motion and supporting briefs and exhibits are incorporated herein by reference.

Site" to include the Lister Site and the Lower Passaic River. (OCC SOF ¶ 57.1, Exs. 37-38.)

2. The SPA defines "Inactive Sites" as, *inter alia*, "those former chemical plants and commercial waste disposal sites listed on Schedule 9.03(a)(iv) . . . ." Among the sites listed on Schedule 9.03(a)(iv) is DSCC's former chemical plant site in "Newark, New Jersey," *i.e.*, the Lister Site. (*Id.* ¶ 57.2, Pl. Ex. 46 and Ex. 10.)

3. The SPA includes as "Historical Obligations" of DSCC "[a]ll liabilities and obligations associated with the discontinued businesses of DSCC or any predecessor in interest . . . including . . Ag Chem . . ." The facility at the Lister Site had manufactured pesticides and herbicides as a part of the Ag Chem business of DSCC and its predecessors. (*Id.* ¶ 57.3, Exs. 4, 11.)

Thus, on three separate and independent bases, the SPA unambiguously requires that Maxus indemnify OCC with respect to the Lister Site.

In addition, Maxus also promised in the SPA to use its "best efforts . . . to obtain at the earliest practicable date . . . any amendments, novations, releases, waivers, consents or approvals necessary to have each of the DSCC companies released from its obligations and liabilities under the Historical Obligations" of DSCC. (OCC SOF ¶ 58; SPA § 12.11(a), Pl. Ex. 46.) Those "best efforts" were to include providing Maxus' own corporate guarantee in consideration for such a release. (*Id.* ¶ 59; SPA § 12.11(b), Pl. Ex. 46.) Because the Lister Site related to the "Historical Obligations" of DSCC, Section 12.11 of the SPA required Maxus to use its best efforts to have DSCC expressly "released" from any obligations relating to that site. (OCC SOF ¶ 60.)

At the time the SPA was consummated, Maxus was prosecuting a civil action in New Jersey state court in the name of DSCC against various insurance companies that had provided insurance coverage to Old Diamond Shamrock, *i.e.*, *Diamond Shamrock Chemicals Co. v. Aetna Casualty & Surety Co.* (the "*Aetna*" litigation). (*Id.* ¶ 61.) In that action, Maxus sought indemnification for, *inter alia*, the environmental clean-up costs associated with the Lister Site and losses arising from a number of claims that had been brought against Old Diamond

Shamrock by third parties who alleged that the release of dioxins and other hazardous substances from the Lister Site had caused environmental damage to surrounding properties.[19] (*Id.* ¶ 62.)

Consistent with Maxus' opening position in the negotiations, the SPA contained lengthy provisions expressly addressing the responsibilities and the rights of Maxus and OCC with respect to insurance proceeds and the *Aetna* litigation in particular. (*Id.* ¶ 63.) Section 8.13(b) of the SPA states:

> Whenever [Maxus] becomes aware that a claim against any Current Carrier under any of the Existing Policies exists, with respect to a matter for which [Maxus] has liability directly or pursuant to the provisions of this Agreement, then [Maxus] shall be entitled to pursue such claim in any reasonable manner which it deems expedient (including Litigation) in the name of any one or more of the parties, including any DSCC Company, which are provided coverage under such Existing Policy ("Insured Parties"), as [Maxus] may elect . . . .

(*Id.* ¶ 63.1, Pl. Ex. 46.) To effect the implementation of this provision, Section 8.13(c) requires DSCC, *inter alia*, to "***assign to [Maxus] the applicable claims under Existing Policies*** with respect to a matter for which [Maxus] has liability directly or pursuant to the provisions of this Agreement." (*Id.* ¶ 63.2, Pl. Ex. 46 (emphasis added).)

The *Aetna* case was specifically referenced in the SPA. Section 8.14 provides in pertinent part as follows:

> Claims Against Current Carriers. [***Maxus***] ***shall have the right,*** and DSCC shall cause . . . the appropriate DSCC Company to cooperate fully in the exercise of such right, ***to continue or to settle pending Litigation or claims filed against any of the Current Carriers prior to the Closing (including, without limitation, Diamond Shamrock Chemicals Company vs. The Aetna Casualty and Surety Company***, now pending in the Superior Court of New Jersey, Chancery Division, Morris County, New Jersey) ("Existing Claims") for the payment of amounts

[19] In the *Aetna* case, Maxus also sought indemnification relating to third-party actions which alleged that Agent Orange manufactured by Old Diamond Shamrock at the Lister Site and elsewhere had injured Vietnam veterans who were exposed to that substance. This part of the *Aetna* litigation is not relevant to the instant Motion.

> allegedly due to any Diamond Company on account of losses suffered by any Diamond Company as a result of its products or damage to the environment or persons caused by the operations of any DSCC Company's production facilities prior to the Closing Date.

(*Id.* ¶ 63.3; SPA § 8.14 (emphasis added), Pl. Ex. 46.) Although Maxus was required to "keep [DSCC] apprised of the status of all settlement negotiations with respect to Existing Claims," Maxus was fully empowered to "act in the name and on behalf of DSCC . . . in releasing such Existing Claims . . . ."[20] (*Id.* ¶ 64; SPA § 8.14, Pl. Ex. 46,) Thus, pursuant to Section 8.14, Maxus expressly retained full control of the *Aetna* litigation after the closing of the SPA and was a de facto assignee of such claims.

Section 8.14 also provides that the party who owes the duty of indemnification with respect to a specific third-party action is entitled to receive any insurance proceeds relating to that action. It states:

> Any insurance proceeds paid in respect of the matters contemplated by Article IX hereof shall be distributed to the Indemnifying Party (as defined in Article IX)[21] to the extent of the Indemnity Payment[22] on account of any Indemnifiable Loss (as defined in Article IX)[23] paid by such Indemnifying Party under and in accordance with Article IX.

(OCC SOF ¶ 65, Pl. Ex. 46.) As shown above and in OCC's Motion for Partial Summary Judgment against Maxus (incorporated herein by reference), Section 9.03 of the SPA requires

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[20] Section 8.14 only requires that Maxus seek OCC's/DSCC's consent prior to entering into a release relating to an Existing Claim where the release "include[s] an agreement to the termination of further coverage under the Existing Policies in connection with any such settlement (other than in respect of the Existing Claim to which the settlement relates or a release which does not adversely affect a DSCC Company) . . . ." (Pl. Ex. 46.) Therefore, OCC's consent was required in those limited circumstances which are not relevant here.

[21] Section 9.03(i) of the SPA defines "Indemnifying Party" as "any Entity required to provide indemnification under this Agreement. (OCC SOF ¶ 66.1, Pl. Ex. 46.)

[22] An "Indemnity Payment" is defined as "any amounts of Indemnifiable Losses required to be paid pursuant to . . . Section 9.03." (OCC SOF ¶ 66.2; SPA § 9.03(g), Pl. Ex. 46.)

[23] For purposes of the SPA, "Indemnifiable Losses" include "any and all claims, demands or suits . . . ., losses, liabilities, damages, obligations, payments, costs and expenses, paid or incurred, whether or not relating to, resulting from or arising out of any Third Party Claim . . . ." (OCC SOF ¶ 66.3; SPA § 9.03(a), Pl. Ex. 46.)

Maxus to indemnify OCC in perpetuity with respect to any losses relating to the Lister Site. (*Id.* ¶ 68.) Because Maxus has the obligation to pay any such losses, Section 8.14 gives Maxus the right to recover any insurance proceeds payable as a result of those losses. (*Id.* ¶¶ 61-67.) Accordingly, if the *Aetna* court had declared that the claims relating to the Lister Site were covered losses under the relevant insurance policies, then it was Maxus—not OCC—that would have been entitled to those insurance proceeds. (*Id.* ¶ 69.)

In order to implement the SPA's provisions regarding insurance, the SPA required OCC to furnish Maxus at the Closing with an executed copy of the form attached to the SPA as Exhibit 8.13. (OCC SOF ¶ 70; SPA § 8.13(c), Pl. Ex. 46.) Complying with this requirement, OCC executed the form on the Closing Date, appointing Maxus, "subject to the provisions of Sections 8.13 and 8.14" of the SPA, as the attorney in fact for OCC/DSCC for the following two limited purposes:

> (1) "for ***in [OCC/DSCC's] name, place and stead***, to perform all acts and to execute all documents relating to the maintenance and administration of the Existing [Insurance] Policies . . . "; and
>
> (2) "to ***pursue in [OCC/DSCC's] name*** in any reasonable manner which [Maxus] deems expedient any claim, including without limitation, ***any Existing Claim*** . . . , against any Current Carrier . . . under any of the Existing Policies ***with respect to a matter for which [Maxus] has liability*** directly or ***pursuant to the provisions of the [SPA]***."

(OCC SOF ¶ 71; Exhibit 8.13 to SPA (emphasis added), Pl. Ex. 58.) OCC empowered Maxus only to act ***in the name of DSCC*** (but not in its stead) in pursuing the Existing Claims, including the *Aetna* litigation. (*Id.* ¶ 72, Pl. Ex. 58.) Maxus could pursue those claims in "any reasonable manner" that it "deem[ed] expedient." (*Id.* ¶ 73, Pl. Ex 58.) This full power given to Maxus to

act in its own "stead" in the *Aetna* litigation constitutes the complete assignment of the claims which was required by Sections 8.13 and 8.14 of the SPA. (*Id.* ¶ 74.)

Pursuant to these provisions of the SPA, Maxus continued to prosecute the *Aetna* litigation in the name of DSCC after the SPA closed on September 4, 1986. In an affidavit filed in support of a motion by DSCC, Robert D. Stauffer of Maxus informed the *Aetna* court and the parties of the SPA and its limited impact on the case. (OCC SOF 76, Ex. 39.) Mr. Stauffer stated:

> I am the Director of Corporate Insurance of Maxus Energy Corporation (formerly Diamond Shamrock Corporation), which is attorney-in-fact for Diamond Shamrock Chemicals Company (hereinafter "Diamond"). . . . On September 4, 1986, ***Diamond Shamrock Corporation*** sold all of the stock of Diamond to a subsidiary of Occidental Petroleum Corporation but ***retained the power to prosecute the instant litigation in Diamond's name.***

(*Id.* (emphasis added).) Later in the litigation, in "DSCC's" proposed findings of fact, Maxus again reiterated:

> In September 1986, Diamond Shamrock Corporation sold Diamond's stock to a company owned by Occidental Petroleum Corporation. Under the sales agreement with Occidental, Diamond Shamrock Corporation (now ***Maxus Energy Corporation . . .***) ***has retained certain obligations and the right to prosecute the instant action in the name of Diamond.***

(OCC SOF ¶ 77, Ex. 40 (emphasis added).)

Consistent with these statements, other pleadings in that case reflect that James F. Kelley (*i.e.*, Maxus' then-General Counsel), W.E. Notestine, and Edward J. Masek—all of "Maxus Energy Corporation"—were listed as "Of Counsel" for DSCC in that case. (OCC SOF ¶ 78, Pl. Exs. 4 and 14, Ex. 41.) Mr. Masek appeared at a number of depositions in that case as an "Attorney for Diamond Shamrock" or as one of the "Attorneys for Plaintiff," *i.e.*, DSCC. (*Id.* ¶ 79, Exs. 42-44.) The *Aetna* trial transcripts reveal that Mr. Masek was also present for at least

part of the trial. (*Id.* ¶ 80, Ex. 44.) By contrast, these documents contain no similar mention of any participation in the litigation by OCC, its counsel, or employees. (*Id.* ¶ 81.)

The Chancery Court issued its order in the *Aetna* case on April 12, 1989. (OCC SOF ¶ 83, Pl. Ex. 15.) The next day, Maxus issued a press release titled "Maxus Responds to Ruling in Insurance Suit Involving Diamond Shamrock Chemicals." (*Id.* ¶ 84, Ex. 46.) The press release states in relevant part:

> Maxus Energy Corporation said that adequate reserves have been established to cover costs of the environmental cleanup at a former chemicals plant in Newark, New Jersey.
>
> When Diamond Shamrock Chemicals Company was sold to Occidental Petroleum Company in September of 1986, Diamond Shamrock Corporation agreed to indemnify Occidental for liabilities that occurred prior to the sales date. . . .
>
> Earlier this week a New Jersey judge ruled that insurance policies issued by Aetna Life & Casualty Co. and other insurers cover Diamond Shamrock Chemicals' $23 million portion of a 1984 settlement regarding Agent Orange.
>
> The company said it is considering appealing the other part of the judge's ruling that denied coverage for the operation of the Newark Plant.

(*Id.*)

Soon thereafter, Maxus filed a Form 8-K with the Securities and Exchange Commission regarding the *Aetna* ruling. (OCC SOF ¶¶ 86-87, Ex. 47.) Maxus stated:

> As reported in Maxus Energy Corporation's Annual Report on Form 10-K for the fiscal year ended December 31, 1988, three lawsuits were brought by Maxus Energy Corporation or a predecessor (the "Company") against the Company's insurance carriers. On April 12, 1989, a judgment was rendered in one of these lawsuits, Docket No. C-3939-84 in the Superior Court of New Jersey, Chancery Division, Morris County, involving . . . personal injury and property damage claims related to the Newark plant. The judge concluded that there is no insurance coverage . . . with respect to any pending or future claims for property damage or personal injury asserted by residents, property owners or

> workers in the neighborhood of the Newark plant under any of the policies in question. . . .
>
> The Company plans to appeal this judgment . . . .

(*Id.* at MAXUS0069734.) In the letter transmitting the Form 8-K, Maxus noted that it was reporting under "Item 5" of Form 8-K. (*Id.* ¶ 88, Ex. 47.) At the time of this filing, Item 5 denoted disclosures of "Other Materially Important Events." (*Id.* ¶ 89, Ex. 40.)

After the Appellate Division affirmed Judge Stanton's ruling on April 6, 1992 (OCC SOF ¶ 90), Maxus issued another Form 8-K disclosing that decision under "Item 5" (*Id.* ¶ 91, Ex. 49). Maxus stated:

> In an opinion filed April 6, 1992, No. A-694-89T1, the Appellate Division of the Superior Court of New Jersey upheld the lower court ruling previously disclosed by Maxus Energy Corporation (the "Company") that there is no insurance coverage of the cost of environmental personal injury and property damage claims, including remedial activities, related to the Newark, New Jersey agricultural chemicals plant formerly operated by the Company's chemical subsidiary which was sold in 1986. The Company indemnified the buyer of that subsidiary against the liabilities involved.

(*Id.* ¶ 92, Ex. 49.) In addition, Maxus made the following disclosure regarding the *Aetna* litigation in its Form 10-K for 1996:

> The insurance companies that wrote [DSCC's] and [Maxus'] primary and excess insurance during the relevant periods have to date refused to provide coverage for most of [DSCC's] or [Maxus'] cost of the personal injury and property damage claims related to environmental claims, including remedial activities at chemical plant sites and disposal sites. In two actions filed in New Jersey state court, ***[Maxus] has been conducting litigation against all of these insurers for declaratory judgments that it is entitled to coverage for certain of these claims***. In 1989, the trial judge in one of the New Jersey actions ruled that there is no insurance coverage with respect to the claims related to the Newark plant . . . . The trial court's decision was upheld on appeal and that action is now ended.

(*Id.* ¶ 93, Ex. 50 (emphasis added).)

By contrast, OCC's parent company, Occidental Petroleum Corporation ("OPC") issued no Form 8-Ks regarding the *Aetna* rulings. (OCC SOF ¶ 94.) Further, OPC's Form 10-Ks for 1989 and 1992 did not mention the *Aetna* case. (*Id.* ¶ 95, Exs. 45, 52.)

On August 10, 1989, Maxus entered into a letter agreement with Diamond Shamrock R&M, Inc. resolving a dispute between those parties (the subject of which is unrelated to the issues in this case). (OCC SOF ¶¶ 96-97, Ex. 51.) In that letter, Maxus described the *Aetna* litigation as "***Maxus' suit against its insurance carriers*** involving Agent Orange (a Product Liability claim) and the Newark cleanup (not a Product Liability claim)." (*Id.* (emphasis added).)

B. Basic Principles of Collateral Estoppel Under New Jersey Law.

The New Jersey Supreme Court repeatedly has recognized that the doctrine of collateral estoppel "has its roots in equity, [and] will not be applied when it is unfair to do so." *Oliveri v. Y.M.F. Carpet, Inc.*, 186 N.J. 511, 521-22 (2006); *see In re Estate of Dawson*, 136 N.J. 1, 23 (1994) ("'[C]ollateral estoppel is an equitable doctrine and need not be applied . . .'if it would not be fair to do so.'") (citation omitted). The doctrine is "'not mandated by constitution or statute'" and is "'not to be applied if there are sufficient countervailing interests.'" *Hills Dev. Co. v. Twp. of Bernards*, 103 N.J. 1, 59 (1986) (quoting Restatement (Second) of Judgments (hereinafter "Restatement") § 13 at 132 and *Matter of Coruzzi*, 95 N.J. 557, 568 (1984)); *see Pivnick v. Beck*, 326 N.J. Super. 474, 485-86 (App. Div. 1999) (collateral estoppel "'must be applied equitably, not mechanically'" and only "when fairness requires") (citation omitted).

As Plaintiffs note, New Jersey courts have adopted the factors set forth in the Restatement §§ 27-29 and looked to the Restatement for guidance in determining when collateral estoppel should apply. (Motion at 28 (citing cases).) Thus, in order to estop a party with respect

to an issue previously decided in another case, the party asserting the bar in New Jersey must prove ***all*** of the following:

> (1) the issue to be precluded is identical to the issue decided in the prior proceeding;
>
> (2) the issue was actually litigated in the prior proceeding;
>
> (3) the court in the prior proceeding issued a final judgment on the merits;
>
> (4) the determination of the issue was essential to the prior judgment; and
>
> (5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding.

See First Union Nat'l Bank v. Penn Salem Marina, Inc., 190 N.J. 342, 352 (2007); *Estate of Dawson*, 136 N.J. at 20; Restatement § 27.

Moreover, even if these five elements are met, New Jersey law is clear that collateral estoppel ***should not be applied*** when, *inter alia*:

> "***the party sought to be precluded***, as a result of the conduct or his adversary or other special circumstances, ***did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action***."

Oliveri, 186 N.J. at 523 (quoting Restatement § 28(5)(c)) (emphasis added); *see Gannon v. Am. Home Prods., Inc.*, 414 N.J. Super. 507, 521, 530 (App. Div. 2010) (noting that New Jersey has specifically adopted the § 28 exceptions and reversing and remanding to trial court for consideration of those factors); *Bernstein v. Shulman*, 2010 WL 4117142, at *12-13 (N.J. Super. App. Div. Apr. 1, 2010) (same).[24]

The Restatement and New Jersey courts recognize similar equitable limitations on the use of collateral estoppel by parties—such as Plaintiffs here—who were not parties to the prior

[24] A true and correct copy of *Bernstein v. Shulman*, 2010 WL 4117142 (N.J. Super. App. Div. Apr. 1, 2010) is attached to the Certification of Lindsay A. Wagner as Exhibit 53. Pursuant to *R.* 1:36-3, no contrary unpublished opinion is known to counsel.

proceeding. Thus, the New Jersey Supreme Court has held that "[a] party precluded from relitigating an issue with an opposing party . . . is also precluded from doing so with another person ***unless he lacked full and fair opportunity to litigate the issue in the first action*** or unless other circumstances justify affording him an opportunity to relitigate the issue." *Zirger v. Gen. Accident Ins. Co.*, 144 N.J. 327, 338 (1996) (emphasis added) (citing *United Rental Equip. Co. v. Aetna Life & Cas. Ins. Co.*, 74 N.J. 92, 101 (1977)); *see* Restatement § 29. As the Appellate Division has recognized, "It is . . . one thing to say that the doctrine of collateral estoppel ***may*** be applied despite the lack of mutuality and entirely another to say that it ***must*** be." *Garden State Fire & Cas. Co. v. Keefe*, 172 N.J. Super. 53, 59 (App. Div. 1980) (emphasis added).

As shown below, the *Aetna* decision cannot and should not be used against OCC for any purpose in this case.

C. OCC Did Not Have An Adequate Opportunity Or Incentive To Litigate The *Aetna* Case And Thus Cannot Be Bound By Its Holding.

As noted above, collateral estoppel may not be invoked where "'the party sought to be precluded . . . did not have adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.'" *Oliveri*, 186 N.J. at 523 (quoting Restatement § 28(5)(c)). Moreover, it cannot be used by Plaintiffs here (who were not parties to *Aetna*) unless OCC had a "full and fair opportunity" to litigate the *Aetna* matter. Restatement § 29. Because it is difficult to imagine a party that had ***less*** opportunity or incentive to litigate a matter than OCC did in the *Aetna* case, that case does not preclude OCC from defending itself in this action.

Applying Restatement § 28(5)(c), the Appellate Division has refused to use collateral estoppel to bind a person who, like OCC, had transferred his rights in the earlier litigation to someone else and played no role in the prosecution of that action. In *Pace v. Kuchinsky*, 347

N.J. Super. 202 (App. Div. 2002), the court held that the results of an earlier arbitration against an insurer were not binding on the plaintiff (Pace) in a subsequent civil case where the arbitration had been pursued by Pace's doctor to collect payment as the assignee of Pace's claims. *Id.* at 218. In Pace's separate civil action, the trial court concluded that Pace was collaterally estopped from seeking damages incurred after the cut-off date established in the arbitration pursued by the doctor as his assignee. *Id.* at 214.

The Appellate Division reversed, finding that Pace did not have "an adequate opportunity to be heard nor an incentive to demand a full and fair adjudication concerning his lumbar injuries and whether his resulting surgery and disability, if any, were [causally] related to the accident." *Id.* at 218. The court noted that in determining whether to apply collateral estoppel, the "'key factor is the opportunity to be heard ***fully***.'" *Id.* at 217 (quoting *Habick v. Liberty Mut. Fire Ins. Co.*, 320 N.J. Super. 244, 255 (1999)).

> Equitable application of the doctrine of collateral estoppel requires not only that the party sought to be precluded had a full opportunity to be heard, but also had an "incentive to make a case." A party sought to be precluded under the doctrine of collateral estoppel must have his or her "day in court" on the specific issue in question. Unless expressly waived, a full and fair hearing requires representation by the party's own counsel, thereby insuring presentation of the specific issues to be decided in the very manner that the party chooses. This is especially so where the party sought to be precluded was not the identical party in the prior proceeding.

Id. (internal citations omitted). The *Pace* court then concluded that the doctor-assignee—not Pace—was the real party in interest in the arbitration. *Id.* Although Pace had testified at the arbitration, the court noted that Pace's counsel was not present at the arbitration and Pace "did not have the opportunity to present the issues in the same way as he might have, had his interest been fully represented by counsel." *Id.* Further, the court cited the fact that civil action involved "different issues and claims" than were involved in the arbitration, as well as different parties in

interest. *Id.* Specifically, the scope of the arbitration was limited to "the doctor's claims for payment for treatment provided," thus "embrac[ing] a specific controversy" between the doctor and the insurer, not Pace and the civil defendant. *Id.* at 218. Accordingly, Pace had no incentive to demand a "full and fair adjudication" regarding his injuries in the arbitration. *Id.* The Appellate Division thus concluded that "[i]t is these very differences that give rise to the equitable considerations enumerated in subsection five of § 28 of the *Restatement*, disfavoring preclusion." *Id.* at 217.

Although not cited in *Pace*, a separate section of the Restatement specifically addresses whether nominal parties may be bound by a prior judgment and strongly supports the conclusion that OCC cannot be bound by *Aetna*. *See* Restatement § 37. Comment c to § 37 describes the narrow circumstances—which are not present here—in which issue preclusion may apply to a ***nominal plaintiff*** like OCC/DSCC:

> Under some interpretations of the rules governing designation of parties plaintiff, actions on claims transferred after their creation may be brought in the name of the original owner of the claim rather than the transferee. ***Transfer of claims after their creation may occur by assignment***, by subrogation either by contract or by operation of law, or by succession such as that following the death of an owner of a claim.
>
> . . . If the transfer is effective and the transferee maintains an action in the name of the transferor which thereafter goes to judgment, the question can arise in a subsequent action whether the transferor is bound. ***The transferor is bound if he conducts himself in such a way that the opposing party reasonably supposes him to be the holder of the claim.***[25] The transferor's subscription of the complaint[26] or participation in the action, in the absence of contrary manifestation, is ordinarily a sufficient basis for the opposing party to make that supposition.

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[25] As shown below, the record of the *Aetna* case clearly demonstrates that both before and after the closing of the SPA, Diamond Shamrock Corporation/Maxus conducted itself as the holder of the claims.

[26] "Subscription" is defined as "the act of signing one's name on a document." Black's Law Dictionary (9th ed. 2009).

Restatement § 37 cmt. c (emphasis added). The Reporter's Note to that comment clarifies that "[t]here is but a narrow range of instances in which a nominal plaintiff might be precluded by an action brought in his name. If the claim involved is assigned or subrogated in its entirety, and the original holder has no other claim involving the same set of facts, . . . issue preclusion can[not] arise against the transferor." *Id.* at Reporter's Note to cmts c and d; *see also* 18A Wright & Miller, Federal Practice & Procedure § 4449 (2d ed.) ("A party to a prior action should not be precluded [from litigating issues decided in the prior action] . . . if he was involved only as a nominal party or in a specially circumscribed and subordinate role.").

Applying these standards, OCC simply cannot be bound by any ruling in the *Aetna* case.

1. OCC had no opportunity to litigate in *Aetna*.

When Maxus first announced its intention to sell DSCC, it made clear that because it retained responsibility for the liabilities associated with properties like the Lister Site, it would also keep the right to any insurance proceeds that were payable in connection with those liabilities. (*See* Pl. Ex. 56.) Thus, referring to the *Aetna* litigation ***by name***, the SPA expressly provided that Maxus—and not OCC—would control that litigation going forward. (SPA § 8.14, Pl. Ex. 46.)[27] To implement this provision, OCC executed a form giving Maxus full authority to pursue claims such as *Aetna* in "***[DSCC's] name*** in any reasonable manner which [Maxus] deems expedient." (Pl. Ex. 58 (emphasis added).)

And that is precisely what Maxus did. Plaintiffs concede that after DSCC was sold to OCC, "DSCC" continued to be represented in *Aetna* by attorneys selected, controlled, and paid by Maxus. (Motion at 36.) Indeed, Maxus' then-General Counsel and other lawyers in Maxus' in-house legal department appeared on DSCC's pleadings and attended the trial and depositions

[27] That section provides in applicable part that Maxus "shall have the right . . . to continue or to settle pending Litigation or claims filed against any of the Current Carriers prior to the Closing (including, without limitation, Diamond Shamrock Chemicals Company vs. The Aetna Casualty and Surety Company) . . . ."

in that case. Moreover, the documents openly stated that these individuals were representatives of "Maxus Energy Corporation." There were no similar appearances by any members of the OCC legal department. But perhaps more importantly, Maxus expressly informed the *Aetna* court and parties in at least two separate filings that although it had sold DSCC to OCC, Maxus had "retained certain obligations and the right to prosecute the [*Aetna*] action in the name of [DSCC]." (Ex. 40; *see* Ex. 39.) Therefore, the insurer defendants in *Aetna* could not have "reasonably suppose[d] [OCC] to be the holder of the claim." Restatement § 37 cmt. c. Rather, it was specifically disclosed that DSCC was only a nominal plaintiff and that Maxus was the real party-in-interest in that case, a fact that also would have been obvious to anyone who read Maxus' press release and public disclosures regarding the matter.

Indeed, the only argument that Plaintiffs proffer to connect OCC in any substantive way to the *Aetna* proceedings is their claim that "OCC participated in the [*Aetna*] trial through its attorney-in-fact, Maxus" and that OCC "hired Maxus to represent it" in that trial. (Motion at 36.) Plaintiffs base these statements solely on Exhibit 8.13 to SPA, which actually compels the opposite conclusion. As discussed above, Exhibit 8.13 designates Maxus as OCC/DSCC's attorney in fact for two separate and limited purposes:

> (1) "for ***in [OCC/DSCC's] name, place and stead***, to perform all acts and to execute all documents relating to the maintenance and administration of the Existing [Insurance] Policies . . . "; and
>
> (2) "to ***pursue in [OCC/DSCC's] name*** in any reasonable manner which [Maxus] deems expedient any claim, including without limitation, ***any Existing Claim . . . ,*** against any Current Carrier . . .under any of the Existing Policies ***with respect to a matter for which [Maxus] has liability*** directly or ***pursuant to the provisions of the [SPA].***"

(Pl. Ex. 58 (emphasis added).) The fact that the parties chose to describe Maxus' role in different ways with respect to each duty is telling. OCC authorized Maxus to act in the "name, place and stead" of DSCC in maintaining and administering the existing insurance coverage. Thus, OCC clearly designated Maxus as its representative with respect to managing DSCC's insurance policies. However, the words "place and stead" are noticeably absent from the description of Maxus' pursuit of claims such as the *Aetna* litigation. In that regard, OCC permitted Maxus to act only in the ***name*** of DSCC. In other words, OCC gave Maxus a full assignment of DSCC's claims in the *Aetna* case. (*See* SPA §§ 8.13(c) and 8.14, Pl. Ex. 46.) There is absolutely no indication that in pursuing those claims, Maxus would be acting in the place or on behalf of OCC.[28] Rather, Maxus clearly pursued those claims on its own behalf. (*See* Exhibit 53 at YPF-AK-0012795 (describing the *Aetna* case as "Maxus' suit against its insurance carriers . . . .").)

The lone authority cited by Plaintiffs—which does not even mention, much less purport to apply, the doctrine of collateral estoppel[29]—also fails to support their position. In *Transamerica Occidental Life Insurance Co. v. Aviation Office of America, Inc.*, 292 F.3d 384 (3d Cir. 2002), the Third Circuit affirmed the dismissal of a New Jersey action that it determined should have been brought as a compulsory counterclaim to a Texas suit. The court concluded that the New Jersey defendant, International Insurance Company ("IIC"), was an "opposing

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[28] Indeed, Section 8.13(b) of the SPA specifically gives Maxus the right to pursue litigation in the name of "any DSCC Company" against insurance carriers relating to any matter "for which [Maxus] has liability directly or pursuant to the provisions of this Agreement." (Pl. Ex. 46.)

[29] The *Transamerica* court does analogize to the related doctrine of res judicata or claim preclusion. *See Transamerica Occidental Life Ins. Co. v. Aviation Office of Am., Inc.*, 292 F.3d 384, 391 (3d Cir. 2002). In a statement quoted by Plaintiffs (at 37), the court notes that "in the claim preclusion context, where an earlier lawsuit establishes the rights or liabilities of a party, both the named party and those in privity with it are bound by the holding." *Id.* Significantly, however, in both of the cases cited by the Third Circuit in support of this proposition, the named party—unlike OCC/DSCC here—was an active participant in the earlier action. *See CoreStates Bank, N.A. v. Huls Am., Inc.*, 176 F.3d 187, 193 (3d Cir. 1999); *Martino v. McDonald's Sys., Inc.*, 598 F.2d 1079, 1081 (7th Cir. 1979).

party" in the Texas case for purposes of Fed. R. Civ. P. 13(a). The named plaintiffs in the Texas action were two other insurance companies (North River and U.S. Fire), who had assigned to ICC the right to pursue their claims in that case, as well as the right to any recovery. The Texas defendant then brought suit in New Jersey against IIC, arguing that IIC was not an "opposing party" in the Texas case for purposes of Rule 13(a) because it was not a named party in that action. The Third Circuit rejected that argument, holding that "***by virtue of the assignment, the rights that are at stake in the Texas litigation are actually IIC's rights***, not North River or U.S. Fire's, and this is the reason why IIC is conducting the litigation in the Texas action." *Id.* at 392 (emphasis added). Even if this case could be extended outside of the Rule 13(a) context to suggest that ***IIC*** could be collaterally bound by a finding in the Texas case even though it was not a named party, *Transamerica* ***does not*** suggest that the ***assigning parties*** (*i.e.,* North River and U.S. Fire) who gave only their names to that case would be similarly bound in a later litigation against a different party. Rather, *Transamerica* indicates that they would ***not*** be so bound because it specifically concludes that the rights of North River and U.S. Fire were not at stake in that litigation because they had assigned those rights to IIC. Thus, that case actually supports the proposition that OCC is not bound here.

Moreover, the simple fact that Maxus may have shared certain interests with OCC in denying that intentional discharges occurred from the Lister Site does not change the fact that OCC was not permitted to pursue ***its own defense*** to those allegations in *Aetna*. Thus, New Jersey law clearly provides that OCC cannot be collaterally estopped by any findings in that case. *See Panniel v. Diaz*, 376 N.J. Super. 597, 620 (Law Div. 2004) (defendants in second action were not bound by causation ruling in prior arbitration against their insurance company even though they were in privity and shared common goals with insurer; "clear and convincing

need for a new determination" existed under Restatement § 28(5) because defendants could have employed different litigation strategies if they had been represented by their own counsel in the arbitration, including "compromising it in some fashion" rather than litigating it "to the hilt" and thus permitting arbitrator to make causation finding that "conceivably could have much broader effect in the third-party tort action.").

Accordingly, OCC—which was not represented by its own counsel in *Aetna*, played no role in the prosecution of that claim, and had no stake in the outcome—had ***no*** opportunity whatsoever to obtain a "full and fair adjudication" of the *Aetna* case, much less the type of "full and fair opportunity" that the principles of equity require. *See Rutgers Cas. Ins. Co. v. Dickerson*, 215 N.J. Super. 116, 121 (App. Div. 1987) ("[I]t remains essential that the party to be bound by the former adjudication have fair notice and be fairly represented in the prior proceeding.").

2. OCC had no incentive to participate in the *Aetna* litigation.

Even if OCC had retained authority to press its own case in *Aetna* (which it did not), it lacked any incentive to do so. If Maxus had prevailed in the declaratory judgment action, any insurance proceeds paid out as a result of that ruling would have gone to Maxus, which had paid all past losses relating to the Lister Site and was required by the SPA to indemnify OCC for all such future liabilities. In fact, Maxus' public statements regarding the *Aetna* litigation clearly demonstrate that the risks and potential rewards of that litigation belonged solely to Maxus. The day after Judge Stanton entered his order denying coverage for the environmental claims, Maxus issued a press release "respond[ing]" to that ruling and assuring the public and investors that "adequate reserves have been established to cover costs of the environmental cleanup at a former chemicals plant in Newark, New Jersey." (Ex. 46.) Soon thereafter, Maxus filed a Form 8-K with the SEC disclosing the ruling, which Maxus categorized as a "Materially Important

Event[]." (Ex. 47.) It issued another Form 8-K with that same categorization when the Appellate Division affirmed the Chancery Court. (Ex. 49.) It is highly unlikely that Maxus would have felt compelled to issue a press release and file two Form 8-Ks reporting the adverse decisions in *Aetna* if it were acting solely as an attorney-in-fact for OCC in that case and not for its own benefit. Indeed, in its 1996 10-K, Maxus made clear to the investing public that Maxus had "been conducting litigation against [the *Aetna*] insurers for declaratory judgments that ***it*** is entitled to coverage for certain of these claims." (Ex. 50 at 31 (emphasis added).) In none of these public statements did Maxus suggest that it was pursuing those claims as a mere representative of OCC. The fact that OCC's own public filings during the same time period contain no mention of the *Aetna* case confirms that Maxus—not OCC—was the party with a material interest in the results of the case.

In fact, OCC had no stake in the outcome of *Aetna* at all. Not only was Maxus entitled to receive all insurance proceeds relating to the Lister Site, but OCC had full contractual assurances from Maxus that OCC would never incur any losses relating to that site. OCC was fully indemnified in perpetuity by Maxus with respect to the Lister Site, and Section 12.11 of the SPA required Maxus to use its best efforts to have OCC released altogether from any future liability relating to that site. Thus, because the Lister Site liabilities were being paid regardless of whether insurance coverage existed, OCC lacked any incentive to join the fight regarding who—as between Maxus and the insurers—bore the ultimate responsibility for those payments. All that mattered to OCC was that it was not OCC.

Finally, even if OCC had theorized that a day could possibly come in which it could be held directly liable (without indemnification) for losses arising from pollution of the Passaic River, it had no reason to believe that a lawsuit in which Maxus was seeking insurance coverage

for damage to properties surrounding the Lister Site could be used 25 years later to establish as a matter of law that OCC was liable for intentional discharges into the Passaic River.

Because OCC had no incentive (nor even any contractual right) to play any role in the *Aetna* case, that case cannot preclude OCC from defending itself against Plaintiffs' claims in this action. *See Nogue v. Estate of Santiago*, 224 N.J. Super. 383, 389-90 (App. Div. 1988) (arbitration ruling establishing the negligence of an unknown driver and awarding uninsured motorist ("UM") benefits to passenger and estate of deceased driver did not collaterally estop passenger from attempting to establish negligence of deceased driver in civil action because, *inter alia*, the passenger had "little, if any, incentive" in the UM arbitration to attempt to establish deceased's negligence) (citing Restatement § 25(5)(c)).

* * *

The factual record thus overwhelmingly establishes that OCC had no right to control the *Aetna* litigation or to receive any benefits that might flow from it.[30] New Jersey law is clear that a party is not bound by a prior ruling unless it had ***both*** an opportunity and an incentive to obtain a "full and fair adjudication" of the issues in the prior action. Here, OCC had neither. Nor can Plaintiffs—who were not parties to *Aetna*—use that case as a basis for collateral estoppel since OCC lacked a "full and fair opportunity" to litigate it. Accordingly, collateral estoppel does not apply to establish against OCC that Old Diamond Shamrock intentionally discharged dioxin, DDT and other hazardous substances into the Passaic River.

[30] At the very least, these facts create a genuine issue of material fact as to whether OCC had an opportunity and incentive to litigate the issue in *Aetna*, thus precluding resolution of the question on a motion for partial summary judgment.

D. OCC Was Not A Party To Or In Privity With The Real Party In Interest In The *Aetna* Case.

Plaintiffs concede that they bear the burden of proving the five elements necessary to establish the applicability of collateral estoppel.[31] (Motion at 29.) Plaintiffs cannot meet this burden. To establish this, OCC need only discuss Requirement (5) and go no further. That requirement states it must be shown that "the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding."

Plaintiffs do not contend that OCC was a named party to *Aetna*. Indeed, it was not. Rather, Plaintiffs claim that because the *Aetna* trial occurred after DSCC had merged into OCC, "OCC was DSCC and the true plaintiff-in-interest" in that trial.[32] (Motion at 35.) As established in Part II above, Maxus succeeded to and "retained" all Old Diamond Shamrock liabilities related to the Lister Site. (*See* SPA § 12.11, Pl. Ex. 46.) Because the *Aetna* case involved a dispute regarding insurance coverage for liabilities retained by Maxus, OCC similarly is not the successor for purposes of that case. Moreover, as described above, DSCC de facto assigned the *Aetna* litigation to Maxus and gave Maxus the power to pursue that litigation in DSCC's name. Thus, there can be no realistic question that Maxus was the real party in interest in *Aetna* even after OCC acquired the stock of DSCC.

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[31] As shown above in Part III.B., these elements are:

(1) the issue to be precluded is identical to the issue decided in the prior proceeding;

(2) the issue was actually litigated in the prior proceeding;

(3) the court in the prior proceeding issued a final judgment on the merits;

(4) the determination of the issue was essential to the prior judgment; and

(5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding.

See First Union Nat'l Bank., 190 N.J. at 352; *Estate of Dawson*, 136 N.J. at 20; Restatement § 27.

[32] Plaintiffs are the only ones to suggest that OCC was a party to the *Aetna* case. There is no reference to OCC as a party in *Aetna* nor was OCC treated as such by the *Aetna* parties. (*See* Part III.A. above.)

As might be expected and as shown in Part III.C. above, OCC played no part whatsoever in the litigation of that case and had no incentive or contractual right to do so. Therefore, it was not the "true plaintiff-in-interest" in *Aetna* and cannot be bound by any findings in that case.

Plaintiffs also cannot show that OCC was in privity with Maxus in connection with its prosecution of *Aetna*. The New Jersey Supreme Court has recognized in *Zirger* that one person is in "privity" with another for purposes of collateral estoppel only "'when there is such an identification of interest between the two as to represent the same legal right . . . .'" *Zirger*, 144 N.J. at 339 (citation omitted) (ellipses in original). Here, as demonstrated above, OCC had no right to pursue anything in the *Aetna* litigation and no interest in its outcome. Thus, it was not in privity with Maxus for purposes of that case.

Finally, it should be noted that intent does not appear to be a necessary element of ***any*** of the causes of action that Plaintiffs assert against OCC.[33] Therefore, Plaintiffs may be seeking a finding of "intentional" discharges solely to lay the groundwork for a request for punitive damages and/or for lifting the cap on the statutory damages available under the Spill Act. Such a use of *Aetna* against OCC (who was not a party to the case and had no opportunity or incentive to participate in that action) would be highly improper and trigger serious fairness concerns, especially where Plaintiffs did not state such an intended use in their Motion. Moreover, OCC cannot be held liable for punitive damages or statutory penalties at all because it is only a successor to DSCC. The New Jersey Supreme Court has recognized that "it would be unfair to impose punitive damages on a successor" unless either (1) "the successor's independent action provides a basis" for such damages or (2) the successor is "'sufficiently connected to the culpable conduct.'" *Lefever*, 160 N.J. at 326 n.4 (quoting *Brotherton v. Celotex Corp.*, 202 N.J.

[33] In their Third Amended Complaint, Plaintiffs assert claims against OCC under the New Jersey Spill Compensation and Control Act (¶¶ 94-102) and the New Jersey Water Pollution Control Act (¶¶103-09), as well as causes of action for Public Nuisance (¶¶ 110-18), Trespass (¶¶ 119-22), and Strict Liability (¶¶ 123-26).

Super. 148, 157 (Law Div. 1985)); *see Baker v. Nat'l State Bank*, 161 N.J. 220, 228 n.1 (1999) (quoting this language from *Lefever* and *Brotherton*). Old Diamond Shamrock's plant on the Lister Site was shut down in 1969—seventeen years before OCC acquired DSCC. Because OCC had no connection to the allegedly culpable conduct that occurred at that site, there is simply no basis for "punishing" OCC through the imposition of punitive damages or statutory penalties in this action.

* * *

In the end, "the doctrine of collateral estoppel is essentially one of fairness." *Barker v. Brinegar*, 346 N.J. Super. 558, 568 (App. Div. 2002). Plaintiffs argue that principles of fairness weigh in favor of collateral estoppel here because:

> There are no other compelling circumstances that would support the dedication of scarce judicial resources to the relitigation of a fact that was determined in the course of a full-blown trial before a New Jersey Superior Court Judge and affirmed by the Appellate Division. Litigation that occurred from 1984 to 1988 is intrinsically superior to any litigation that could occur now because eye-witnesses to the plant operations testified in depositions and at trial regarding their own actions and observations at the Lister Plant. Nothing is to be gained by recalling those who would still be available a quarter-century later to tell the same story again. In fact, it is the public and Plaintiffs who would be unfairly prejudiced if this issue -- now decades old -- had to be relitigated.

(Motion at 41-42.) This argument merely begs the question as to why Plaintiffs did not file this action years earlier. In fact, the Motion (at 39) notes that the then-Deputy Commissioner of the NJDEP testified in the *Aetna* trial that his agency had reserved the right to assert these types of claims. Thus, although the NJDEP clearly was aware of the potential basis for these claims at that time, it waited at least 17 years before even filing this case. Plaintiffs are responsible for the decision to bring this action approximately 40 years after the relevant conduct. Thus, Plaintiffs' assertion that ***they*** would be unfairly prejudiced if now forced to prove their claims through the

introduction of actual evidence at trial rings hollow. Instead, ***it is OCC that would be unfairly prejudiced*** if it were bound by testimony and findings from an insurance coverage dispute that occurred 25 years ago in which OCC had no opportunity or incentive to participate. Accordingly, Plaintiffs' motion for partial summary judgment on the basis of collateral estoppel should be denied.

CONCLUSION

In their Motion, Plaintiffs seek a finding of liability against OCC without permitting OCC a full and fair opportunity for fact and expert discovery. Although Plaintiffs' frustration with the pace of this litigation is apparent, it cannot and does not justify a literal "rush to judgment" against OCC. Therefore, OCC respectfully submits that the Court should deny Plaintiffs' Motion for Partial Summary Judgment against OCC in its entirety.

Respectfully Submitted,

ROBERT T. LEHMAN

June 24, 2011

Robert T. Lehman, Esq.
Phil Cha, Esq.
Lindsay A. Wagner, Esq.
ARCHER & GREINER
A Professional Corporation
One Centennial Square
P.O. Box 3000
Haddonfield, NJ 08033-0968
(856) 795-2121

Oliver S. Howard, Esq.
David L. Bryant, Esq.
Amelia A. Fogleman, Esq.
GABLE & GOTWALS
1100 ONEOK Plaza
100 West Fifth Street

Tulsa, OK 74103-4217
(918) 595-4490

Attorneys for Defendant Occidental Chemical Corporation

6869876v1

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of Defendant Occidental Chemical Corporation's Opposition To Plaintiffs' Motion For Partial Summary Judgment were served upon the following as follows:

Honorable Marina Corodemus, J.S.C. (Ret.)
Corodemus & Corodemus Law, LLC
120 Wood Avenue South – Suite 500
Iselin, New Jersey 08830
(via hand delivery and e-mail)

Michael Gordon, Esq.
Gordon & Gordon, P.C.
505 Morris Ave.
Springfield, NJ 07081
(via hand delivery & e-mail)

William J. Jackson, Esq.
Jackson Gilmour & Dobbs, P.C.
3900 Essex Lane, Suite 700
Houston, TX 77027
Counsel for Plaintiffs New Jersey Department of Environmental Protection, et al.
(via regular mail & e-mail)

William L. Warren, Esq.
Drinker Biddle & Reath LLP
105 College Road East, Suite 300
Princeton, NJ 08452
Counsel for Defendants Maxus Energy Corp. & Tierra Solutions, Inc.
(via regular mail and e-mail)

Andrew A. Kassof, Esq.
Kirkland & Ellis LLP
300 North LaSalle
Chicago, IL 60654
(via regular mail & e-mail)

Mark H. Sobel, Esq.
Greenbaum, Rowe, Smith & Davis LLP
75 Livingston Avenue, Suite 301

Roseland, NJ 07068-3701
(via regular mail & e-mail)
Counsel for Repsol YPF, S.A., YPF, S.A., YPF Holdings, Inc. YPF International S.A. & CLH Holdings

Richard J. Dewland, Esq.
Coffey & Associates
465 South Street
Morristown, NJ 07960
Counsel for Borough of Hasbrouck Heights
(via regular mail)

John P. McGovern, Esq.
Assistance City Attorney
City of Orange Township
29 North Day Street
Orange, NJ 07050
Counsel for City of Orange
(via regular mail)

Frank G. Capece, Esq.
Garrubbo, Capece, & Millman
53 Cardinal Drive
Westfield, NJ 07090
Counsel for Township of Winfield Park
(via regular mail)

All parties which have consented to service by posting on https://cvg.ctsummation.com consistent with Case Management Order XIII.
(via CT Summation)

Date: June 24, 2011

Robert T. Lehman, Esquire

ARCHER & GREINER
A Professional Corporation
One Centennial Square
P.O. Box 3000
Haddonfield, NJ 08033-0968
(856) 795-2121

BY: ROBERT T. LEHMAN, ESQUIRE

GABLE & GOTWALS
1100 ONEOK Plaza
100 West Fifth Street
Tulsa, OK 74103-4217
(918) 595-4990

BY: OLIVER S. HOWARD, ESQUIRE
DAVID L. BRYANT, ESQUIRE

Attorneys for Defendant Occidental Chemical Corporation

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE COMMISSIONER OF THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION and THE ADMINISTRATOR OF THE NEW JERSEY SPILL COMPENSATION FUND, Plaintiffs, v. OCCIDENTAL CHEMICAL CORPORATION, TIERRA SOLUTIONS, INC., MAXUS ENERGY CORPORATION, MAXUS INTERNATIONAL ENERGY COMPANY, REPSOL YPF, S.A., YPF, S.A., YPF HOLDINGS, INC., YPF INTERNATIONAL S.A. (f/k/a YPF INTERNATIONAL LTD.) AND CLH HOLDINGS, INC., Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION - ESSEX COUNTY DOCKET NO.: L-009868-05 (PASR) Civil Action **ORDER DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST OCCIDENTAL CHEMICAL CORPORATION**

THIS MATTER having come before the Court on the Motion of Marc-Philip Ferzan, Acting Attorney General; and Jackson Gilmour & Dobbs P.C. and Gordon & Gordon, P.C., Special Counsel to the Attorney General; attorneys for Plaintiffs, the New Jersey Department of Environmental Protection, and Administrator of the New Jersey Spill Compensation Fund ("Plaintiffs"); and having been opposed by Defendant Occidental Chemical Corporation, by and through its attorneys Archer & Greiner, P.C. and Gable & Gotwals; and the Court having considered the parties' submissions and arguments; and for good cause having been shown;

IT IS on this ___ day of _____, 2011 **ORDERED** that:

1. Plaintiffs' Motion for Partial Summary Judgment on Count I of Plaintiffs' Third-Amended Complaint against Defendant Occidental Chemical Corporation, Inc. is hereby **DENIED**;

2. Plaintiffs' Motion to conclusively establish the findings of fact of the Superior Court in *Diamond Shamrock Chems. Co. v. Aetna Cas. & Sur. Co.*, Docket No. C-3939-84, Superior Court of New Jersey, Chancery Division, is **DENIED** as to Defendant Occidental Chemical Corporation; and

3. Based on the consent of the parties, the Court finds that there were discharges of hazardous substances from 80 Lister Avenue, Newark New Jersey, into the Passaic River in the 1950s and 1960s.

A copy of this Order is to be served on all counsel of record within seven (7) days of receipt.

_____

J.S.C.

_____ Opposed
_____ Unopposed