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NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION and THE ADMINISTRATOR OF THE NEW JERSEY SPILL COMPENSATION FUND,

Plaintiffs,

v.

OCCIDENTAL CHEMICAL CORPORATION, TIERRA SOLUTIONS, INC., MAXUS ENERGY CORPORATION, MAXUS INTERNATIONAL ENERGY COMPANY, REPSOL YPF, S.A., YPF, S.A., YPF HOLDINGS, INC., YPF INTERNATIONAL S.A. (f/k/a YPF INTERNATIONAL LTD.) and CLH HOLDINGS,

Defendants.

MAXUS ENERGY CORPORATION AND TIERRA SOLUTIONS, INC.,

Third-Party Plaintiffs,

v.

3M COMPANY, et al.,

Third-Party Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - ESSEX COUNTY
DOCKET NO. ESX-L9868-05 (PASR)

Civil Action

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST TIERRA SOLUTIONS, INC.

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Plaintiffs, the New Jersey Department of Environmental Protection ("DEP"), the Commissioner of the DEP ("Commissioner") and the Administrator of the New Jersey Spill Compensation Fund ("Administrator") (collectively, "Plaintiffs"), file this Brief in support of their Motion for Partial Summary Judgment ("Brief") against Defendant Tierra Solutions, Inc. ("Tierra"). Contemporaneously, Plaintiffs have filed a separate brief in support of their Motion for Partial Summary Judgment against Defendants Occidental Chemical Corporation ("OCC") and Maxus Energy Corporation ("Maxus").

PRELIMINARY STATEMENT

The Legislature expressly recognized that "discharges of toxic chemicals dating back to early industrialization have left a legacy of contaminated industrial property in this State[.]" N.J.S.A. 13:1K-7. In response, the Legislature passed, among others, the Spill Compensation and Control Act of 1976, N.J.S.A. 58:10-23.11, et seq. (the "Spill Act"). Over the years, the Spill Act has become an integral component of a comprehensive series of statutes that represent an articulation of the basic policy that past industrial pollution must be cleaned up, but that the cost burden of remediation should not be borne by the taxpayer. Instead, the cost of cleaning up New Jersey's industrial pollution should be imposed on a class of persons deemed "responsible" by the Legislature. Initially, under the Spill Act, the cost burden was imposed only upon the "discharger" of a hazardous substance. But a series of interrelated enactments over several decades cast an ever-wider strict liability net upon persons "in any way responsible" for hazardous substances discharged. Those persons include operators of industrial facilities that were to be sold or shut down, sellers of property where discharges had taken place, and purchasers of contaminated property who failed to exercise environmental due diligence and are not eligible to assert the statutory "innocent purchaser" defense.

In furtherance of their statutory duty overseeing the cleanup of historic pollution, Plaintiffs brought this action against a discrete group of defendants. These defendants – OCC, Maxus and Tierra, in particular – are all associated with the "Lister Plant," a former pesticides plant in Newark, from which dioxin, DDT and other hazardous substances were routinely and intentionally discharged for decades into the Passaic River. Plaintiffs moved for partial summary judgment against OCC, as the direct successor by merger to Diamond Shamrock Chemicals Company ("DSCC"), the operator of the Lister Plant and discharger of hazardous substances.

In this Brief, Plaintiffs move for partial summary judgment against Tierra, the current owner of the Lister Plant site. The Spill Act imposes strict, joint and several liability on a person that acquired contaminated property before September 14, 1993 for all costs of cleanup and removal, unless the person can demonstrate that it is an "innocent purchaser" of the property by satisfying the requirements of N.J.S.A. 58:10-23.11g(d)(5). To qualify for the innocent purchaser defense, a defendant must show that it: (i) acquired the property after a discharge of hazardous substances occurred; (ii) did not know or have reason to know that hazardous substances had been discharged at the property; (iii) is not a discharger or in any way responsible for a hazardous substance discharged at the property; and (iv) gave notice of the discharge to DEP. N.J.S.A. 58:10-23.11g(d)(5).

Tierra's admissions and pleadings clearly demonstrate that it acquired the Lister Plant site in August 1986 with knowledge that discharges of hazardous substances, including dioxin and DDT, had occurred at the property and into the Passaic River. Indeed, Tierra admits that it acquired the Lister Plant site from DSCC for the purpose of facilitating remedial activities at the site. Accordingly, in this Brief, Plaintiffs demonstrate that there is no genuine issue as to any material fact and that Plaintiffs are entitled to a judgment establishing as a matter of law that:

(1) Tierra is the owner of property on and from which hazardous substances were discharged;

(2) Tierra does not meet the requirements for safe harbor under the Spill Act's "innocent purchaser" defense; and, therefore,

(3) Tierra is strictly, jointly and severally liable to Plaintiffs for all cleanup and removal costs as a person "in any way responsible" for the hazardous substances discharged at and from the Lister Plant.

Plaintiffs respectfully request that this Court grant Plaintiffs' Motion for Partial Summary Judgment and enter an order of judgment against Tierra, jointly and severally, for all of Plaintiffs' past and future cleanup and removal costs associated with discharges of hazardous substances from the Lister Plant.

FACTUAL SUMMARY

Pursuant to R. 4:46-2(a), Plaintiffs have submitted a common Statement of Undisputed Material Facts ("Statement of Facts") as to which Plaintiffs contend there is no genuine issue. Plaintiffs hereby incorporate by reference their Statement of Facts for all purposes. In addition, Plaintiffs provide a summary of those undisputed material facts particularly relevant to this Brief immediately below.

A. For Decades, Dioxin, DDT and Other Hazardous Substances Were Systematically and Intentionally Discharged from the Lister Plant Into the Passaic River.

From 1951 until 1969, DSCC and its predecessors owned and operated the Lister Plant in Newark. During the course of manufacturing operations, for nearly two decades, DSCC routinely and intentionally disposed of its waste chemical effluent and "off-spec" products directly into the Passaic River. That effluent and product included many hazardous substances, including dioxin and DDT.

The contamination resulting from Lister Plant operations is notorious in New Jersey. The fact that discharges occurred and that they were intentional was decided by Superior Court Judge

Reginald Stanton and affirmed by the Appellate Division. See Diamond Shamrock Chems. Co. v. Aetna Cas. & Sur. Co., 258 N.J. Super. 167 (App. Div. 1992) ("Aetna"). Testimony from the Aetna case, as well as the trial court's findings of fact, describe in detail the activities of a rare corporate citizen: one that both undertook a "deliberate course of pollution [constituting] intentional conduct" and one that had the "subjective knowledge of harm" posed by the dioxin in its discharges. Aetna, supra, 258 N.J. Super. at 215-16; Statement of Facts at ¶¶ 1 – 34.

B. After the Discovery of Dioxin at the Lister Plant, Tierra – a Maxus Subsidiary – Purchased the Lister Plant Site to Facilitate Remedial Activities.

In 1983, environmental agencies discovered that the Lister Plant was the source of massive dioxin contamination, prompting then-Governor Kean to issue Executive Order 40, which declared a state of emergency and required immediate response actions. As a result, DEP began taking samples from areas surrounding the Lister Plant, including the Passaic River. The sampling results caused the then-Commissioner of DEP to issue a fish consumption advisory prohibiting "the consumption of fish and shellfish taken from that portion of the Passaic River" adjacent to the Lister Plant site due to dioxin. Soon thereafter, in September 1984, the Lister Plant site was added to the United States Environmental Protection Agency's ("USEPA") Superfund National Priorities List and was designated the "Diamond Alkali Superfund Site."

In January 1986, DSCC – then a wholly-owned subsidiary of Diamond Shamrock Corporation (n/k/a Maxus) – re-acquired title to the Lister Plant site. At that time, DSCC was undertaking remedial measures at the Lister Plant site under the supervision of DEP. On March 21, 1986, Maxus created Diamond Shamrock Process Chemicals, Inc. n/k/a Tierra. On August 28, 1986, for the consideration of $10.00, Tierra acquired from DSCC title to the Lister Plant site. In September 1986, Maxus sold the stock of DSCC to OCC, and, in the Stock Purchase Agreement ("SPA"), Maxus agreed to indemnify OCC for Lister Plant-related liabilities.

In its pleadings, Tierra admits that it is the current owner of 80 Lister Avenue and that the purpose of its obtaining title was to "facilitate continued environmental response actions after the 1986 SPA." Maxus and Tierra's Answer at 12 ¶ 35. Similarly, Tierra admits that at the time it acquired title, it "had knowledge of the presence of some hazardous substances on the Lister Site[,]" and it "knew that the State had already asserted that alleged discharges of certain hazardous substances had occurred in the past at the Lister Site and that some previously discharged substances had subsequently migrated and/or were threatening to migrate off-site." Ibid.; Response to Admissions, Exhibit 69 at 18 ¶ 1; Statement of Facts at ¶¶ 46 – 52.

C. Tierra Assumed Maxus's Indemnity Obligations to OCC, Signaling Its Clear Understanding of Its Liability Under the Spill Act.

On August 14, 1996, Maxus and Tierra entered into an "Assumption Agreement," whereby Tierra, a Maxus affiliate, agreed to assume some of Maxus's environmental liabilities, including those covered under the 1986 SPA. Exhibit 71 at MAXUS0105856 ¶ 10 ("[Tierra] hereby assumes and undertakes to pay . . . the debts, liabilities, obligations and commitments . . . set forth below to the extent that Maxus . . . is or may become liable "); see also Exhibit 70 at MAXUS018146 ¶¶ 12-13. Moreover, like Maxus, Tierra has taken an active role in implementing remedial measures at the Lister Plant:

> [OCC] and Tierra represent that pursuant to a 1986 stock transaction, the corporation now named [Maxus] indemnified [OCC] for (among other things) environmental liabilities arising from ownership and/or operation of 80 and 120 Lister Avenue by [DSCC] or its predecessors in interest. [OCC] and Tierra represent further that, in 1996, Tierra (then known as Chemical Land Holdings, Inc.) agreed by contract with Maxus to perform the indemnification responsibilities that Maxus owes [OCC]. [Exhibit 2 at MAXUS1355009 ¶ 5].

Thus, as admitted by Tierra, Maxus agreed to indemnify OCC for Lister Plant liabilities, and Tierra assumed those liabilities.

APPLICABLE LEGAL STANDARD

A court may grant summary judgment where no genuine issue of material fact exists:

> The judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. [R. 4:46-2(c).]

When determining whether a genuine issue of material fact exists, a court is to "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co., 142 N.J. 520, 540 (1995).

Plaintiffs seek partial summary judgment, as provided for by R. 4:46-1. "A party seeking any affirmative relief may, at any time after the expiration of 35 days from the service of the pleading claiming such relief, move for a summary judgment or order on all or any part thereof or as to any defense." R. 4:46-1. When the summary judgment requested does not entirely dispose of the case, the court is to determine which facts have been determined by the partial judgment and make an order specifying those facts, which are then deemed established. R. 4:46-3(a).[1] Thus, the court can render partial summary judgment on any issue, reserving the remaining issues for trial.

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[1] 4:46-3. Case Not Adjudicated on Motion

> (a) Order Limiting Factual Controversy. If on motion under this rule judgment is not rendered upon the whole action or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall, if practicable, ascertain what material facts, including facts as to the amount of damages, exist without substantial controversy and shall thereupon make an order specifying those facts and directing such further proceedings in the action as are appropriate. Upon trial of the action the facts so specified shall be deemed established. [R. 4:46-3(a).]

ARGUMENT

POINT I

THE SPILL ACT IMPOSES STRICT, JOINT AND SEVERAL LIABILITY ON A PERSON IN ANY WAY RESPONSIBLE FOR A HAZARDOUS SUBSTANCE, INCLUDING PURCHASERS OF CONTAMINATED PROPERTY.

The Spill Act represents an evolving, "pioneering effort by government to provide the monies for a swift and sure response to environmental contamination." Buonviaggio v. Hillsborough Twp. Comm., 122 N.J. 5, 7 (N.J. 1991). At first, it streamlined traditional means of determining liability and "imposed strict liability on polluters." In re Adoption of N.J.A.C. 7:26E-1.13, 377 N.J. Super. 78, 86 (App. Div. 2005), aff'd 186 N.J. 81 (2006). Soon after its enactment in 1976, and with an increased awareness of the extent of toxic pollution in the State, the scope of the Spill Act's liability provision was expanded. Buonviaggio, supra, 122 N.J. at 9 ("The cruder threat of the spreading oil slick was displaced as the primary concern by the vastly more complex hazard posed by the unseen and unknown contamination of natural resources."). Joint and several liability was added to the Spill Act's strict liability scheme, and liable "persons" expanded from "dischargers" to those "in any way responsible" for hazardous substances. L. 1979, c. 346, § 5; see also In re Kimber, 110 N.J. 69, 88-89 (1988) (C.J. Wilentz, dissenting) ("The Legislature's decision to use unconventional remedies in the [Spill Act] was based on a valid perception that this state faces an enormous environmental problem and that a great deal of money will be required to address it.").

While the Legislature never defined the term "in any way responsible," it clearly intended the Spill Act "to be 'liberally construed to effect its purposes.'" Dep't of Envtl. Prot. v. Ventron Corp., 94 N.J. 473, 502 (1983). The Legislature's directive led the Supreme Court to conclude that "[a] party even remotely responsible for causing contamination will be deemed a responsible party under the Act." Kimber, supra, 110 N.J. at 85; see also Dep't of Envtl. Prot. v. Arlington

Warehouse, 203 N.J. Super. 9 (App. Div. 1985) (holding manufacturer retroactively liable under the Spill Act, not as a discharger, but because it contracted to store chemicals at a warehouse that were discharged as a result of a fire). Early court decisions construing the Spill Act's expanded liability provision, however, struggled with the scope of "in any way responsible." For instance, the Supreme Court in Ventron explained that "[t]he subsequent acquisition of land on which hazardous substances have been dumped may be insufficient to hold the owner responsible." Ventron, supra, 94 N.J. at 502 (emphasis added). Statutory enactments, Spill Act amendments and court decisions would eventually clarify the scope of that liability and demonstrate that Tierra, as a subsequent owner of contaminated property, is liable as a person "in any way responsible" under the Spill Act.

A. Later-Enacted Environmental Statutes and Spill Act Amendments Clarify the Scope of "In Any Way Responsible."

In the early 1980s, the Legislature determined that the Spill Act alone could not deal with the magnitude of New Jersey's industrial pollution in a timely manner. One problem was that Spill Act enforcement depended upon DEP's knowledge of a discharge. To facilitate enforcement, the Legislature developed reporting requirements, N.J.S.A. 58:10-23.11e, but those requirements still depended upon honest reporting by polluters. In addition, despite the Legislature's efforts to streamline liability determinations, enforcement and cost recovery proceedings did not result in the timely cleanup of the State's resources: "The seven years consumed in litigating [Ventron], and the discovery of dioxin at the [Lister Plant] site of Diamond Shamrock Corporation ten years after the closure of that site[,] alerted the Legislature to the need for a more expeditious administrative response." In re Adoption of N.J.A.C. 7:26B, 128 N.J. 442, 446 (1992).

Some relief came when the Legislature enacted the Environmental Cleanup and Responsibility Act of 1983, N.J.S.A. 13:1K-6, et seq. ("ECRA"). ECRA complemented the Spill Act by imposing a self-executing duty to remediate contaminated property on the current owner or operator at the time of an industrial property sale or facility closure:

> [T]he statute requires as a precondition to closure, sale, or transfer that the property of an "industrial establishment" be in an environmentally appropriate condition. Owners and operators can satisfy the precondition by submitting either a negative declaration or a cleanup plan. In brief, ECRA requires the owner or operator planning to close, sell, or transfer operations: (1) to notify the DEP within five days of its intention to engage in any of the triggering events; (2) on closure or within sixty days before the transfer or sale, to submit a cleanup plan or a "negative declaration" that there has been no hazardous discharge or that the discharge has been cleaned up; and (3) to obtain financial security guaranteeing performance of the cleanup plan.
>
> The purpose of these obligations is to assure the cleanup of property even if the current owner or operator is not responsible for the contamination. In this sense, the statute focuses on the environmental wrong, not the wrongdoer. Identification of the polluter plays no part in the ECRA process, which imposes a "self-executing duty to remediate." [In re Adoption of N.J.A.C. 7:26B, supra, 128 N.J. at 447 (emphasis added)].

See also Superior Air Prods. Co. v. NL Indus., Inc., 216 N.J. Super. 46, 62-63 (App. Div. 1987) (explaining purpose of ECRA).

After 1983, the duty to address hazardous waste contamination became a major component in every industrial real estate transaction or decision to close an industrial facility in New Jersey. DEP suddenly became involved in overseeing the cleanup of thousands of contaminated sites. Under the ECRA program, in less than a decade, DEP estimated that 1,759 industrial facility cleanups were completed or underway at an estimated cost of more than $478 million. In re Adoption of N.J.A.C. 7:26B, supra, 128 N.J. at 446. By 1994, DEP had compiled a list of some 21,000 sites with known or suspected contamination. Metex Corp. v. Fed. Ins. Co., 290 N.J. Super. 95, 111 (App. Div. 1996).

In 1993, the Legislature modified ECRA and the Spill Act with the passage of L. 1993, c. 139 (hereinafter, L. 1993, c. 139 will be referred to "S-1070," which was the Senate bill number of the law prior to its enactment). With S-1070, the Legislature added an "innocent purchaser" defense to Spill Act liability. According to that provision, persons who acquired property after September 14, 1993, and who established that they had no knowledge of a discharge of hazardous substances after the exercise of "due diligence," would not be liable under the Spill Act for cleanup and removal costs or any other damages. N.J.S.A. 58:10-23.11g(d)(2). But, as the Supreme Court noted in Marsh, the "defense [S-1070] created for innocent landowners was only 'new' in terms of explicit statutory expression." Marsh v. Dep't of Envtl. Prot., 152 N.J. 137, 148 n.2 (1997). In other words, the Supreme Court recognized that landowner liability for contaminated property pre-dated S-1070's enactment. In fact, landowner liability had been part of the Spill Act's liability scheme since 1979. Id. at 148.

The Legislature revisited the "innocent purchaser" defense in 2001. At that time, the Spill Act was again modified, and the safe harbor defense available to persons who unknowingly acquired contaminated property after September 14, 1993 was extended to persons who unknowingly acquired contaminated property before September 14, 1993:

> A person, including an owner or operator of a major facility, who owns real property acquired prior to September 14, 1993 on which there has been a discharge, shall not be liable for cleanup and removal costs or for any other damages . . . for the discharged hazardous substance . . . if that person can establish by a preponderance of the evidence that . . . :
>
> (a) the person acquired the real property after the discharge of that hazardous substance at the real property;
>
> (b) (i) at the time the person acquired the real property, the person did not know and had no reason to know that any hazardous substance had been discharged at the real property . . . . ;
>
> (c) the person did not discharge the hazardous substance, is not in any way responsible for the hazardous substance, and is not a corporate successor to the

> discharger or to any person in any way responsible for the hazardous substance or to anyone liable for cleanup and removal costs pursuant to this section;
>
> (d) the person gave notice of the discharge to the department upon actual discovery of that discharge.
>
> To establish that a person had no reason to know that any hazardous substance had been discharged for the purposes of this paragraph (5), the person must have undertaken, at the time of acquisition, all appropriate inquiry on the previous ownership and uses of the property based upon generally accepted good and customary standards. [N.J.S.A. 58:10-23.11g(d)(5)].

In the legislative history to the "2001 Amendment," the Senate Environmental Committee stated that the inclusion of the innocent purchaser defense "is not intended to change any liability that otherwise exists for persons who acquired contaminated property before September 14, 1993." Statement to SCR 2345, attached as Appendix A. In other words, purchasers of contaminated property, regardless of when the property was acquired, have been liable under the Spill Act since its liability provisions were broadened in 1979, unless they can establish all the elements of the defense. Marsh, supra, 152 N.J. at 148.

B. New Jersey Courts Have Confirmed Landowner Liability Under the Spill Act When the Landowner Cannot Satisfy the "Innocent Purchaser" Defense.

Since the 2001 Amendment was passed, the United States District Court for the District of New Jersey has twice confirmed that a party acquiring property – whether the acquisition occurred before or after S-1070's September 14, 1993 effective date – is liable pursuant to the Spill Act for discharges that occurred before the property's acquisition unless that party can establish the "innocent purchaser" defense. See Interfaith Cmty. Org. v. Honeywell Int'l Inc., 215 F. Supp. 2d 482, 505-08 (D.N.J. 2002) (denying summary judgment to defendant who acquired contaminated site after discharges ceased because, whether defendant acquired site before or after September 14, 1993, the Spill Act provides that all owners of contaminated property must comply with "certain requirements by a preponderance of the evidence to be

absolved from potential Spill Act liability"); Litgo New Jersey, Inc. v. Martin, 2010 WL 2400388 (D.N.J. June 10, 2010), modified on other grounds, 2011 WL 65933 (D.N.J. January 7, 2011).

In Litgo, District Judge Thompson held that the owner of a contaminated site on which a discharge occurred prior to its acquisition is strictly liable under the Spill Act unless all four conditions of the innocent purchaser defense are established. Litgo, supra, 2010 WL 2400388 at *34; N.J.S.A. 58:10-23.11g(d)(5). In that case, Goldstein was Litgo's sole shareholder. Litgo, supra, 2010 WL 2400388 at *18. Goldstein acquired a contaminated site in 1990 with knowledge that discharges of a hazardous substance, TCE, had occurred on the site. Id. at *15, 18. Goldstein transferred the property to Litgo the same year. Id. at *18. Imputing Goldstein's knowledge of discharges to Litgo, Judge Thompson concluded that "Litgo does not qualify for the narrow protection provided by the Spill Act to current owners of real property." Id. at *34; N.J.S.A. § 58:10-23.11g(d)(5)(b). Accordingly, Judge Thompson held Litgo "in any way responsible" for the hazardous substances discharged on the site. Litgo, supra, 2010 WL 2400388 at *34.

Although it was issued before the 2001 Amendment, the Supreme Court's decision in Marsh supports the notion that persons who acquire contaminated property are Spill Act liable parties, regardless of the date of acquisition. In Marsh, a plaintiff sought reimbursement from the Spill Fund after incurring cleanup and removal costs associated with property she inherited from her mother in 1991, eight years after ECRA but before the passage of S-1070 in June 1993. Marsh, supra, 152 N.J. at 140-41. The Appellate Division had denied her claim for reimbursement because it held she was liable under the Spill Act. Id. at 143. On appeal, the plaintiff argued that the Legislature's passage of S-1070 proved the absence of Spill Act liability.

Id. at 147-48. She argued that, because S-1070 contained an "innocent purchaser" defense from Spill Act liability for transactions after September 14, 1993, she had no duty to investigate for discharges at the time of her acquisition of the property before September 14, 1993. Id. at 147. In other words, the plaintiff argued that a person who acquired property before S-1070's enactment – without meeting S-1070's due diligence requirements – could not be found liable under the Spill Act for contamination caused by prior owners. Ibid. The Supreme Court rejected this argument:

> That interpretation would turn the law on its head. [The plaintiff's] contention that [S-1070] created a "prospective duty" on landowners, and that prior to its enactment no such duty existed, is flawed. [S-1070] did not impose a duty on landowners to inquire diligently into the condition of their property. Rather, it established a "new defense" to Spill Act liability for landowners who acquired their property after it had been contaminated and who could prove that they conducted such an investigation. [Id. at 147-48.]

Ultimately, the Supreme Court denied the plaintiff reimbursement from the Spill Fund because discharges occurred during the period of her ownership, making her an actual discharger. Id. at 146. Although deferring a ruling on the liability of a pre-S-1070 purchaser who failed to exercise environmental due diligence,[2] the Supreme Court unequivocally expressed its understanding of the Spill Act's reach to such persons:

> In effect, [the plaintiff] asks us to hold that because the innocent landowner defense did not exist when she received her property, she cannot be held liable, and therefore ineligible for Spill Fund reimbursement, under liability provisions that have been at the core of the Spill Act since 1979. . . . The addition of a prospective defense (that the claimant cannot satisfy) does not nullify the pre-existing operative provisions of a statute. [Id. at 148].

In sum, as the Legislature later made clear in 2001, an owner of contaminated property is "in any way responsible" pursuant to the "liability provisions that have been at the core of the Spill Act

[2] Id. at 147-48 n.2 ("We leave for another day the issue of whether a landowner who took title to her property before [S-1070's] enactment and who at that time had neither actual nor constructive knowledge of pre-existing contamination may be liable under the Spill Act for the cost of cleaning up that pre-existing pollution.").

since 1979," unless it can establish all of the elements of the innocent purchaser defense. See id.; N.J.S.A. 58:10-23.11g(d)(5).

C. Tierra's Reliance on the White Oak Funding Case Is Misplaced and Cannot Support Relief from Spill Act Liability.

As it has before, Tierra may rely on the Appellate Division's decision in White Oak Funding, Inc. v. Winning, 341 N.J. Super. 294 (App. Div. 2001), in an attempt to avoid Spill Act liability for its ownership of the Lister Plant site. See Maxus and Tierra's Brief in Support of Motion to Dismiss. Such reliance would be misplaced. If White Oak was ever good law – which, according to the Supreme Court in Marsh, it was not – White Oak was abrogated with the Legislature's passage of the 2001 Amendment of the Spill Act only one week after the White Oak decision was issued.

White Oak involved a succession of owners and operators of a single contaminated site. From 1976 until 1983, George Winning operated a fuel oil distribution business, during which time discharges at the site occurred. White Oak, supra, 341 N.J. Super. at 296-97. In 1983, Winning sold the property to the Scarboroughs, who operated a photocopy service for three years before selling the property to Thomas Page. Id. at 297. Page, a florist, later declared bankruptcy. Ibid. The plaintiffs purchased the property in a tax sale, at which time they discovered the property was contaminated. Ibid. The plaintiffs sued Winning and the Scarboroughs to recover cleanup and removal costs. Id. at 296.

The Scarboroughs argued that they were not liable under the Spill Act because they had neither discharged hazardous substances nor owned the property at the time of a discharge. Finding no evidence of actual discharges by the Scarboroughs, the court considered whether the Scarboroughs were persons "in any way responsible" for the hazardous substances on the site, based upon evidence that the Scarboroughs knew about Winning's past operations. Id. at 298-

301. Instead of examining whether the failure to exercise environmental due diligence made the Scarboroughs "in any way responsible," the court found that liability under the Spill Act required that "the person must be in any way responsible for the discharge that caused the contamination[.]" Id. at 301 (emphasis in original).

Citing Marsh, the White Oak court acknowledged that, for properties purchased after September 14, 1993 and the enactment of S-1070, the responsibility to investigate for hazardous substances was a condition of being absolved from Spill Act liability. Id. at 302 n.3 (noting that S-1070 "established a 'new defense' to Spill Act liability for landowners who acquired their property after it had been contaminated and who could prove that they conducted such an investigation"). But the Scarboroughs had purchased the site in 1983, before S-1070's enactment: "In this pre-[S-1070] situation, neither lack of due diligence . . . nor the other circumstances advanced by plaintiff bring the Scarboroughs within the ambit of the Spill Act's 'in any way responsible' provision." Id. at 301.

The White Oak court never provided a basis for differentiating acquisitions of contaminated properties before September 14, 1993 from acquisitions that occurred after that date. In fact, the court altogether ignored the Supreme Court's instruction in Marsh that S-1070's "innocent purchaser" defense did not nullify the "pre-existing operative provisions" of the Spill Act, which established ownership liability in 1979. Marsh, supra, 152 N.J. at 148. Accordingly, White Oak was wrongly decided.

Moreover, the Appellate Division was handicapped in reaching its decision by the failure of any of the parties to bring to its attention that legislation had already been introduced that would have clarified the very issue before the court. On June 11, 2001, while the White Oak case was pending in the Appellate Division, the Senate Environmental Committee introduced a

provision to an existing bill that would provide an "innocent purchaser" defense to persons who acquired contaminated property before September 14, 1993. See Appendix A. The accompanying statement made clear that the Senate viewed the provision as ensuring that those who did not conduct proper due diligence in making property purchases before September 14, 1993 would continue to be liable under the Spill Act: "The substitute is intended to provide a defense to liability for only those persons who purchased contaminated property before September 14, 1993 and, after appropriate inquiry, did not know and had no reason to know that the property was contaminated." Id. at 2 ¶ 1.

On July 13, 2001, less than one week after White Oak was decided, L. 2001, c. 154 § 2, was approved, creating an "innocent purchaser" defense to Spill Act liability for real property acquired before S-1070's effective date part of the Spill Act. N.J.S.A. 58:10-23.11g(d)(5). According to the Senate, the statute was "not intended to change any liability that otherwise exists for persons who acquired contaminated property before September 14, 1993." Appendix A at 2 ¶ 1. In other words, the 2001 Amendment did not establish new liability, it established a new defense and merely clarified Spill Act liability.

Given the Appellate Division's recognition of landowner liability under the Spill Act for acquisitions occurring after September 14, 1993, it is clear that the White Oak decision would have been decided differently had the 2001 Amendment been enacted earlier. In fact, the federal district court in Interfaith Cmty. Org. had relied on White Oak in granting summary judgment to a pre-S-1070 landowner who had not conducted environmental due diligence, only to reconsider its ruling once the 2001 Amendment was brought to its attention. Interfaith Cmty. Org. v. Honeywell Int'l Inc., 204 F.Supp.2d 804, 815 (D.N.J. 2002), rev'd by, Interfaith Cmty. Org., supra, 215 F. Supp.2d at 508 ("This Court also finds that a factual dispute exists as to whether

Roned-JC has met all of the requirements imposed upon pre-September 14, 1993 owners of contaminated real property as set forth in N.J. Stat. Ann. § 58:10- 23.11g(d)(5).").

Accordingly, it is clear that owners of contaminated sites in New Jersey are liable pursuant to the Spill Act, unless they can establish the conditions required of an "innocent purchaser," regardless of whether acquisition of the site occurred before or after September 14, 1993. In this case, Tierra cannot establish the innocent purchaser defense and even admits that it was not an innocent purchaser in its acquisition of the Lister Plant site.

POINT II

AS THE KNOWING PURCHASER OF CONTAMINATED PROPERTY TIERRA IS A SPILL ACT LIABLE PARTY THAT CANNOT QUALIFY FOR THE "INNOCENT PURCHASER" DEFENSE.

Tierra acquired the Lister Plant site from DSCC in 1986, some three years after the passage of ECRA, with the full understanding that, by virtue of that acquisition, it would be a party "in any way responsible" for the hazardous substances discharged at and from the site. The Legislature's passage of the 2001 Amendment establishing an "innocent purchaser" defense for transactions occurring before September 14, 1993 only clarified Tierra's status as a person "in any way responsible" under the Spill Act. Indeed, Tierra not only knew of the previous discharges at and from the Lister Plant site, but the purpose of its acquisition was to facilitate remedial measures necessitated by those discharges.

A. Tierra Owns the Lister Plant Site On Which and From Which Discharges of Hazardous Substances Occurred.

Tierra – a Delaware corporation doing business in New Jersey and a "person" within the meaning of the Spill Act – currently owns 80 Lister Avenue, the former location of the Lister Plant. Maxus and Tierra's Answer at 4 ¶ 14; at 12 ¶ 35 (admitting that Tierra "had knowledge of

the presence of some hazardous substances on the Lister Site at the time it acquired such property and that Tierra continues to own the Lister Site today.").

There is no dispute that DSCC discharged dioxin, DDT and other hazardous substances at the Lister Plant and from the Lister Plant into the Passaic River over the course of decades. Statement of Facts at ¶¶ 4 – 32. DSCC sought insurance coverage for claims related to its discharges, and DSCC's employees and its expert testified extensively that dioxin, DDT and other hazardous substances were discharged at and from the Lister Plant both as the result of accidental spills and intentional releases. Id. at ¶¶ 4 – 15. In its appellate briefing, DSCC even admitted that discharges of dioxin and other wastes from the Lister Plant into the Passaic River occurred. Id. at ¶¶ 16 – 17. Accordingly, there can be no credible dispute that discharges of hazardous substances occurred at and from the Lister Plant. Id. at ¶¶ 4 – 32; Brief in Support of Plaintiffs' Motion for Partial Summary Judgment Against OCC and Maxus at 3 – 8, which Plaintiffs hereby incorporate by reference.

As the owner of a site on which hazardous substances were previously discharged, Tierra is strictly, jointly and severally liable under the Spill Act unless it can demonstrate, by a preponderance of the evidence, that all four conditions listed in N.J.S.A. 58:10-23.11g(d)(5) apply to its acquisition of the property.

B. Tierra Cannot Establish the Necessary Elements of the "Innocent Purchaser" Defense to Avoid Spill Act Liability.

To establish its status as an innocent purchaser, Tierra must prove the following:

(1) The discharges occurred before Tierra's acquisition;

(2) Tierra neither knew, nor had reason to know, that hazardous substances had been discharged at the site;

(3) Tierra did not discharge the hazardous substances, is not in any way responsible for the hazardous substances, and is not the corporate successor to any person liable for cleanup and removal costs pursuant to the Spill Act; and

(4) Tierra notified DEP of the discharges upon their discovery.

N.J.S.A. 58:10-23.11g(d)(5). Tierra cannot establish the defense, because it knew that hazardous substances were discharged at or from the Lister Plant at the time of its acquisition of the site.[3]

On August 28, 1986, Tierra acquired title to 80 and 120 Lister Avenue, which included the former location of the Lister Plant. Exhibit 65; Exhibit 66; OCC's Amended Cross-Claims at ¶ 10; Maxus and Tierra's Answer to Amended Cross-Claims at ¶ 10. By that time, dioxin contamination at and from the Lister Plant was well-known to Tierra and throughout New Jersey. For instance,

- Tierra's one-time affiliate, DSCC, who sold the Lister Plant property to Tierra for $10.00, had intentionally discharged dioxin, DDT and other hazardous substances for nearly two decades during the time it operated the Lister Plant. Statement of Facts at ¶¶ 4 – 32.

- In 1983, environmental agencies discovered that the Lister Plant was the source of massive dioxin contamination of the Newark area, prompting then-New Jersey Governor Thomas Kean to issue Executive Order 40. Exhibit 6 at NJDEP0051857; Exhibit 7 at NJDEP00112133. Executive Order 40 required DEP to take emergency measures with respect to dioxin contamination emanating from the Lister Plant site.

- Later in 1983, in response to Executive Order 40, the then-Commissioner of DEP issued administrative orders prohibiting the consumption of fish and shellfish from parts of the Passaic River adjacent to the Lister Plant after testing revealed high dioxin concentrations in them. These administrative orders identified the Lister Plant as the source of dioxin contamination. Exhibit 8; Exhibit 9 at NJDEP00113027 ¶ 1. In March 1984, DEP directed DSCC to remediate the dioxin and other contamination at the Lister Plant site. Exhibit 10.

- In September 1984, the Lister Plant site was added to USEPA's Superfund National Priorities List and was designated the "Diamond Alkali Superfund Site." Exhibit 96.

[3] Tierra also cannot establish the first or third conditions of the innocent purchaser defense to Spill Act liability. For purposes of this Brief, Plaintiffs are entitled to summary judgment based on Tierra's own admissions that it was aware of discharges on the Lister Plant site at the time of its acquisition. In other words, this Brief focuses on the second element of the innocent purchaser defense. Plaintiffs do not concede that Tierra can establish any other element, and Plaintiffs expressly reserve their rights to challenge those elements if necessary.

- Also in September 1984, DSCC filed the Aetna case, seeking to establish insurance coverage for cleanup and removal costs associated with its discharges at and from the Lister Plant. Exhibit 11.

Accordingly, at the time of its acquisition, Tierra not only knew that hazardous substances had been discharged at and from the Lister Plant site, Tierra knew that environmental liability had already attached to the Lister Plant site. DSCC, Tierra's then-affiliate, had already executed consent orders concerning the Lister Plant, and Tierra's acquisition of the Lister Plant site was meant to allow Tierra to control remediation of the property after the stock of DSCC was sold to OCC pursuant to the pending SPA. Tierra's answer in this litigation explicitly admits that Tierra acquired title to the Lister Plant site "to facilitate continued environmental response actions after the 1986 SPA. . . ." Maxus and Tierra's Answer at 12 ¶ 35. Similarly, Tierra admits that at the time it acquired title to the Lister Plant site, it "had knowledge of the presence of some hazardous substances on the Lister Site[,]" and it "knew that the State had already asserted that alleged discharges of certain hazardous substances had occurred in the past at the Lister Site and that some previously discharged substances had subsequently migrated and/or were threatening to migrate off-site." Ibid.; Response to Admissions, Exhibit 69 at 18 ¶ 1.

Tierra's admissions establish as a matter of law that Tierra is a Spill Act liable party and cannot establish the "innocent purchaser" defense provided by N.J.S.A. 58:10-23.11g(d)(5). Plaintiffs are, therefore, entitled to summary judgment that Tierra is strictly, jointly and severally liable for all past and future cleanup and removal costs associated with discharges of hazardous substances at and from the Lister Plant.

CONCLUSION

Plaintiffs respectfully submit that there is no genuine issue as to any material fact and that they are entitled to partial summary judgment as a matter of law that Tierra is liable under the Spill Act for all past and future cleanup and removal costs associated with discharges of hazardous substances from the Lister Plant. Plaintiffs respectfully request that, pursuant to R. 4:46-3, the Court enter an order accordingly and set the remaining issues for trial.

Respectfully submitted,

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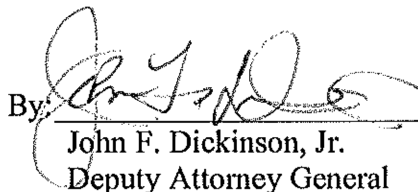

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APPENDIX A

SENATE ENVIRONMENT COMMITTEE

STATEMENT TO

SENATE COMMITTEE SUBSTITUTE FOR **SENATE, No. 2345**

STATE OF NEW JERSEY

DATED: JUNE 11, 2001

The Senate Environment Committee reports favorably a committee substitute for Senate Bill No. 2345.

This committee substitute would make several changes to the laws concerning the cleanup of contaminated sites. First, the committee substitute would provide a new "innocent party" defense to liability under the "Spill Compensation and Control Act," P.L.1976, c.141 (C.58:10-23.11 et seq.). The substitute would also clarify that "remediation" does not include the payment of compensation for damages to, or loss of, natural resources. Therefore, a person who is not a responsible party and therefore eligible to receive a covenant not to sue, would not be liable for the payment of natural resource damages. Finally, the proposed committee substitute would extend and change the statute of limitations for civil actions brought by the State pursuant to laws concerning the remediation of contaminated sites or the closure of sanitary landfill facilities and for the payment of compensation for damage to, or loss of, natural resources due to the discharge of a hazardous substance, pursuant to the State's environmental laws.

The substitute would provide a new defense to liability for persons who purchased contaminated property prior to September 14, 1993. If it can be established by a preponderance of the evidence that (1) a person acquired the property after the discharge of the hazardous substance, (2) at the time the person acquired the property he did not know and had no reason to know that any hazardous substance had been discharged at the property, or the person acquired the real property by devise or succession, (3) the person did not discharge the hazardous substance, is not in any way responsible for the hazardous substance, and is not a corporate successor to the discharger, or to the person in any way responsible for the hazardous substance or to anyone liable for cleanup and removal costs, and (4) the person gave notice of the discharge to the Department of Environmental Protection upon actual discovery of the discharge, then the person is not liable for cleanup and removal costs or for any other damages to the State or to any other person for the discharged hazardous substance pursuant to the Spill Act or pursuant to civil common law. To establish that a

person had no reason to know that any hazardous substance had been discharged, the person must have undertaken at the time of acquisition, all appropriate inquiry on the previous ownership and uses of the property based upon generally accepted good and customary standards. The substitute is intended to provide a defense to liability for only those persons who purchased contaminated property before September 14, 1993 and, after appropriate inquiry, did not know and had no reason to know that the property was contaminated. The substitute is not intended to change any liability that otherwise exists for persons who acquired contaminated property before September 14, 1993.

The substitute would also clarify that a person who is not a discharger or a person in any way responsible for a hazardous substance, and has a defense to liability, would not be responsible for the payment of compensation for damage to, or loss of, natural resources.

Finally, the substitute would extend and change the statute of limitations for civil actions brought by the State pursuant to laws concerning the remediation of contaminated sites or the closure of sanitary landfill facilities and the payment of compensation for damage to, or loss of, natural resources due to the discharge of a hazardous substance, pursuant to the State's environmental laws. The bill would provide that a cause of action concerning the remediation of contaminated sites or the closure of sanitary landfill facilities shall not be deemed to have accrued, for the purposes of the statute of limitations, prior to January 1, 2002, or until the contaminated site has been remediated or the landfill has been properly closed, whichever is later, in which case any civil action by the State must be commenced within three years next after the cause of action shall have accrued.

The committee substitute would also establish a separate statute of limitations for civil actions brought by the State for the payment of compensation for damage to, or loss of, natural resources due to the discharge of a hazardous substance, pursuant to the State's environmental laws. A civil action must be commenced by the State no more than four years after the cause of action accrues. The substitute provides that the no cause of action would accrue for payment of compensation for damage to, or loss of, natural resources prior to January 1, 2002 or until the performance of the preliminary assessment, site investigation, and remedial investigation, if necessary, of the contaminated site or sanitary landfill facility, whichever is later. The substitute would also provide that actions covered by the limitations period established in section 5 of the committee substitute would not be subject to the limitations period established in P.L.1991, c.387 (C.2A:14-1.2).