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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) <u>Civil Action</u> REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST OCCIDENTAL CHEMICAL CORPORATION AND MAXUS ENERGY CORPORATION

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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 Reply Brief in support of their Motion for Partial Summary Judgment ("Reply") against Defendants Occidental Chemical Corporation ("OCC") and Maxus Energy Corporation ("Maxus"). Contemporaneously, Plaintiffs file a separate Reply Brief in support of their Motion for Partial Summary Judgment against Defendant Tierra Solutions, Inc. ("Tierra").

PRELIMINARY STATEMENT

Plaintiffs' Motion for Partial Summary Judgment against OCC[1] rests upon three fundamental tenets of black-letter law:

1. Diamond Shamrock Chemicals Company ("DSCC") discharged hazardous substances from the Lister Plant into the Passaic River and is, therefore, strictly liable under the Spill Act;

2. OCC later acquired and merged DSCC into itself, and – as the surviving entity of that merger – OCC ***is*** DSCC and thus succeeded to the Spill Act liabilities at issue; and

3. DSCC/OCC cannot relieve itself of its Spill Act liabilities for the Lister Plant by merely transferring them to a subsidiary, a joint-venturer, or anyone else.

Based upon these indisputable – and undisputed – points, Plaintiffs seek a judgment finding OCC liable under the Spill Act for whatever cleanup and removal costs are associated with DSCC/OCC's discharges. As contemplated by the Court and CMO XVII, a Spill Act liability finding would complete Track I as to OCC. Because the Court has ordered that damages be bifurcated from liability in this case, all cleanup and removal costs associated with OCC's discharges will be determined in Track VIII and in the years to come thereafter, as the Passaic River is finally cleaned up.

[1] Plaintiffs also moved for partial summary judgment against Maxus, in that Maxus is collaterally estopped from denying certain facts established in the Aetna case. Those issues are addressed in Point III.

Over the persistent objections of Defendants, particularly OCC and Maxus, Plaintiffs have sought leave to file this motion and establish the Spill Act liability of OCC practically since the inception of this action. This judgment is absolutely critical to the remediation of the Passaic River and to the fair and just implementation of the Spill Act. The papers now before the Court demonstrate, without question, that Plaintiffs are entitled to this judgment. Not only do OCC and Maxus fail to contest the underpinnings of Plaintiffs' motion, they actually make admissions establishing Plaintiffs' Spill Act strict liability claim.

As to Plaintiffs' first point – DSCC's Spill Act liability – OCC and Maxus cavalierly swat this aside by admitting that DSCC discharged hazardous substances from the Lister Plant into the Passaic River from 1951 through 1969. OCC Brief at 6; Maxus Brief at 1, 4, 6. OCC and Maxus even go so far as to state that "[n]o party in this suit has contested the fact that there were discharges by DSCC into the Passaic River between 1951 and 1969." Maxus Brief at 4; OCC Brief at 6. Their new admissions and statements, however, stand in stark contrast to the answers and positions of these defendants over the last five and a half years. See, e.g., Maxus and Tierra Answer at ¶¶ 1, 63-69 (denying the fact of discharges of hazardous substances from the Lister Plant to the Passaic River); OCC Answer at ¶¶ 1, 63-69 (same). Indeed, it took Plaintiffs' actually filing their motion for OCC and Maxus to concede the obvious: OCC/DSCC used the Passaic River as a dump to dispose of chemical effluent, which included dioxin (2,3,7,8-TCDD), DDT and other hazardous substances under the Spill Act.

Almost six years have passed since this case was filed. Now that they are finally faced with the clarity of a judgment for Spill Act liability, OCC and Maxus seek further delay by proposing that the Court should make certain factual findings about the admitted discharges into the Passaic River. They offer Plaintiffs this Pyrrhic victory by seeking to tease concepts of

"nexus" and causation improperly from the damages phase of this bifurcated case and insert them as necessary elements into the liability phase. This argument is too clever by half and, accordingly, fails as a matter of law.

The Spill Act is a strict liability statute: if you discharge a hazardous substance, you are strictly liable. N.J.S.A. 58:10-23.11g.c. In the damages phase of this bifurcated proceeding, currently set for the fall of 2013, Plaintiffs will demonstrate that the cleanup and removal costs sought in this case are "associated with" Defendants' discharges. But, to suggest that the "nexus" to Plaintiffs' costs and damages is an element of liability, segregated from the proofs of actual costs incurred or to be incurred in the future, is to set an impossible burden on Plaintiffs and is based upon a wrong, even disingenuous, reading of the Spill Act. The Spill Act is clear: a person who discharges hazardous substances is strictly liable. Period.

As to Plaintiffs' second point, OCC admits that it is liable under the Spill Act when it admits that it acquired and then merged DSCC into itself. OCC Brief at 8-9. As a matter of law, OCC is DSCC because they merged into one entity. As the surviving entity of that merger, OCC succeeded to the liabilities of both of its parts. As a matter of black letter law: "[t]he surviving or new corporation shall be liable for all the obligations and liabilities of each of the corporations so merged or consolidated[.]" N.J.S.A. 14A:10-6(e); DEL. CODE ANN. tit. 8, § 259(a); N.Y. BUS. CORP. LAW § 906(b)(3).

OCC seeks to avoid the inescapable result of its first two admissions, however, by arguing that the Spill Act liabilities at issue were somehow excised from DSCC prior to OCC's acquisition of DSCC. In fact, the overwhelming majority of OCC's Brief focuses on its argument that, through a wide variety of equitable theories and shadowy transactions, Maxus succeeded to the liabilities now at issue. Plaintiffs agree that Maxus is also "in any way

responsible" under the Spill Act and are eager to complete discovery against Maxus and have the Court determine Maxus's liability under the Spill Act. However, it is clear: the liability of Maxus and OCC are not mutually exclusive, and OCC's liability is now before the Court.

This brings the Court to the third point of law on which Plaintiffs' Motion rests: OCC/DSCC cannot extinguish its liability to Plaintiffs, or any third person, by simply agreeing to jettison that liability to another company. A party is free to agree to an indemnity and hold harmless agreement – as OCC and Maxus actually did here – but the law does not allow a company to shed its liabilities to a third person by merely agreeing that another will satisfy that debt. The indemnified party remains the liable entity and can turn to its indemnitor, of course, but as to an injured plaintiff, the liable entity cannot simply slough-off its obligations and liabilities. Ironically, the equitable theories upon which OCC relies were created precisely to protect innocent third parties from such a result. Thus, no matter how OCC couches Maxus's reorganization and the various agreements to which it points,[2] it does not free itself from the facts it has now admitted: as a matter of law, OCC is DSCC and, as such, is Spill Act liable because it intentionally discharged copious quantities of hazardous substances into the Passaic River for well over a decade.

There is no question of fact or law in dispute, as OCC and Maxus have essentially admitted strict liability under the Spill Act. Accordingly, Plaintiffs are entitled to a partial summary judgment that OCC is liable under the Spill Act for those cleanup and removal costs associated with DSCC's discharges.

[2] Moreover, as discussed infra, the transactions that OCC now argues freed it from its liabilities do not even involve or attempt to transfer Lister Plant-related liabilities. The transactions involved the sale of operating units and ongoing business operations in the 1980s. Operations at the Lister Plant ceased in 1969 and the property was sold long before the reorganization and other transactions to which OCC now points. Lister Plant liabilities were clearly connected to discontinued operations under the agreements at issue and not attached to operational assets over a decade after the plant was shuttered.

ARGUMENT

POINT I

PLAINTIFFS ARE ENTITLED TO PARTIAL SUMMARY JUDGMENT ON THEIR SPILL ACT CLAIM BASED UPON DSCC'S NOW UNCONTESTED DISCHARGES OF HAZARDOUS SUBSTANCES INTO THE PASSAIC RIVER

A. After Years of Denial, OCC and Maxus Have for the First Time Admitted That DSCC Discharged Hazardous Substances From the Lister Plant Into the Passaic River From 1951 – 1969.

Astonishingly, OCC and Maxus now claim that they have never denied the fact that DSCC discharged hazardous substances from the Lister Plant into the Passaic River during the time that DSCC and its predecessors operated the Lister Plant. OCC Brief at 6 ("While OCC has never contested the fact that there were discharges from the Lister Site to the Passaic River in the 1950s and 1960s. . . ."); Maxus Brief at 1, 4, 6 ("No party in this suit has contested the fact that there were discharges by DSCC into the Passaic River between 1951 and 1969."). Nothing could be further from the truth.

In OCC's and Maxus's Answers to Plaintiffs' operative Third Amended Complaint, filed as recently as October 2010, Maxus and OCC continued a five-year-long denial of any allegations that relate to discharges from the Lister Plant. OCC's Answer at ¶¶ 1, 63-69 ("[OCC] is without knowledge or information sufficient to form a belief as to the truth of the allegation that DDT, 2,4-D, 2,4,5-T, and TCDD were used, produced, and discharged at the Lister Site and therefore denies such allegations."); Maxus's Answer at ¶¶ 1, 63-69 (denying that the hazardous substances DDT, 2,4-D, 2,4,5-T and TCDD, which Maxus admits were produced at the Lister Plant, were discharged from the Lister Plant).

Even in its proposed Trial Plan, submitted to the Court in January 2011, Maxus suggests that Plaintiffs should be able to try their Spill Act claims relating to DSCC's "alleged" discharges sometime after 2013, more than eight years after Plaintiffs filed this lawsuit. Maxus

Proposed Trial Plan at pp. 2-3, 16-17. Maxus acknowledged Plaintiffs repeated desire to establish such Spill Act liability by summary judgment, but never came close to conceding that discharges from the Lister Plant had occurred. Id. at 16 ("Plaintiffs have sought to resolve via summary judgment the factual issue of discharges from the Lister Site into the Passaic River during DSCC's operations (i.e., pre-1969) and will likely seek to have this be the first liability issue resolved. . . . Even if Plaintiffs establish a discharge . . ."). Worse, OCC's proposed Trial Plan did not even provide a date for Plaintiffs to have their day in court on their Spill Act claim, indicating that OCC also envisioned delaying that liability finding for as long as possible. OCC's Proposed Trial Plan.

It is clear that OCC and Maxus have, for six years, steadfastly refused to concede the fact of discharges from the Lister Plant to the Passaic River to further their agenda of delay. Now that the Court will finally address the issue, OCC and Maxus have been forced to concede what has been obvious for so long: DSCC discharged hazardous substances from the Lister Plant into the Passaic River from 1951 through 1969. As a result, after six years of litigation, Plaintiffs are entitled to a partial summary judgment on their Spill Act claim against those responsible for DSCC's discharges.

B. Plaintiffs Are Entitled to a Partial Summary Judgment on Spill Act Liability, Given OCC's and Maxus's Admissions.

In their responsive briefs, OCC and Maxus avoid any discussion regarding the plain language of the Spill Act's strict liability provision. That provision – N.J.S.A. 58:10-23.11g.c – provides as follows:

> any person who has discharged a hazardous substance, or is in any way responsible for any hazardous substance, shall be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs . . . incurred by the department[.]

See also N.J.S.A. 58:10-23.11c ("The discharge of hazardous substances is prohibited."); Dep't of Envtl. Prot. v. Ventron Corp., 94 N.J. 473, 494 (1983) (noting the key elements of Spill Act strict liability involve "any person 'who has discharged a hazardous substance or is in any way responsible for any hazardous substance'"); Dep't of Envtl. Prot. v. Arlington Warehouse, 203 N.J. Super. 9, 13 (App. Div. 1985) ("The plain reading of the amended statute is that any person who has discharged a hazardous substance or is in any way responsible for any hazardous substance . . . is strictly liable, jointly and severally, for all cleanup and removal costs."); Black's Law Dictionary, 7th Ed. (defining "strict liability" as "[l]iability that does not depend on actual negligence or intent to harm, but that is based on the breach of an absolute duty . . . .").

Neither OCC nor Maxus dispute the key elements of the Spill Act's strict liability provision, i.e., that DSCC is a "person" that "discharged a hazardous substance." In fact, by now admitting that DSCC discharged hazardous substances into the Passaic River, OCC and Maxus have admitted to statutorily prohibited conduct and to strict liability, therefore. N.J.S.A. 58:10-23.11c ("The discharge of hazardous substances is prohibited."). Accordingly, DSCC and its successors (infra, Point II) are "strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs . . . incurred by the department[.]" N.J.S.A.58:10-23.11g.c. There is nothing vague or ill-defined about an order in favor of Plaintiffs providing for such Spill Act liability, particularly since "cleanup and removal costs" is a defined term in the Spill Act. See N.J.S.A. 58:10-23.11b; infra, Point I.C.

C. As Set Forth in the Trial Plan, Plaintiffs Will Establish That the Cleanup and Removal Costs They Seek Are "Associated With" DSCC's Discharges in Track VIII.

Before the issuance of the Trial Plan and Case Management Order XVII (the "Trial Plan"), Plaintiffs urged the Court to include Plaintiffs' past cleanup and removal costs in the Phase One/Track III trial. See Plaintiffs' Proposed Trial Plan. Instead, the Court bifurcated Spill

Act liability and damages, with liability to be determined in Tracks I and III and damages, including cleanup and removal costs, in Track VIII. Trial Plan at 4, 6, 17-18. Notwithstanding this clear delineation of issues, in their response briefing, OCC and Maxus interject the issue of "nexus" into the liability phase in an attempt to muddy the water and further delay a liability finding until September 2013. The Court should flatly reject OCC's and Maxus's ploy.

OCC and Maxus rely on two cases for the proposition that Spill Act liability depends on proof of a "nexus" between the discharge(s) at issue and the cleanup and removal costs being sought. See Dep't of Envtl. Prot. v. Dimant, 418 N.J. Super. 530, 544 (App. Div. 2011) (requiring some connection or "'nexus' between a discharge and damages resulting from the contaminated discharge"); N.J. Turnpike Auth. v. PPG Indus., Inc., 197 F.3d 96, 106 (3d Cir. 1999) ("[T]the Spill Act places a burden on the [plaintiff] to demonstrate some connection or nexus between the [contamination] at the sites in question and the [defendants] in this case.") (emphasis added).

While Plaintiffs will likely disagree with the extent to which OCC and Maxus may use Dimant and PPG Indus. to stretch a "nexus" requirement under the Spill Act, there is no dispute that DSCC discharged hazardous substances from the Lister Plant into the Passaic River.[3] Moreover, Plaintiffs acknowledge that their recovery of cleanup and removal costs requires an association between the discharge(s) at issue and the cleanup and removal costs being sought. Indeed, the Spill Act defines "cleanup and removal costs" as "all direct costs associated with a discharge, and those indirect costs that may be imposed by the department . . . associated with a discharge, incurred by the State or its political subdivisions." N.J.S.A. 58:10-23.11b (emphasis

[3] OCC and Maxus use Dimant to argue that Plaintiffs are required to demonstrate a connection between their discharge and the contamination at issue to achieve a liability finding. Here, there is no dispute regarding that connection. They admit it.

added). But such a requirement in no way precludes Plaintiffs from obtaining summary judgment for strict liability against those responsible for DSCC's discharges. See Dep't of Envtl. Prot. v. Exxon Mobil Corp., 393 N.J. Super. 388, 397-98 (App. Div. 2007) (noting the trial court granted DEP's summary judgment holding Exxon Mobil strictly liable for cleanup and removal costs before such costs had been shown); 206-36th Street, LLC v. Wick, 2009 WL 2253226 *2-3 (App. Div. 2009) (affirming summary judgment to buyer of contaminated property and damages which proceeded to trial after summary judgment was awarded under the Industrial Site Recovery Act's strict liability scheme).[4]

With a summary judgment on Spill Act liability as to OCC in hand, and after additional liability findings are made in Track III as necessary, Plaintiffs will proceed to Track VIII and establish that the cleanup and removal costs they seek are "associated with" the discharges from the Lister Plant – as envisioned by the Court.[5] Importantly, however, Plaintiffs right to cleanup and removal costs based upon discharges from the Lister Plant will continue long after a Track VIII trial. That is because DEP likely will continue to incur cleanup and removal costs as remedial measures are undertaken at the Diamond Alkali Superfund Site in the Passaic River and Newark Bay Complex. As explained by the Appellate Division, the Legislature crafted the Spill Act to deal with these contingencies, which our courts are equipped to handle:

> DEP's second contention that the court improperly limited defendants' liability to 5.2 million dollars to remedy the contamination is most persuasive. That sum may prove to be grossly inadequate to implement the ordered remedies. Under both the [Spill Act] and [Water Pollution Control Act], the court is empowered to order that all costs to abate water pollution be paid by those adjudged liable for violating the law. These are specially created statutory

[4] Pursuant to R., 1:36-3, counsel advises the Court that it is unaware of any contrary unpublished decisions.

[5] Defendants' attempt to push some "nexus" element into the liability trial would also create an impossible burden: How could Plaintiffs demonstrate a "nexus" to cleanup and removal costs that they are not permitted to demonstrate or recover in the liability phase of this trial?

> remedies and are not, therefore, subject to common law requirements that plaintiff be limited to those specific present and prospective damages which he can prove at the time of trial. Rather, the intent of the statute is to charge those found to be responsible for pollution with the actual costs of cleanup. The implementation of this statute necessarily requires that unforeseen expenses and contingencies be considered.
>
> . . .
>
> In light of these uncertainties, it is quite possible that the 5.2 million dollars ordered by the court will not accurately reflect the eventual costs of implementation. Therefore, defendants are hereby obligated to pay all cleanup and removal costs actually incurred by DEP . . . and are not limited to the amounts expressly imposed by the trial court's order and judgment.
>
> . . .
>
> Our reliance on statutory authority to require defendants to pay the costs of certain remedies does not negate our concern for fairness to defendants. The reasonableness of the costs imposed upon defendants, however, is adequately safeguarded by the provision of the trial court's judgment which . . . allows the parties to have continued access to the Chancery Division to settle the reasonableness and necessity of any of the specifications or costs to be incurred. [City of Perth Amboy v. Madison Indus. Inc., Nos. A-1127-81T3, A-1276-81T3 (Consolidated), 1983 N.J. Super. LEXIS 1111, *9-11 (App. Div. 1983) (emphasis added).]

Accordingly, as in Exxon Mobil and Perth Amboy, supra, Plaintiffs will have to prove their entitlement to cleanup and removal costs on an ongoing basis after a judgment on Spill Act strict liability is obtained. Under the Spill Act's strict liability scheme, Plaintiffs do not have to prove that the Defendants are Spill Act liable parties each time Plaintiffs seek to recover additional cleanup and removal costs. Thus, a partial summary judgment on Spill Act liability based upon admitted discharges from the Lister Plant to the Passaic River is essential to the Court's administration of the Spill Act's remedial scheme, as well as the conservation of judicial and party resources.

The arguments put forward by OCC and Maxus simply ignore that the Spill Act imposes strict liability. That they now cavalierly admit discharges of hazardous substances from the Lister Plant into the Passaic River makes those responsible for those discharges liable under the Spill Act. That is the end of the liability inquiry under this statute. The Court decided that the

cleanup and removal costs for which the Lister Defendants are jointly and severally liable will be tried separately in Track VIII, which will necessarily include the "nexus" to the costs put forward by Plaintiffs at that time and thereafter as additional costs are incurred. In sum, to suggest that Spill Act liability cannot attach until a "nexus" to any particular past or future cleanup and removal costs are incurred means that Plaintiffs cannot obtain a liability determination for decades to come, ignores the plain language and intent of the Legislature, and puts Plaintiffs in an absolutely impossible position: to define nexus to costs that they are not allowed to prove under the current trial plan at this time. New Jersey courts have rejected that suggestion. Exxon Mobil, supra, 393 N.J. Super. at 397-98; Perth Amboy, supra, 1983 N.J. Super. LEXIS at *9-11.

POINT II

OCC'S ATTEMPT TO MAKE MAXUS THE "SOLE" SUCCESSOR TO LISTER PLANT LIABILITIES FAILS

A. Plaintiffs Agree That Maxus Is Liable for the Discharges From the Lister Plant, But Maxus Is Liable in Addition to OCC, Not Instead of OCC.

While OCC never explicitly says so, OCC's entire brief is imbued with the idea that the Court must choose between OCC and Maxus as the party responsible for Lister Plant-related liabilities. OCC is intent on establishing that Maxus is "the" successor to the Lister Plant liabilities, under equitable theories of successorship. However, as the legal successor, OCC is liable as a matter of law. Moreover, the Spill Act was created to cast a broad liability net: one that catches both OCC and Maxus. See Ventron, supra, 94 N.J. at 502-03. Thus, this Court need not decide between Spill Act liability for Maxus or Spill Act liability for OCC. Both are liable for the admitted discharges from the Lister Plant.

Like OCC, Plaintiffs have studied the documents and circumstances regarding the 1983 reorganization, which suggest that Maxus is "in any way responsible" for Lister Plant liabilities under Ventron. In fact, Plaintiffs would have moved for partial summary judgment against

Maxus as "in any way responsible" under the Spill Act. But, despite months of attempts to obtain and close the written discovery sought from them two years ago, Maxus and Tierra simply have not produced the discovery necessary to complete that analysis. After receiving that discovery, and with the Court's indulgence, Plaintiffs would like to move for summary judgment on their Spill Act claim against Maxus. Plaintiffs will also be prepared to address those matters in the Track III trial ordered by the Court.

On the other hand, no additional discovery is needed to establish Spill Act liability against OCC as the legal successor to Lister Plant liabilities. Despite OCC's attempts to raise a fact issue, there is simply no getting around the facts already established and now admitted. OCC is the legal successor by merger to DSCC, which, according to its General Counsel, "was known until on or about December 19, 1967, as Diamond Alkali Company and eventually thereafter as Diamond Shamrock Chemicals Company and Occidental Electrochemical Corporation." Exhibit 49 at OCCNJ0124796-97 ¶ 6. OCC is thus liable to Plaintiffs under the Spill Act as a matter of law. Nothing in OCC's brief changes or affects that.

B. OCC Is Liable for DSCC's Discharges Because OCC Is DSCC's Direct Legal Successor by Merger.

1. As a matter of black-letter law, OCC is DSCC and is liable for the discharges OCC has finally admitted here.

There is a clear line of undisputed transactions by which OCC is the legal successor by merger to DSCC. As set forth in Plaintiffs' Brief and Statement of Facts, DSCC (f/k/a Diamond Alkali Company and Diamond Shamrock Corporation) operated the Lister Plant from 1951 to 1969. OCC's Amended Cross-Claims at ¶¶ 2-3. In September 1986, the company eventually known as Maxus sold the stock of DSCC to Oxy-Diamond Alkali Corporation, an OCC affiliate. Id. at ¶ 13. The acquisition was conducted pursuant to the terms of a Stock Purchase Agreement ("SPA"). Id.; Exhibit 46. After the SPA was implemented, DSCC, a Delaware corporation, was

renamed Occidental Electrochemical Corporation ("OEC"). Exhibit 47 at OCCNJ0009303-04; OCC's Amended Cross-Claims at ¶ 13. On or about November 25, 1987, OCC and OEC merged, with OCC being the surviving entity in the merger. Exhibit 48 at OCCNJ0011580 ¶ 2; 0011581 ¶ 2; OCC's Amended Cross-Claims at ¶ 13. In the merger, OCC expressly assumed DSCC/OEC's liabilities. Exhibit 48 at OCCNJ0011580 ¶ 2. OCC admits each of these facts. OCC's Response to Plaintiffs' Statement of Material Facts at ¶¶ 36, 38.

Moreover, for nearly 25 years, OCC has admitted in writing and by its conduct that it is the successor to DSCC, the company that operated the Lister Plant from 1951-1969, during which time hazardous substances were admittedly discharged into the Passaic River. In its response papers, OCC backtracks by claiming that any admissions it made were "almost entirely authored or entered into by counsel retained by Maxus and under the SPA to represent both Maxus and OCC." OCC Brief at p.22, n.16. OCC is incorrect.

The list of OCC admissions is long, with Plaintiffs' Exhibits being only a subset of that list. See Exhibits 2, 10, 49 – 55, 57. Exhibit 49, for instance, is an Affidavit signed by Robert D. Luss, the Associate General Counsel and Assistant Secretary of OCC:

> OCC is the successor, by merger effective November 30, 1987, to [OEC]. . . .
>
> [OEC] was known until on or about December 19, 1967 as Diamond Alkali Company, and successively thereafter as Diamond Shamrock Corporation (until on or about September 1, 1983), Diamond Chemicals Company (until on or about November 1, 1983), and [DSCC] (until on or about September 29, 1986).
>
> On or about September 4, 1986, an affiliate of OCC, Oxy-Diamond Alkali Corporation, acquired from the holding company then known as Diamond Shamrock Corporation (and now known as [Maxus]) the stock of the operating company then known as [DSCC].
>
> Following that acquisition, DSCC changed its name to [OEC] on or about September 29, 1986. As noted above, [OEC] was subsequently merged into OCC effective November 30, 1987.

> By reason of the foregoing, OCC is the successor by merger to the company which was known until on or about December 19, 1967, as Diamond Alkali Company and eventually thereafter as [DSCC] and [OEC]. [Exhibit 49 at OCCNJ0124796-97 ¶¶ 2-7.]

Similarly, Exhibit 74 includes several letter agreements from 1987 and 1989 between OCC and Maxus, under which Maxus admits that Lister Plant-related liabilities are subject to indemnification under the SPA and OCC agrees to sign consent orders relating to the remediation of the Lister Plant site with USEPA and DEP as the successor to DSCC. Exhibit 74 at OCCNJ0102501-505. By signing the consent orders for the Lister Plant as the successor to DSCC and acting in conformity therewith for over two decades, OCC's course of conduct plainly demonstrates that it is the successor to DSCC for Lister Plant liabilities. Thus, through its words and deeds, OCC has admitted that it is the successor to Lister Plant liabilities for the last 25 years.

2. A corporation cannot relieve itself of its obligations and liabilities to third parties by agreeing to simply to transfer them to another company.

Despite its long history of admissions and conduct acting as the legal successor to Lister Plant-related liabilities, OCC has for the first time in this litigation created a novel theory to free itself of those liabilities. Under its new theory, introduced in its Amended Cross-Claims and explained in its response papers, OCC claims that its Lister Plant-related liabilities were transferred from DSCC and merged into Maxus during the 1983 restructuring, under an equitable "de facto merger" theory of corporate successorship. OCC's Amended Cross-Claims at ¶¶ 7-8; OCC Brief at 20. There are at least two fatal legal problems associated with OCC's new theory.

First, as a matter of law, an assignment of Lister Plant-related liabilities by DSCC to another company, related or not, does not impact an injured third party. Plaintiffs' Brief cites to numerous cases standing for the proposition that, while two corporations can contractually allocate liabilities between themselves, injured plaintiffs are not bound by the contractual

allocations and can sue and recover from the party who injured the plaintiff, regardless of who held the liabilities as between the two corporations. Haynes v. Kleinewefers & Lembo Corp., 921 F.2d 453, 458 (2d Cir. 1990); In Re Silicon Gel Breast Implants Products Liability Litigation, 837 F. Supp. 1123, 1126 (N.D. Ala. 1993); Watkins v. Black and Decker (U.S.) Inc., 882 F. Supp. 621, 625 (S.D. Tex. 1995); Grant-Howard Assoc. v. General Housewares Corp., 472 N.E.2d 1, 3 (N.Y. 1984); American Standard, Inc. v. Oakfabco, Inc., 907 N.Y.S.2d 98 (N.Y. Sup. Ct. 2008).

This principle is reiterated in Nieves v. Bruno Sherman Corp., 86 N.J. 361, 372 (1981). In that case, the Supreme Court held that an intermediate successor, who purchased assets from the original manufacturer and later transferred them to another company before the plaintiff was injured, could also be liable under an equitable theory of corporate successorship, along with the company currently owning the assets and producing the product. Id. at 364-65. In so holding, our Supreme Court considered the effect of a contractual indemnification between the two successors and determined that the plaintiff was not affected by it:

> As between the two successor corporations the provisions of this indemnification agreement, if applicable to the particular fact situation presented, should be given their intended effect as a risk-spreading and cost-avoidance measure. While the Ramirez rationale is concerned with imposing strict tort liability for damages caused by defects in units of the product line acquired and continued by successor manufacturers, neither Ramirez nor the injured plaintiff if he successfully proves his case against the successors, who stand in the shoes of the original manufacturer is concerned with how that liability will be allocated or borne as between two successor corporations. [Id. at 372.]

While two companies can allocate liabilities between them, an injured plaintiff is not affected by any such allocation and can sue the party actually causing the injury and recover, even if some other party has agreed to pay the liability. Id. Accordingly, in this case, Plaintiffs are simply not

impacted by any agreement to assign Lister Plant-related liabilities by DSCC, the admitted discharger of hazardous substances into the Passaic River from 1951-1969.

3. OCC's "de-facto merger" theory fails, because DSCC survived the so-called merger with Maxus and was sold to OCC.

The second legal problem with OCC's new theory, which is fatal to its argument, concerns the "de facto merger" doctrine. OCC claims that Maxus is the "sole survivor of a de facto merger or its equivalent" between DSCC (DSC-1, according to OCC) and Maxus. OCC Brief at 20. OCC claims that as the "sole survivor" of this "de facto" merger, Maxus has 100% of the liability that formerly belonged to DSCC/DSC-1. Id. at 20. But a merger, whether de facto or otherwise, involves the joining of two entities, with one or both of the constituent parts then ceasing to exist. Knapp v. North American Rockwell Corp., 503 F.2d 361, 365 (3d Cir. 1974). Even cases finding an exception to the rule that the selling corporation must cease to exist have done so based on the limitations of the continued corporation as a bona fide defendant. Id. at 367-70 (holding that the "barren continuation" of a corporation forbidden from conducting any business activities and which was required to be dissolved as quickly as possible would not defeat a plaintiff's right to sue the corporation who purchased its assets).

DSCC/DSC-1 did not cease to exist. It continued to exist after the 1983 reorganization as DSCC with assets and active business operations. Indeed, DSCC – along with its assets, operations and liabilities – were purchased by OCC when it bought all of DSCC's stock in 1986 for $411 million and a requirement that Maxus defend and indemnify OCC for the liabilities now at issue. OCC Brief at 21-22. Those same assets, operations and liabilities were later merged into OCC. Accordingly, the "de facto merger" doctrine simply does not apply to the facts of this case.

4. Factually, OCC's attempts at freeing itself from Lister Plant-related liabilities do not hold water.

In addition to failing for purely legal reasons, OCC's new theory also fails because it factually does not hold water. In its Brief and Counterstatement of Facts, OCC identifies two agreements whereby it claims that Lister Plant-related liabilities were transferred out of DSCC/DSC-1 prior to, or as part of, the 1983 reorganization. One of those agreements was with Diamond Shamrock Corporate Company ("DS Corporate") and the other was with SDS Biotech Corporation ("SDS Biotech"), a company created as part of a joint venture. OCC's COF at ¶¶ 11-12, 21-25. While a transfer of DSCC's liabilities will not impact Plaintiffs in this case,[6] OCC's argument will also fail unless OCC can somehow prove that Lister Plant-related liabilities were transferred out of DSCC before September 4, 1986. OCC cannot do so.

The instrument by which OCC claims that Lister Plant-related liabilities were transferred out of DSCC to DS Corporate is the January 1, 1984 Assignment and Assumption Agreement ("DS Corporate Assignment") between DSCC and DS Corporate. Exhibit 63. OCC's Counterstatement of Facts quotes language from the DS Corporate Assignment, but OCC does not explain how the quoted language accomplished the transfer of Lister Plant-related liabilities. OCC's COF ¶¶ 25.1 – 25.4. In fact, the paragraphs detailing the extent of the liabilities transferred from DSCC to DS Corporate are not ever referenced at all in OCC's Brief, for good reason. This is because each paragraph explicitly limited the liabilities transferred to those liabilities "relating to or based upon" the assets or business activities that were assigned. Exhibit 63 at MAXUS022035-36. OCC's new theory fails because, by January 1984 when certain then-operational assets were transferred, Lister Plant-related assets were no longer even held by

[6] As Plaintiffs explained above and stress again here, even if Lister Plant-related liabilities were contractually transferred out of DSCC, that fact does not affect Plaintiffs' right to sue OCC/DSCC because DSCC is the original party whose acts injured Plaintiffs.

DSCC. DSCC ceased manufacturing operations at the Lister Plant in 1969 and sold the plant in 1971. OCC's Response to Plaintiffs' SOF at ¶¶ 36, 46. Accordingly, at the time of the DS Corporate Assignment, there simply were no Lister Plant-related assets or operations to transfer from DSCC to DS Corporate.

OCC attempts to circumvent this inconvenient fact by next arguing that Lister Plant-related liabilities had been moved earlier in 1983 from DSCC to SDS Biotech in a joint venture. OCC's COF at ¶ 11-12. While unclear, OCC appears to be arguing that the historical Lister Plant-related liabilities went from DSCC to SDS Biotech in 1983, OCC's COF at ¶¶ 11-12, then to DS Corporate in 1984 in the DS Corporate Assignment. OCC's COF at ¶ 25.3.1. Presumably, OCC is claiming that because the DS Corporate Assignment transferred DSCC's interest in the stock of SDS Biotech to DS Corporate, Lister Plant-related liabilities must have gone along with the stock of SDS Biotech to DS Corporate. See Exhibit 63 at MAXUS022034, 022036.

There are two significant factual problems with OCC's theory. First, OCC provides no evidence that Lister Plant-related liabilities were passed from DSCC to SDS Biotech in the joint venture. There were no operations or assets related to the Lister Plant for DSCC to contribute to the joint venture in the 1980s; the Lister Plant had been shuttered and sold 14 years earlier, unlike the plant in Greens Bayou, Texas that was transferred to SDS Biotech. In fact, in its Answer to Plaintiffs' Third Amended Complaint, OCC conceded that "the Lister site was part of [DSCC's] previously discontinued operations related to its Ag Chem business and, on information and belief, was not included in the Ag Chem business [DSCC] sold and transferred to SDS Biotech." OCC's Answer at p. 28 ¶ 6. Without some proof that Lister Plant liabilities were put into SDS Biotech, as OCC concedes, OCC's lengthy chain of logic falls apart.

Second, even if Lister Plant-related liabilities were transferred to SDS Biotech as a result of the joint venture, DSCC did not transfer the SDS Biotech liabilities to DS Corporate in the DS Corporate Assignment. In fact, the DS Corporate Assignment dealt with the liabilities associated with SDS Biotech as follows:

> [DS Corporate] and [DSCC] hereby agree that they are and shall remain jointly and severally liable with respect to all the obligations of [DSCC] under that certain Joint Venture Agreement dated as of the first day of July 1983, between [DSCC], Showa Denko, K.K., a corporation organized under the laws of Japan, and SDS Biotech Corporation, a Delaware corporation[.] [Exhibit 63 at MAXUS022036.]

Thus, DSCC retained joint and several liability with DS Corporate under the DS Corporate Assignment. As a result, even if, as OCC contends, (i) Lister Plant-related liabilities were transferred to SDS Biotech and (ii) DSCC's stock in SDS Biotech went to DS Corporate, DSCC did not transfer to DS Corporate the liabilities associated with SDS Biotech, but continued to hold the liabilities jointly with DS Corporate.[7]

In any event, there is no evidence to support this hypothesis, the language of the contracts themselves do not support OCC's new theory, and it is all immaterial as a matter of law. OCC is DSCC and could not shed its Spill Act liabilities by transferring them to DS Corporate or contributing them to SDS Biotech.

C. Spill Act Liability Is Not Limited to the Legal Successor of the Company Holding Lister Plant-Related Liabilities.

OCC's focus on the identity of the equitable "successor" to the company holding Lister Plant-related liabilities is an attempt to avoid the correct legal result that both OCC and Maxus are liable for discharges from the Lister Plant to the Passaic River. Under Ventron, "persons"

[7] In fact, if OCC were correct in claiming that Lister Plant-related liabilities went to SDS Biotech, the result would be that Maxus and OCC are jointly and severally liable for them because Maxus is the successor to DS Corporate and OCC is the successor to DSCC. The same result is true under Spill Act analysis.

with a relationship to the site and discharges may also be liable in addition to the legal successor. Plaintiffs will explain why Maxus is liable to them based on its relationship to the site and the discharges in their own motion or at trial. But for purposes of this motion, Plaintiffs have established that OCC is the legal successor to DSCC. At law, OCC is DSCC and that is sufficient to impose Spill Act liability for admitted discharges. In summary, the Spill Act provides for liability for multiple parties who are related to a discharge. The Court is not required to choose between Maxus and OCC as the liable party. The issue before the Court is OCC's liability, which is established as a matter of law.

POINT III

OCC AND MAXUS HAVE NOT DENIED, AND ARE ESTOPPED FROM DENYING, THE FACT OF DSCC'S INTENTIONAL DISCHARGES OF DIOXIN, DDT AND OTHER HAZARDOUS SUBSTANCES INTO THE PASSAIC RIVER

A. Neither Maxus Nor OCC Has Contested Plaintiffs' Summary Judgment Evidence Establishing that DSCC Intentionally Discharged Hazardous Substances Into the Passaic River.

OCC and Maxus both argue that, with respect to discharges from the Lister Plant to the Passaic River from 1951-1969, a judgment based upon collateral estoppel is unnecessary because such discharges are now uncontested. OCC Brief at 26; Maxus Brief at 7. On the other hand, OCC and Maxus argue that collateral estoppel should not support a finding against them that those admitted discharges were "intentional." Yet neither OCC nor Maxus contests any of Plaintiffs' summary judgment evidence demonstrating DSCC's intentional conduct or introduces any summary judgment evidence of their own to create a fact issue. Accordingly, the issue of whether DSCC's discharges from the Lister Plant to the Passaic River from 1951-1969 were intentional has been proven as a matter of law.

The fact is that neither OCC nor Maxus can reasonably contest the intentional nature of DSCC's conduct. Neither could do so during the Aetna trial either. In fact, DSCC – through

OCC and Maxus – admitted during the Aetna trial that discharges to the Passaic River were intentional. Their own expert witness, Dr. Wolfskill, testified that DSCC had both accidental and "planned" discharges to the Passaic River throughout the course of the operation. Exhibit 21 at MAXUS026855-57; Exhibit 22 at MAXUS026957. Eye-witnesses and a slew of documentary evidence elaborated on Dr. Wolfskill's testimony. Statement of Facts at ¶¶ 8-13, 22-32. Based on that evidence, the trial court issued detailed and extensive findings of fact describing the intentional nature of DSCC's conduct, including their "intentional" discharges to the Passaic River "in known violation of public law." Exhibit 15; Statement of Facts at ¶ 5.

On appeal, DSCC – OCC and Maxus – did not dispute the intentional nature of DSCC's discharges to the Passaic River. Instead, DSCC argued that coverage should be afforded because it did not intend the "results" of its intentional acts. Exhibit 1 at MAXUS034128 ¶ 1. The Appellate Division disagreed: "[W]e are convinced that subjective knowledge of harm was proven as a matter of fact. The Chancery Division judge so found, and we agree that this conclusion is virtually inescapable." Diamond Shamrock Chems. Co. v. Aetna Cas. & Sur. Co., 258 N.J. Super. 167, 215 (App. Div. 1992). In addition, the Appellate Division expressly found that the trial court's "finding of fact that [DSCC] knowingly and routinely discharged contaminants over a period of 18 years" was supported by "adequate, substantial and credible evidence." Id. at 211.

That same evidence has not been disputed here. Accordingly, Plaintiffs are entitled to a finding that DSCC intentionally discharged hazardous substances from the Lister Plant into the Passaic River from 1951-1969.[8]

B. Collateral Estoppel Provides Another Basis for the Relief Plaintiffs Request.

1. OCC was the plaintiff in Aetna and is, therefore, bound by the findings of fact supporting the judgment against it.

As set forth in Plaintiffs' Brief, OCC was not simply in privity with a party to the Aetna litigation, OCC was a party to the Aetna litigation. In September 1986, two years after the Aetna lawsuit was filed, OCC's affiliate acquired DSCC. Exhibit 11; Exhibit 46. After the acquisition, DSCC changed its name to Occidental Electrochemical Corporation ("OEC"). Exhibit 47 at OCCNJ0009303-04; OCC's Amended Cross-Claims at ¶ 13. Then, in November 1987, OEC and OCC merged, with OCC being the surviving entity in the merger. Exhibit 48 at OCCNJ0011580 ¶ 2; 0011581 ¶ 2; OCC's Amended Cross-Claims at ¶13. Thus, by the time the Aetna case went to trial in September 1988, OCC was DSCC and the plaintiff in the case.

In the SPA, pursuant to which OCC's affiliate acquired DSCC, the parties agreed that Maxus would prosecute the Aetna litigation as the "attorney-in-fact" for and in the name of DSCC. Exhibit 58; Exhibit 46 at OCCNJ0000324 ¶1. Of course, by the time the Aetna litigation went to trial, Maxus was acting as the attorney-in-fact for OCC. Accordingly, as OCC acknowledges, in-house counsel for Maxus appeared on record as attorneys for the plaintiff, DSCC/OCC. OCC Brief at 33-34; Exhibit 4 at MAXUS0964734; Exhibit 14 at MAXUS032954; Exhibit 58. In the SPA, OCC essentially agreed to have Maxus represent it in

[8] Both OCC and Maxus spend a lot of time questioning how Plaintiffs intend to use a finding of fact of intentional conduct. The finding, as OCC and Maxus acknowledge, is relevant to Plaintiffs' Spill Act and common-law claims. But, as a practical matter, OCC's and Maxus's concern about Plaintiffs' use of such a finding to prove punitive damages is unfounded. Plaintiffs intend to use every piece of evidence they have to demonstrate the egregiousness of the Lister Defendants' actions to prove punitive damages, pursuant to New Jersey law, before a jury.

the Aetna case, a relationship "close enough" to establish privity for purposes of collateral estoppel under New Jersey law.

Collateral estoppel only applies to parties or to those in privity with them. "[Privity] is merely a word used to say that the relationship between the one who is a party on the record and another is close enough to include the other within the res judicata." Bruszewski v. United States, 181 F.2d 419, 423 (3d Cir. 1950) (Goodrich, J., concurring), cert. denied, 340 U.S. 865. "A relationship is usually considered 'close enough' only when the party is a virtual representative of the non-party, or when the non-party actually controls the litigation." Collins v. E.I. DuPont de Nemours & Co., 34 F.3d 172, 176 (3d. Cir. 1994). In the context of collateral estoppel, virtual representation "requires a relationship by which the party in the suit is the legally designated representative of the non-party[.]" Id. In sum, privity exists "when there is a pre-existing legal relationship by which a party represents a non-party." Id. at 176-77; Panniel v. Diaz, 376 N.J. Super. 597, 613-14 (Law Div. 2004). Thus, through the SPA and Maxus's designation as DSCC/OCC's attorney-in-fact, Maxus and OCC are in privity with one another. See also Transamerica Occidental Life Ins. Co. v. Aviation Office of Am., Inc., 292 F.3d 384, 388-89, 391 (3d Cir. 2002) (explaining that parties to an "attorney-in-fact" relationship should be treated as the same party).

In its response, OCC argues that collateral estoppel should not apply "[b]ecause it is difficult to imagine a party that had less opportunity or incentive to litigate a matter than OCC did in the Aetna case[.]" OCC Brief at 38 (emphasis in original). This is because, according to OCC, it was Maxus that stood to benefit from any insurance recovery in Aetna. OCC Brief at 41.

OCC relies primarily on Pace v. Kuckinsky, 347 N.J. Super. 202 (App. Div. 2002). In that case, the Appellate Division held that collateral estoppel would not bar a plaintiff's personal injury claim against a defendant driver, after the plaintiff's doctor filed an arbitration proceeding against the plaintiff's insurer for unpaid medical bills as the assignee of the plaintiffs' insurance benefits. Pace, supra, 347 N.J. Super. at 217. In Pace, the Appellate Division paid particular attention to the fact that the plaintiff was not represented by its own counsel in the doctor's arbitration proceeding. Id. ("Unless expressly waived, a full and fair hearing requires representation by the party's own counsel, thereby insuring presentation of the specific issue to be decided in the very manner that the party chooses."). According to the Appellate Division, this meant the plaintiff did not get its "day in court." Id.

The Appellate Division's concern in Pace is not present here. OCC had its day in court and was represented by its own lawyers. The deal that it struck with Maxus was that Maxus would defend and indemnify OCC from Lister-related liabilities, including a specific provision for Maxus to appear as "attorney-in-fact" for DSCC/OCC. OCC had the opportunity to participate in Aetna, and it did so through Maxus. Moreover, OCC had every incentive to participate in the Aetna case as the legal successor to DSCC. It merely chose to do so through its indemnitor. Accordingly, OCC should be estopped from denying those facts that were established in Aetna, regardless of whether or not those facts are actually contested here.

2. Maxus's reliance on an exception to collateral estoppel concerning burden of proof is misplaced.

Maxus's only argument against the use of collateral estoppel to prove "intent" centers on the burden to prove punitive damages. Maxus points out that the burden of proof in Aetna was governed by a preponderance-of-the-evidence standard, while punitive damages must be proven by clear and convincing evidence under New Jersey law. Maxus Brief at 8. This distinction

alone, according to Maxus, precludes the Court's entry of judgment on "intent" based on collateral estoppel. Id.

With respect to punitive damages, Maxus's focus on the burden of proof is a red herring, regardless of whether or not that argument is, in fact, correct. This is because, under any standard, DSCC's intentional conduct is proven as a matter of law. DSCC's intentional conduct was not disputed in Aetna, nor is it disputed here. Moreover, Plaintiffs do not intend to use collateral estoppel as a basis to prove punitive damages. Plaintiffs intend to prove their entitlement to punitive damages before a jury, and the findings of fact in Aetna should not preclude Plaintiffs from introducing any evidence in support of its claim for punitive damages, including the Aetna findings themselves. See also note 7.

With respect to other issues in this case, such as Plaintiffs' Spill Act claim, Maxus's burden of proof argument is inapplicable because the burden of proof is governed by the same preponderance-of-the-evidence standard. See Longobardo v. Chubb Ins. Co., 234 N.J. Super. 2, 24 (App. Div. 1989), rev'd on other grounds, 121 N.J. 530; Lacey Mun. Utils. Auth. v. Dep't of Envtl. Prot., 369 N.J. Super. 261, 273 (App. Div. 2004); Plaintiffs' Brief at 38. Accordingly, OCC and Maxus should be collaterally estopped from disputing that DSCC's discharges from the Lister Plant to the Passaic River were intentional.

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:

(1) DSCC discharged dioxin, DDT and other hazardous substances into the Passaic River in violation of the Spill Act;

(2) OCC is DSCC's direct successor by merger and is liable as a "discharger" under the Spill Act for all past and future cleanup and removal costs associated with DSCC's discharges, which shall be established in future proceedings; and

(3) OCC and Maxus are collaterally estopped from denying that DSCC intentionally discharged dioxin, DDT and other hazardous substances into the Passaic River.

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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