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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

STATEMENT OF UNDISPUTED
MATERIAL FACTS IN SUPPORT OF
PLAINTIFFS' MOTION FOR PARTIAL
SUMMARY JUDGMENT AGAINST
OCCIDENTAL CHEMICAL CORPORATION,
MAXUS ENERGY CORPORATION,
AND TIERRA SOLUTIONS, INC.

TABLE OF EXHIBITS

<u>No.</u>	<u>Description</u>
1.	Brief on Behalf of Plaintiff-Appellant Diamond Shamrock Chemicals Company, filed in the matter <u>Diamond Shamrock Chemicals Company v. The Aetna Casualty & Surety Company, et al.</u> , Case No. A-694-89TI, New Jersey Superior Court, Appellate Division (MAXUS034076-34170)
2.	2008 Administrative Settlement Agreement and Order on Consent for Removal Action (In the matter of Lower Passaic River Study Area of the Diamond Alkali Superfund Site, Occidental Chemical Corporation and Tierra Solutions, Inc., Respondents) (MAXUS1355006-1355075)
3.	June 10, 1983 letter from James B. Worthington to Michael Catania (MAXUS036795-36814)
4.	Plaintiff's Statement of Indisputable Material Facts with Respect to Second Tier Motions, filed in the matter <u>Diamond Shamrock Chemicals Company v. Aetna Casualty & Surety Company, et al.</u> , Docket No. C3939-84, Superior Court of New Jersey, Chancery Division, Morris County (MAXUS0964678-964734)
5.	Federal Register/Vol. 72, No. 90/May 10, 2007, p.26544-26554
6.	Executive Order No. 40 (NJDEP00051857-51859)
7.	January 27, 1984 Summary Sheet, 80 Lister Avenue, excerpts from the 80 Lister Avenue, Newark, New Jersey Dioxin Sampling Report (NJDEP00112124-112422)
8.	Administrative Order No. EO-40-1 (NJDEP00162234)
9.	Administrative Order No. EO-40-17 (NJDEP00113027-113028)
10.	March 1984 Administrative Consent Order (OCCNJ0022877-22886)
11.	Civil Action Complaint, filed September 19, 1984 in the matter <u>Diamond Shamrock Chemicals Company v. Aetna Casualty & Surety Company, et al.</u> , Docket No. C3939-84, Superior Court of New Jersey, Chancery Division, Morris County (MAXUS032859-32875)
12.	Brief of Defendants-Respondents/Cross-Appellants, filed in the matter <u>Diamond Shamrock Chemicals Company v. The Aetna Casualty & Surety Company, et al.</u> , Case No. A-694-89TI, New Jersey Superior Court, Appellate Division (NJDEP00002821-2975)

13. July 1, 1989 Partial Final Judgment and R. 4:42-2 Certification, filed in the matter Diamond Shamrock Chemicals Company v. Aetna Casualty & Surety Company, et al., Docket No. C3939-84, Superior Court of New Jersey, Chancery Division, Morris County (MAXUS033003-33013)
14. Second Amended and Supplemented Civil Action Complaint, filed in the matter Diamond Shamrock Chemicals Company v. Aetna Casualty & Surety Company, et al., Docket No. C3939-84, Superior Court of New Jersey, Chancery Division, Morris County (MAXUS032934-32954)
15. Trial Court Opinion (corrected April 12, 1989), entered in the matter Diamond Shamrock Chemicals Company v. Aetna Casualty & Surety Company, et al., Docket No. C3939-84, Superior Court of New Jersey, Chancery Division, Morris County (MAXUS030392-30448)
16. Sworn trial testimony of Walter Blair, recorded in the matter Diamond Shamrock Chemicals Company v. Aetna Casualty & Surety Company, et al., Docket No. C3939-84, Superior Court of New Jersey, Chancery Division, Morris County (MAXUS028275-28279; MAXUS028343-28401; and MAXUS028403)
17. Sworn trial testimony of Nicholas Centanni and Aldo Andreini, recorded in the matter Diamond Shamrock Chemicals Company v. Aetna Casualty & Surety Company, et al., Docket No. C3939-84, Superior Court of New Jersey, Chancery Division, Morris County (MAXUS028404-28467; and MAXUS028469)
18. Sworn trial testimony of Arthur Scureman and John Burton, recorded in the matter Diamond Shamrock Chemicals Company v. Aetna Casualty & Surety Company, et al., Docket No. C3939-84, Superior Court of New Jersey, Chancery Division, Morris County (MAXUS028470-28582)
19. Sworn trial testimony of John Burton, recorded in the matter Diamond Shamrock Chemicals Company v. Aetna Casualty & Surety Company, et al., Docket No. C3939-84, Superior Court of New Jersey, Chancery Division, Morris County (MAXUS028583-28701)
20. Sworn trial testimony of Anthony Wolfskill, recorded in the matter Diamond Shamrock Chemicals Company v. Aetna Casualty & Surety Company, et al., Docket No. C3939-84, Superior Court of New Jersey, Chancery Division, Morris County (MAXUS026561-26565; MAXUS026638-026644; and MAXUS026651)
21. Sworn trial testimony of Anthony Wolfskill, recorded in the matter Diamond Shamrock Chemicals Company v. Aetna Casualty & Surety Company, et al., Docket No. C3939-84, Superior Court of New Jersey, Chancery Division, Morris County (MAXUS026770-26876; and MAXUS026882)

22. Sworn trial testimony of Anthony Wolfskill, recorded in the matter Diamond Shamrock Chemicals Company v. Aetna Casualty & Surety Company, et al., Docket No. C3939-84, Superior Court of New Jersey, Chancery Division, Morris County (MAXUS026883-27007)
23. Sworn trial testimony of Michael Catania, recorded in the matter Diamond Shamrock Chemicals Company v. Aetna Casualty & Surety Company, et al., Docket No. C3939-84, Superior Court of New Jersey, Chancery Division, Morris County (MAXUS025966-26095; and MAXUS026101)
24. Reply Brief on Behalf of Plaintiff-Appellant Diamond Shamrock Chemicals Company, filed in the matter Diamond Shamrock Chemicals Company v. The Aetna Casualty & Surety Company, et al., Case No. A-694-89TI, New Jersey Superior Court, Appellate Division (MAXUS045450-45535)
25. Maxus Energy Corporation's and Tierra Solutions, Inc.'s Amended Initial Disclosures, NJDEP, et al. v. Occidental Chemical Corporation, et al.
26. Occidental Chemical Corporation's Initial Disclosures, NJDEP, et al. v. Occidental Chemical Corporation, et al.
27. June 1, 1955 Memorandum from D.J. Porter to John Burton (OCCNJ0048641)
28. October 20, 1964 Memorandum from J.S. Cort, Jr. to F.R. Kennedy (OCCNJ0048797)
29. July 3, 1956 Letter from Alexander Goldberg and Michael Adolino to Seymour Lubetkin (MAXUS037004)
30. July 6, 1956 Letter from J. Burton to M.D. Adolino (MAXUS037005)
31. July 10, 1956 Memorandum from John Burton to B.D. Gleissner (OCCNJ0048861-48863)
32. July 22, 1956 Letter from J. Burton to Michael Andolino (MAXUS037818)
33. July 26, 1956 Memorandum from John Burton to Bruce Gleissner (OCCNJ0048857)
34. July 31, 1956 Memorandum from W.R. Taylor to John Burton (OCCNJ0048856)
35. April 4, 1960 Memorandum from J. Burton to H. S. Weiner (MAXUS036883-36885)
36. March 24, 1967 document titled: Water Pollution Control in the Chemical Industry, Individual Location Report – Diamond Alkali Company (OCCNJ0048898-48901)
37. August 3, 1956 Letter from Louis Auerbacher, Jr. to Diamond Alkali Company (OCCNJ0048853)
38. August 9, 1956 Letter from J. Burton to Louis Auerbacher, Jr. (OCCNJ0048852)

39. October 13, 1964 Letter from Robert Scocca to Diamond Alkali Company (OCCNJ0048798-48799)
40. September 18, 1968 Letter from Harvey Jones to Diamond Shamrock Chemical Co. (OCCNJ0048879)
41. October 18, 1968 Memorandum from A.L. Gregoric to W.R. Taylor (OCCNJ0048875-48876)
42. November 12, 1968 Memorandum from W.R. Taylor to R.A. Guidi (OCCNJ0048793)
43. September 23, 1968 Memorandum from W.R. Taylor to Robert Chonoles (OCCNJ0048877)
44. February 1985 Site Evaluation – 80 Lister Avenue (NJDEP00141192-141598)
45. March 18, 1986 Passaic River Sediment Study (NJDEP00387455-387614)
46. September 4, 1986 Stock Purchase Agreement between Diamond Shamrock Corporation, Occidental Petroleum Corporation, Occidental Chemical Holding Corporation and Oxy-Diamond Alkali Corporation (OCCNJ0000204-378)
47. State of Delaware Secretary of State Certification and Certificate of Amendment of Restated Certificate of Incorporation of Diamond Shamrock Chemicals Company (OCCNJ0009303-9306)
48. State of Delaware Secretary of State Certification and Certificate of Ownership and Merger – Occidental Electrochemicals Corporation into Occidental Chemical Corporation and Appointment of Agent for Service (OCCNJ0011579-11587)
49. Movants’ Statement in Support of Motion for Summary Judgment, In re “Agent Orange” Product Liability Litigation (OCCNJ0124728-124806)
50. November 7, 2003 Letter from Carol Dinkins to John Sacco (NJDEP00367337-367364)
51. March 1994 Administrative Order on Consent (NJDEP00382467-382515)
52. February 2004 Modified Administrative Order on Consent (OCCNJ0023765-23768)
53. October 30, 2003 e-mail communication from J. Alan Mack to David Wadsworth and Sara Galley (OCCNJ0046171)
54. October 2, 2003 Letter from Karen Ciccone to David Wadsworth (OCCNJ0023709-23710)
55. June 18, 2008 Letter Agreement between OxyChem, Maxus Energy Corporation and Tierra Solutions, Inc., regarding proposed Administrative Settlement Agreement and Order on Consent for Removal Action (OCCNJ0046187-46190)

56. April 4, 1986 Letter from James Kelley to Ray Irani (OCCNJ0027238-27241)
57. July 10, 1987 Letter Agreement between Michael Rudick and W.E. Notestine (OCCNJ0022991-22992)
58. Exhibit 8.13 to the September 4, 1986 Stock Purchase Agreement (OCCNJ0063174)
59. NPL Site Narrative for Diamond Alkali Company
60. April 19, 1984 Deed from E.M. Sergeant Pulp and Chemical Co. to Diamond Shamrock Chemicals Company
61. December 31, 1985 Settlement Agreement and Release between Marisol, Inc. and Diamond Shamrock Chemicals Company (MAXUS040081-40088)
62. January 27, 1986 Deed from Marisol, Inc. to Diamond Shamrock Chemicals Company
63. January 1, 1984 Assignment & Assumption Agreement between Diamond Shamrock Corporate Company and Diamond Shamrock Chemicals Company (MAXUS022033-22038)
64. State of Delaware Secretary of State Certification and Certificate of Amendment of Certificate of Incorporation of Diamond Shamrock Process Chemicals, Inc. (MAXUS0443862-443863)
65. August 28, 1986 Deed from Diamond Shamrock Chemicals Company to Diamond Shamrock Chemical Land Holdings, conveying Lots 58 and 59 in Newark, New Jersey
66. August 28, 1986 Deed from Diamond Shamrock Chemicals Company to Diamond Shamrock Chemical Land Holdings, conveying Lot 57 in Newark, New Jersey
67. August 5, 1986 Diamond Shamrock Chemicals Company Written Action in Lieu of Board Meeting (OCCNJ0009602-9603)
68. Executive Summary and Other Information for Diamond Shamrock Chemicals Company (OCCNJ0005282-5293)
69. Responses of Defendants Maxus Energy Corporation and Tierra Solutions, Inc. to Plaintiffs' Second Set of Requests for Admission
70. 1989-90 Consent Agreement and Order (MAXUS018141-18242)
71. August 14, 1986 Assumption Agreement (MAXUS0105854-105871)
72. August 14, 1986 Contribution Agreement (MAXUS1305777-1305783)
73. Petition for Certification of Diamond Shamrock Chemicals Company, Docket No. 35,462, Supreme Court of New Jersey (MAXUS045536-45558)

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”), pursuant to Rule 4:46-2a,¹ submit this Statement of Undisputed Material Facts (“Statement of Facts”) in support of their motions for partial summary judgment against Defendants Occidental Chemical Corporation (“OCC”), Maxus Energy Corporation (“Maxus”) and Tierra Solutions, Inc. (“Tierra”).

INTRODUCTION

When originally enacted in 1976, the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et seq. (the “Spill Act”), imposed strict liability only against a discharger of hazardous substances. But that rendition of the liability provision was deemed inadequate to address the enormous problem of historic industrial pollution that plagued New Jersey, and the Legislature broadened the net of liability to capture all persons “in any way responsible” for any hazardous substance discharged. Moreover, the Legislature empowered the State to hold any individual party strictly, jointly and severally liable for all cleanup and removal costs incurred. The goal of these changes was to ensure that cleanups would in fact take place and that polluters would ultimately pay to remediate New Jersey, not the public. Accordingly, in this case, Plaintiffs are seeking the recovery of all past costs incurred and declaratory relief that certain defendants associated with the notorious Lister Avenue site pay any future cleanup and removal costs associated with their brazen discharges of dioxin, DDT and other hazardous substances into

¹ Pursuant to Rule 4:46-2(a), Plaintiffs present the page and paragraph number containing the information required to establish each undisputed fact. The uppermost paragraph on the referenced page, whether complete or incomplete, is considered ¶ 1. For multi-page references, the referenced paragraph refers to the paragraph number on the first page referenced. If the referenced page contains numbered paragraphs, the paragraph number provided is the number of the referenced paragraph. For transcripts, Plaintiffs provide the Bates numbers of the referenced pages and the page and line number in the official court transcript.

the Passaic River over the course of decades. The Legislature and the Supreme Court have unequivocally declared that those costs simply should not be borne by the public.

As set forth in the accompanying briefs, OCC and Tierra are both liable under the Spill Act for the hazardous substances intentionally discharged from the Lister Plant.² As a matter of law, OCC is the Lister Plant “discharger” as the direct successor by merger to Diamond Shamrock Chemicals Company (“DSCC”). Likewise, Tierra is a person “in any way responsible” for the hazardous substances OCC/DSCC discharged from the Lister Plant by virtue of its knowing acquisition of the contaminated Lister Plant site in 1986. Accordingly, Plaintiffs ask the Court to rule that OCC and Tierra are strictly, jointly and severally liable to Plaintiffs for all past and future cleanup and removal costs associated with OCC/DSCC’s discharges of hazardous substances from the Lister Plant into the Passaic River.

The Legislature designed the Spill Act’s strict, joint and several liability scheme to avoid complex and lengthy multi-party litigation and provide for the early recovery by the State of its cleanup and removal costs. In this matter, realization of this goal has been hampered in part by the massive quantity and extreme toxicity of the hazardous substances discharged from the Lister Plant, the tidal nature of the Passaic River into which these hazardous substances were intentionally discharged, and also by the delaying tactics employed by these defendants to defer indefinitely the day of reckoning. Nonetheless, the Spill Act’s liability threshold is low, and it is met by the mountain of evidence of discharges from the Lister Plant into the Passaic River.

² Maxus is also a Spill Act liable party. In this motion, however, Plaintiffs have not moved for partial summary judgment on Spill Act liability against Maxus due, in part, to significant issues with Maxus’s recent document production. On January 14, 2011, Maxus and Tierra produced approximately 2.5 million pages of documents in response to Plaintiffs’ document requests, which were issued in August 2009. In addition to the significant volume of documents Maxus and Tierra unloaded at one time, Plaintiffs have encountered many issues with the manner in which Maxus and Tierra produced their documents. These issues have made Plaintiffs’ search through the millions of pages of documents exceedingly difficult. As such, Plaintiffs intend to take targeted discovery from Maxus on issues relevant to their Spill Act liability and hereby seek leave to file a motion for partial summary judgment after such targeted discovery.

Moreover, New Jersey courts have already determined OCC/DSCC to be an intentional discharger, and Plaintiffs ask the Court to find that Maxus and OCC are estopped from contesting that fact again now. Therefore, there is no question of fact or law, and Plaintiffs' Motion for Partial Summary Judgment should be granted.

By granting Plaintiffs' motion now as to liability for discharges to the Passaic River and granting the declaratory relief requested herein, the other issues remaining for trial and later phases are greatly narrowed and focused. Given the mountain of evidence before the Court now, as well as the prior rulings of New Jersey's courts, it would be unfairly burdensome and taxing on the State's administrative and judicial resources to re-try these issues again, some 25 years later. Moreover, while issues pertinent to the geographic scope of contamination and associated cleanup and removal costs must await the forthcoming remedy, only by establishing the underlying Lister Plant liabilities now may the Court proceed to issues of remedy, damages and allocation among these defendants and third parties in a logical fashion. As the last few years have clearly demonstrated, these underlying liabilities must be established first before progress may be made, or resolution had, on any other front in this matter. Finally, by granting these motions now, the Court would be fulfilling its role in enforcing the Spill Act to ensure that responsible parties – and not the public – will be held accountable for all cleanup and removal costs associated with discharges from the Lister Plant.

Accordingly, Plaintiffs ask that the Court grant this Motion for Partial Summary Judgment on liability, enter declaratory relief that OCC and Tierra are strictly, jointly and severally liable for all cleanup and removal costs associated with the discharges from the Lister Plant, and then expeditiously determine the appropriate costs and damages afforded Plaintiffs by that judgment.

STATEMENT OF FACTS

POINT I

DSCC INTENTIONALLY DISCHARGED DIOXIN, DDT AND OTHER HAZARDOUS SUBSTANCES FROM THE LISTER PLANT INTO THE PASSAIC RIVER.

1. From 1951 to 1969, Diamond Shamrock Chemicals Company (“DSCC”) and its predecessors owned and operated the “Lister Plant,” a pesticide manufacturing facility located at 80 Lister Avenue in Newark, New Jersey. Exhibit 1 at MAXUS034098 ¶ 1.³ One of the chemicals produced at the Lister Plant was 2,4,5-T, a phenoxy herbicide. *Ibid.*; Exhibit 3 at MAXUS036796 ¶ 3. Dioxin was a highly toxic by-product of DSCC’s manufacture of 2,4,5-T.⁴ Exhibit 1 at MAXUS034098 ¶ 1; Exhibit 3 at MAXUS036797 ¶ 2; Exhibit 4 at MAXUS0964694 ¶ 4. Other chemicals produced by DSCC at the Lister Plant included “DDT” and “2,4-D.” Exhibit 3 at MAXUS036798-99; Exhibit 4 at MAXUS0964684 ¶1.

2. In 1983, environmental agencies discovered that the Lister Plant was the source of dioxin contamination of the Newark area, prompting then New Jersey Governor Thomas H. Kean to issue Executive Order No. 40. Exhibit 6 at NJDEP00051857; Exhibit 7 at NJDEP00112133. Governor Kean directed DEP to take necessary steps to “protect the health, safety and welfare of the citizens of (New Jersey)” from the dangers posed by the Lister Plant, including the dangers of dioxin contamination in the Passaic River. Exhibit 6 at NJDEP00051858 ¶ 2. Accordingly, in late 1983, after consumption bans due to PCBs, DEP

³ Diamond Alkali Company, who purchased the Lister Plant in 1951, changed its name to Diamond Shamrock Corporation (“DSC-1”) in 1967 and to Diamond Shamrock Chemicals Company – “DSCC” – in 1983. Exhibit 2 at MAXUS1355014 ¶ “f”; *see also* OCC’s Answer and Affirmative Defenses to Plaintiffs’ Third-Amended Complaint (“OCC’s Answer”), and Amended Cross-Claims (“OCC’s Amended Cross-Claims”) at p. 27 ¶¶ 2-3, p. 28 ¶ 6. Unless noted otherwise, Diamond Alkali Company, DSC-1 and DSCC are referred to collectively as “DSCC.”

⁴ The specific form of dioxin formed during the processes used at the Lister Plant was 2,3,7,8 tetrachlorodibenzo-p-dioxin (“2,3,7,8-TCDD”). This form of dioxin is the most toxic of the numerous forms of dioxin. Fed. Reg., May 10, 2007 at p. 26554, attached as Exhibit 5. In fact, an entire system of toxic equivalents has been developed for hazardous substances, and the toxicity of 2,3,7,8-TCDD is set at 1.0, from which all other toxic substances are compared. *Ibid.* In other words, 2,3,7,8-TCDD is believed to be the most toxic synthetic substance known to man.

issued administrative orders prohibiting the consumption of fish and shellfish from parts of the Passaic River adjacent to the Lister Plant after testing revealed dioxin concentrations in them. Exhibit 8; Exhibit 9 at NJDEP00113027 ¶ 1. In March 1984, DEP directed DSCC to remediate the dioxin and other hazardous substances contaminating the Lister Plant, ultimately costing many millions of dollars. Exhibit 10 at OCCNJ0022878 ¶ 8.

3. In September 1984, DSCC filed suit against Aetna Casualty & Surety Company and 125 other insurers in Superior Court. See Diamond Shamrock Chems. Co. v. Aetna Cas. & Sur. Co., Docket No. C-3939-84, Superior Court of New Jersey, Chancery Division (the “Aetna Trial”), attached as Exhibit 11. In the Aetna Trial, DSCC sought a declaratory judgment that its insurers were required to pay for DSCC’s past and future remediation of the Lister Plant and for third-party bodily injury and property damage claims resulting from dioxin “allegedly created in the manufacture of 2,4,5-T and other chemicals at the Newark Plant.” Exhibit 11 at MAXUS032864 ¶ 4. In response, DSCC’s insurers claimed that dioxin had been intentionally discharged from the Lister Plant into the environment and, therefore, coverage for losses due to those discharges was excluded under their policies. Exhibit 12 at NJDEP00002840-41.

A. In the Aetna Trial, Judge Stanton found that DSCC, as a matter of corporate policy, intentionally and continuously discharged dioxin, DDT and other hazardous substances from the Lister Plant into the Passaic River during the entire period of its plant operations.

4. Beginning September 7, 1988, DSCC’s declaratory judgment action was tried before Superior Judge Reginald Stanton. Exhibit 13 at MAXUS033008 ¶ 1.⁵ After a twenty-day bench trial, on April 12, 1989, Judge Stanton issued a strongly-worded 50-page opinion containing the court’s detailed findings of fact and conclusions of law. Exhibit 15. Based on

⁵ During the litigation and Aetna Trial, in-house counsel for Maxus represented DSCC. Exhibit 4 at MAXUS0964734; Exhibit 14 at MAXUS032954.

extensive findings of fact, Judge Stanton “concluded that none of the defendants (was) liable in any amount on any of the policies with respect to (DSCC’s) operation of the (Lister Plant).” Id. at MAXUS030405 ¶ 3.

5. The trial court summarized its findings and DSCC’s environmental policies by stating that “(DSCC) intentionally and continuously discharged highly toxic chemical effluent into the Passaic River from 1951 to 1969.” Id. at MAXUS030430 ¶ 2. Specifically, the trial court found that:

- “From 1951 to 1956, (DSCC) intentionally discharged all of its waste chemical effluent into the Passaic River.” Id. at MAXUS030406 ¶ 4.
- In 1956, the Passaic Valley Sewerage District insisted that DSCC discontinue their discharges into the Passaic River and, in response, DSCC “purportedly tied its entire complex at the (Lister Plant) into an industrial sewer constructed by the Passaic Valley Sewerage Commission.” Id. at MAXUS030407 ¶ 1.
- However, “(a)lthough (DSCC) purported to tie the whole (Lister Plant) into the sewer in 1956, it actually tied only the 2,4-D building into the sewer. The chemical effluent from the main building continued to be discharged directly into the Passaic River.” Ibid. at ¶ 2.
- Those discharges “were intentional, planned discharges from processing equipment through pipes or ditches.” Ibid.
- “In addition, from 1951 through 1969, spills onto floors and ground surfaces drained mostly into the Passaic River. These spills were constant, and, collectively, they were substantial in volume.” Ibid.
- “(DSCC) was conscious that its discharges into the (Passaic) (R)iver were illegal. It deliberately concealed them, and over a period of many years employed an alarm system to warn employees to stop the discharges when Passaic Valley inspectors were on the premises.” Ibid.
- “Over the years, discharges from the (Lister Plant) into the Passaic River included 2,4,5-T acid (and dioxin), caustic soda, DDT, sulfuric acid, TCP (and dioxin), muriatic acid and monochlorobenzene.” Ibid. at ¶ 3.
- Thus, “(t)he conclusion is inescapable that the consistent policy of (DSCC’s) management (both at the local plant level and at corporate headquarters) was to discharge dangerous chemicals into the Passaic River in known violation of public law. This policy persisted from 1951 through 1969.” Id. at MAXUS030407-08 ¶ 3.

- “The policy was consciously adopted by (DSCC’s) management because the pollution of the public waters of the State was not perceived by them as a significant wrong, and because it would have been technically difficult and very costly to have avoided such discharges.” Id. at MAXUS030408 ¶ 1.
- “Housekeeping at the (Lister Plant) ranged from inadequate to poor throughout the entire period of its operation by (DSCC). . . . Spills of liquid and solid chemical products and wastes were literally continuous during every day of the plant’s operations. Some pipes were always leaking.” Ibid. at ¶ 2.
- “The fact that current remediation efforts are centering on the buildings and soils of the (Lister Plant) rather than on the Passaic River does not mean that the extensive testimony about the abuse of the river was irrelevant. The testimony was highly relevant because it established that from 1951 to 1969 (DSCC) had a mindset and a method of conducting manufacturing operations which were destructive of the land, air and water resources of the environment.” Id. at MAXUS030409 at ¶ 2.
- “(E)ven by the standards of the 1951-1969 period, (DSCC’s) conduct in operating the (Lister Plant) was unacceptably wrong and irresponsible. (DSCC) always put its narrowly perceived economic interest first.” Ibid. at ¶ 3.
- DSCC knew “the nature of the chemicals it was handling, it (knew) that they were being continuously discharged into the environment, and it (knew) that they were doing at least some harm.” Id. at MAXUS030431 ¶ 2.

6. Because their discharges from the Lister Plant into the Passaic River constituted knowing and intentional conduct, the trial court held that DSCC had no insurance coverage for the discharges: “(DSCC’s) knowing and routine discharge of contaminants over a period of 18 years makes it necessary to conclude that the resulting injury and damage was expected from the standpoint of the insured” Id. at MAXUS030432 ¶ 1. Moreover, “(w)hen someone acts the way (DSCC) did for 18 years, it is no accident that the environment was contaminated, that property was damaged, that neighbors may have been injured.” Ibid. at ¶ 2.⁶

⁶ Plaintiffs expressly incorporate the entirety of the trial court’s opinion as contained in Exhibit 15 into this Statement of Undisputed Material Facts as there is no dispute as to the contents of the trial court’s ruling.

- B. Judge Stanton's findings of fact and conclusions of law were based on twenty days of detailed testimony describing DSCC's egregious conduct and, particularly, DSCC's intentional discharges of dioxin and other hazardous substances into the Passaic River.

7. As described above, Judge Stanton found that DSCC's intentional discharges into the Passaic River were particularly relevant to his conclusions that no coverage existed under the insurance policies at issue:

The fact that current remediation efforts are centering on the buildings and soils of the (Lister Plant) rather than on the Passaic River does not mean that the extensive testimony about the abuse of the river was irrelevant. The testimony was highly relevant because it established that from 1951 to 1969 (DSCC) had a mindset and a method of conducting manufacturing operations which were destructive of the land, air and water resources of the environment. (Exhibit 15 at MAXUS030409 ¶ 2.)

In other words, Judge Stanton's findings that DSCC's discharges were intentional were expressly based on the extensive, detailed testimony of DSCC's discharges into the Passaic River.

8. Some of the extensive, detailed testimony regarding discharges to the Passaic River includes the testimony of Walter Blair, who worked as a mechanic at the Lister Plant from 1953 to 1969. Exhibit 16 at MAXUS028344 (70:3-18); MAXUS028343-028400.

- Mr. Blair testified that during the 1950s, the wastewater effluent from the Lister Plant went directly to the Passaic River. Id. at MAXUS028344-45 (70:19-71:19).
- He described a pit that was later constructed to hold the waste, but testified that when the pit filled, DSCC heated the pit contents and sent those to the Passaic River. Id. at MAXUS028345 (71:18-25).
- Mr. Blair also testified that when the floors at the Lister Plant were washed down, the wash water went directly into the Passaic River. Id. at MAXUS028347-48 (73:19-74:5).

9. Additional evidence of DSCC's intentional discharges into the Passaic River included the testimony of Nicholas Centanni, a Lister Plant employee from 1948 until 1969. Exhibit 17 at MAXUS028408 (2:1-7); MAXUS028410-13 (4:2-7:4); MAXUS028408-028450.

- Mr. Centanni testified that the term used at the Lister Plant to describe the disposal of effluents was “riverize.” Id. at MAXUS028415 (9:13-17). “Riverize” meant “(s)end it to the river.” Ibid. at 9:17.
- He also described in detail how sulfuric acid was poured on the concrete floors of the process buildings, including the area where the 2,4,5-T process (the process producing dioxin) was conducted. Id. at MAXUS028419-22 (13:8-16:24).
- Mr. Centanni testified that all of the process buildings at the Lister Plant had a trench leading from the building to a catch basin, which in turn led directly to the Passaic River. Id. at MAXUS028427-28 (21:10-22:16). When the catch basin was full of sediment, the solid material would be removed and the basin washed, with the wash water going to the Passaic River or to the city sewer line. Id. at MAXUS028429-34 (23:14-28:9).
- Mr. Centanni also provided a first-hand account of a “mountain” of DDT that accumulated in the Passaic River due to discharges from the Lister Plant. Id. at MAXUS028437-39 (31:17-33:18).

10. Aldo Andreini, a Lister Plant employee from 1955 to 1969, also provided testimony of DSCC’s intentional discharges to the Passaic River. Exhibit 17 at MAXUS028451 (45:6-12); MAXUS028450-028467.

- Mr. Andreini confirmed that until the time he left the plant in 1969, trenches led from the formulations area to the Passaic River so that if spills occurred the material would be washed into the trench and to the river. Id. at MAXUS028452 (46:12-23).
- On cross-examination, DSCC counsel attempted, unsuccessfully, to elicit testimony that the discharges to the river were diverted to the city sewer at some point. Id. at MAXUS028465-67 (59:21-61:1). Mr. Andreini refused to concede this, saying “I could see there was liquid going through the trenches toward the angle of the river.” Ibid.

11. Arthur Scureman, a Lister Plant employee from 1951 until 1969, also testified about DSCC’s intentional discharges to the Passaic River. Exhibit 18 at MAXUS028475 (6:12-14), MAXUS028476-78 (7:9-9:10); MAXUS028475-028527.

- Mr. Scureman described the trench system outside the building in which 2,4-T and 2,4,5-T was made, which led to the Passaic River. Id. at MAXUS028480-82 (11:7-13:3).
- Mr. Scureman also testified about his early morning overtime work, which meant “put(ting) some stuff away in the river.” Id. at MAXUS028507 (38:8-11). He

testified, “(a)nd I used to come in early, work overtime to drop it in the river because they didn’t want the barges and everything going up and down to see us dropping anything in the river.” Ibid. at 38:19-22.

- He further testified about the dumping of contents of barrels of waste material into the Passaic River early in the morning while it was dark. Id. at MAXUS028508-10 (39:20-41:16).
- Mr. Scureman also described his orders upon seeing the company’s guard come in with inspectors, which was to “try and stop them so they don’t go to the river front. And run in the building and the ester room and 2,4-D building and tell them to stop dropping all their stuff to the sewer, close off the valves.” Id. at MAXUS028508 (39:11-18).
- Finally, Mr. Scureman testified that before DSCC installed a catch basin, “everything used to go . . . to the river.” Id. at MAXUS028519-20 (50:22-51:3).

12. John Burton, the long-time Lister Plant Manager, also provided detailed testimony and insight into DSCC’s internal “alarm system” and policies to “riverize” its chemical effluent. Exhibit 18 at MAXUS028527 (58:18-20), MAXUS028536-37 (67:19-68:1), MAXUS028537 (68:7-9); Exhibit 18 at MAXUS028527-028580; Exhibit 19 at MAXUS028588-028700.

- Mr. Burton testified that he was aware that “generally speaking, any substantial quantities of acids or any substantial quantity of any chemicals was not permitted(,)” by law, to be discharged into the Passaic River. Exhibit 18 at MAXUS028543 (74:16-24). He was concerned about this “because (they) were putting in substantial quantities of acids and various organic chemicals.” Id. at MAXUS028544 (75:1-3).
- He testified that the chemicals discharged into the Passaic River included caustic soda, muriatic acid, sulfuric acid and DDT. Ibid. at 75:4-17. These same chemicals continued to be disposed of in the Passaic River into the later 1950s, in addition to TCP and associated chlorophenols, “and probably very small quantities of 2,4,5-T acid.” Id. at MAXUS028546 (77:2-24).
- Mr. Burton described the Lister Plant’s pipe system, which led to the Passaic River until 1956. Id. at MAXUS028559 (90:4-18). Filtrates from the TCP process were discarded into the river. Id. at MAXUS028560-61 (91:23-92:24). He knew these discharges were illegal: “So that at some point probably in the 1954 or thereabouts, I would have known that the amount of chlorophenols and the effluent from the trichlorophenol unit was illegal.” Id. at MAXUS028562 (93:3-16).
- Mr. Burton described the “alarm” whereby, when an inspector checked in with the receptionist to obtain an escort for a visit to the Lister Plant, the receptionist would sound three buzzes on the inter-plant communication system to alert the foreman and

the operators “so they would take prompt steps to see that anything being, going into the river at that moment was stopped.” Id. at MAXUS028574 (105:10-24).

- Mr. Burton testified that while the Lister Plant hooked up one building to the sewer in 1956, the main building was not connected. Exhibit 19 at MAXUS028588-594 (6:22-12:21). Connecting the building to the sewer would have entailed constructing a pit, pump and pipeline, which would have increased costs and would have potentially plugged the sewer line. Id. He testified that from the plant’s point of view, it was determined to “let it just go to the river.” Id. at MAXUS028594 (12:11-17).

13. Even DSCC’s own expert witnesses, Dr. L. Anthony Wolfskill, provided evidence of DSCC’s intentional discharges to the Passaic River. Exhibit 20 at MAXUS026638 (78:11-13); MAXUS026638-026644; Exhibit 21 at MAXUS026775-026880; Exhibit 22 at MAXUS026887-027007.

- Dr. Wolfskill testified that discharges to the Passaic River were both accidental and planned. Exhibit 21 at MAXUS026855-57 (87:7-89:2) (“I think that effluent went into the river two ways, one of them was a discharge, planned discharge. There were plenty of accidental releases although to the river. I mean both occurred.”).
- He testified that the Lister Plant’s effluent discharges to the Passaic River violated regulations and that those violations were essentially continuous. Exhibit 22 at MAXUS026919-20 (34:20-35:14).
- Dr. Wolfskill testified that “(t)here continued to be discharges into the river as to my understanding throughout the operation.” Id. at MAXUS026957 (72:2-3).

14. DSCC also presented Michael Catania, Deputy Commissioner of DEP at the time. Exhibit 23 at MAXUS025971 (6:3-15); MAXUS025971-026095.

- Mr. Catania testified that DSCC had entered into a consent decree with DEP to conduct certain activities as a result of the dioxin contamination at the Lister Plant. Id. at MAXUS025980-81 (15:5-16:3).
- He also testified that, at that time, DEP was conducting studies related to dioxin contamination of the Passaic River. Id. at MAXUS026010 (45:2-15). He testified that dioxin had been found in the Passaic River, and that the dioxin levels increased in the area of the Lister Plant and decreased away from the plant. Id. at MAXUS026003 (38:16-20). He also testified that DEP was reserving the right to require DSCC to take appropriate measures at the end of the study. Id. at MAXUS026010 (45:2-15).

15. Based on this live testimony, Judge Stanton issued the trial court's findings of fact and conclusions of law and entered a judgment denying DSCC's request for a declaration of coverage for the environmental claims pled. Exhibit 13 at MAXUS033008 ¶ 3; Exhibit 15 at MAXUS030405-06 ¶ 3.

C. Judge Stanton's rulings were upheld by the Appellate Division in a published opinion, in which the Appellate Division confirmed the relevance of DSCC's discharges of dioxin, DDT and other hazardous substances from the Lister Plant into the Passaic River to the underlying rulings.

16. DSCC appealed the trial court's ruling on the environmental claims. Exhibit 1. Importantly here, in its appellate briefing, DSCC admitted that it discharged dioxin into the Passaic River: "Up to 1960 the Newark Plant discharged 2,4,5-T process waste waters to the river. Although these discharges contained minute quantities of 2,4,5-T, which, in turn, contained even more minute quantities of dioxin, (Pa 2334-37), there is no evidence of any complaint by the PVSC with respect to such discharges. . . ." Id. at MAXUS034103 n. 9. DSCC even admitted that its discharge of waste waters from the 2,4,5-T process to the Passaic River continued until the time the Lister Plant ceased operations in 1969. Id. at MAXUS034104 ¶ 1; see also Exhibit 4 at MAXUS0964706-07 ¶ 15, MAXUS0964709 ¶ 17 – 0964711 ¶ 18, MAXUS0964716 ¶ 21, MAXUS0964722 ¶ 25.

17. Instead of claiming that no discharges from the Lister Plant to the Passaic River occurred, DSCC argued on appeal that it should be afforded insurance coverage because it did not expect or intend the damages resulting from its discharges. Exhibit 1 at MAXUS034128 ¶ 1 (arguing that the law of New Jersey was that "coverage will not be provided for intended results of intentional acts but will be provided for the unintended results of an intentional act"). In addition, DSCC attempted to avoid the impact of the mountain of evidence regarding discharges

to the Passaic River by claiming that those discharges were not relevant to the insurance coverage it was seeking or to the appeal. Exhibit 24 at MAXUS045465 ¶¶ 1-3.⁷

18. The Appellate Division disagreed on all points, affirming the trial court's ruling regarding the environmental claims in a published opinion. Diamond Shamrock Chems. Co. v. Aetna Cas. & Sur. Co., 258 N.J. Super. 167, 211-16 (App. Div. 1992). 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." Aetna, supra, 258 N.J. Super. at 211. "(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." Id. at 215.

19. Moreover, the Appellate Division disagreed with DSCC's contention that the evidence concerning discharges to the Passaic River was not relevant to the issue of coverage. The Appellate Division found that the evidence bore "upon the state of (DSCC's) knowledge and intent regarding the environmental damage caused by its operations." Id. at 183-84. As such, the trial court's finding that DSCC's discharges to the Passaic River were intentional was a basis for the Appellate Division's decision to affirm the ruling of the trial court denying coverage for the environmental claims. Id. at 211.⁸ The Supreme Court denied certification of the case. Diamond Shamrock Chems. Co. v. Aetna Cas. & Sur. Co., 134 N.J. 481 (1993).

20. OCC, Maxus and Tierra recognize the relevance of the Aetna rulings to this litigation. On February 9, 2009, Maxus and Tierra served their Initial Disclosures in this case.

⁷ DSCC explicitly noted that there was the possibility that DEP might require DSCC to incur expense regarding the Passaic River, but claimed that the issue of whether its insurance policies would cover the costs related to the river would be determined in later proceedings. Ibid. at n. 2.

⁸ Plaintiffs expressly incorporate the entirety of the Appellate Division opinion into this Statement of Undisputed Material Facts as there is no dispute as to the contents of the court's opinion.

Exhibit 25. In their Initial Disclosures, Maxus and Tierra made this representation about insurance available to satisfy any environmental claims in this litigation: “Maxus and Tierra do not believe that there is any insurance coverage available to satisfy any environmental claims in Plaintiffs’ Second Amended Complaint. . . .” Id. at p. 28 ¶ 2. And, on February 17, 2009, OCC represented in its Initial Disclosures that “OCC does not believe that there is any insurance coverage available to OCC to satisfy any claims . . . against OCC referenced in Plaintiffs’ operative Second Amended Complaint. . . .” Exhibit 26 at p. 14 ¶ 2. Those issues were decided during the Aetna Trial and appeal.

D. Additional evidence produced in discovery by OCC, Maxus and Tierra demonstrates, without question, that DSCC intentionally discharged dioxin and other hazardous substances into the Passaic River.

21. In addition to the testimony and other evidence presented in the Aetna Trial, OCC, Maxus and Tierra have produced documents in this case demonstrating without question that DSCC intentionally discharged dioxin, DDT and other hazardous substances from the Lister Plant into the Passaic River.

22. Discovery shows that, in 1955, DSCC management sent Lister Plant Manager John Burton a memo asking him to show Bill Taylor around the Lister Plant. According to the memo, Mr. Taylor was “Central Engineering’s outstanding authority on the subject of pollution abatement(.)” Exhibit 27.⁹ Following that meeting, Lister Plant Manager Burton kept Mr. Taylor apprised of the Lister Plant’s practices of discharging its effluents into the Passaic River.

23. For example, on July 3, 1956, representatives of the Passaic Valley Sewerage Commission (“PVSC”) observed a discharge from the Lister Plant into the Passaic River. Exhibit 29 at ¶ 3. Lister Plant Manager John Burton promised the PVSC inspectors that the plant

⁹ Mr. Taylor was elsewhere described by management as the person who “heads up Diamond’s pollution control activities.” Exhibit 28 at ¶ 2.

would connect to a sanitary sewer as soon as possible, instead of discharging chemical effluent directly to the Passaic River. *Ibid.* at ¶¶ 3-4; Exhibit 30. Then, Mr. Burton wrote to the PVSC on July 6, 1956 to inform it that DSCC had “complied with (its) request to divert the objectionable effluent stream of ‘2-4-D filtrate’ into the sanitary sewer. Exhibit 30.

24. However, on July 10, 1956, Plant Manager Burton told a different story to DSCC corporate representatives, Mr. Taylor and Dr. Bruce Gleissner. Exhibit 31. Plant Manager Burton explained that “(a) drive has been started to clean up the Passaic River, principally from an appearance point of view, but in turn this has started the (PVSC) to checking on our effluent(,)” which was problematic given the Lister Plant’s “general history and problems on effluent.” *Id.* at OCCNJ0048861 ¶ 1. Plant Manager Burton explained that the Lister Plant had previously been able to outwit the authorities by “(rerouting) our lines containing HCl to underneath the surface of the water so that they were never detected as a source of acid effluent.” *Id.* at OCCNJ0048862 ¶ 2. The memorandum continues and bears quoting from extensively:

(PVSC) particularly specified that the 2,4-D alkaline filtrate would be satisfactory to go into the sanitary sewer, although at the time at least, they did not know about its high phenolic content.

In general, I feel that if we clean up some of the materials which have some noticeable content of solids that we are not appreciably contaminating the river which has a tremendous flow at this point. The proof of this is our own planned river pump installation. The high phenolic content of our effluent however might some day be a serious problem if they try to make this an area where fish would live, but on the other hand they would first have to clean up the oil scum from the river which to date they have not been able to do. Nevertheless, in view of their strict rules which these various agencies have, we will have to continue to out-wit them as we have in the past or spend a substantial amount of money for neutralizing our effluent and for construction of a larger sanitary sewer out to Lister Avenue. Every year that we can stall this off we are saving ourselves a substantial amount of money and increasing the likelihood that we may have more land at that time to give us room to install some type of neutralization system. . . . Therefore, I think our fundamental position is safe at this location, although we may have to spend some capital and operating money to keep out of trouble if we are not able to continue to outwit the various agencies concerned with the Passaic River.

In view of the recent activity of the (PVSC), we are going to study our effluent problem as much as time permits . . . and determine what we might do in the event that we are subject to really strict inspection and control. (*Id.* at OCCNJ0048863 ¶¶ 2-4 (emphasis added)).

25. Moreover, consistent with the Aetna Trial testimony, discovery further shows that, on July 22, 1956, Plant Manager Burton wrote a letter to the PVSC in which he chastised the inspectors for visiting the “plant area without checking in at the office and being provided with an escort. . . .” Exhibit 32 at ¶ 1. In addition, instead of tying the whole Lister Plant to the sanitary sewer as he told the PVSC, Plant Manager Burton informed his superiors of his plan to tie the 2,4-D process building to the sanitary sewer, but not the main building: “I think our best hope at this time is that we can keep out of serious trouble until we get our 2,4-D filtrate diverted to the local sewer and to hope that we will be able to get by with our various acidic effluents from the DDT, HCB and Miticide operations in our main building.” Exhibit 33 at ¶ 3.

26. In response, Plant Manager Burton received a memo from Mr. Taylor, the “outstanding authority” at DSCC on pollution abatement. Exhibit 34. Mr. Taylor’s response makes clear that John Burton was not a rogue employee in an otherwise exemplary organization:

I have noted with some interest your correspondence relative to the activities of the (PVSC). Apparently we may be in for some extended difficulties with this Commission

The action of the . . . inspectors in “snooping” around the plant is not considered standard practice in the pollution field. Their action might arise for one of two reasons; the inspector might be young and ignorant of proper procedure or they might be hoping to find evidence of unlawful doings when unescorted. I think your letter to (PVSC) had just the right tone and was certainly justified.

As a matter of caution, it might be well to continue a cooperative attitude towards the Commission and to be as frank as you feel desirable. Evasive tactics are fine as long as they work, but discovery of such action by the Commission can lead to a change of attitude which could be serious. If the Commission begins to feel that they have been “had” they may insist on orderly and complete elimination of polluting materials from your discharge. If this happens, it might be a significant factor in consideration of plant relocation. (*Id.* at ¶¶ 1, 3-4 (emphasis added)).

27. Internal DSCC memoranda describe just how much of DSCC's waste chemical effluent was discharged to the Passaic River, the vast majority of which went undetected. In an April 1960 memorandum to DSCC representatives, entitled "River Contaminants and Your Memo of March 31st(,)" Mr. Burton summarized the various, extensive discharges of contaminants from the Lister Plant to the Passaic River over the years. Exhibit 35. It includes the following representations:

- "Until approximately 1956, we disposed of all our plant effluents into the Passaic River." Id. at MAXUS036883 ¶ 2.
- "Approximately 1956, the (PVSC) officially objected to our polluting the river, and we spent approximately \$15,000 for a sewer connection to the Newark city sewer." Ibid.
- "My impression is that the city sewer is a pretty good bet for getting rid of modest amounts of chlorophenols which otherwise would be serious contaminants in rivers, etc." Id. at MAXUS036884 ¶ 1.
- "All of our unsold muriatic acid is dumped in the Passaic." "In 1958 we dumped 2000 tons; in 1959 we dumped 4400 tons." Ibid. at ¶ 2.
- "We produce approximately 2000 tons of 2,4-D per year with a yield slightly less than 60%. This means that we discard approximately the molecular weight equivalent of 400 tons of 2,4-D per year." "Considering molecular weights, this would be approximately 110 tons of chlorophenols." Ibid. at ¶ 3.
- "We discard the acidic effluent from our chlorosulfonation operations to either the city sewer or the river." Ibid. at ¶ 4.
- "The 2,4,5-T effluent is generally similar to 2,4-D, but is only approximately one quarter the amount. The effluent would consist of mostly trichlorophenols with some 2,4,5-T acid and 2,4,5-T esters." Ibid. at ¶ 5.
- "(A)t various times we have spills or special products which involve additional contamination problems. The 'unimportant violations' are minor quantities of slightly dirty liquids which we sometimes get from washing down the floors near the river or the river front. I call them 'unimportant' because overzealous inspectors sometimes comment on slight signs of poor housekeeping at the river front" Id. at MAXUS0036884-85 ¶ 5.

28. Similarly, on March 24, 1967, DSCC representative F. Gordon Stewart signed a survey form from the Manufacturing Chemists' Association in which Stewart detailed the discharges from the Lister Plant, including the information that at the time, the plant was discharging 12,800 gallons per day of effluent that "did not meet all existing requirements." Exhibit 36 at OCCNJ0048899 ¶ 6. According to the completed survey, four processes resulted in discharges to surface waters and two processes resulted in discharges to a sewer. Ibid. The survey even provides estimates of the Lister Plant's illegal discharges. For example, the Lister Plant discharged 14,500 gallons per day of effluent that required no treatment under existing control requirements, and 12,800 gallons per day of "untreated effluent not meeting all existing requirements." Ibid. DSCC knew its discharges to the Passaic River did not meet environmental requirements, but boldly admitted in the survey that none of these illegal discharges were "now scheduled for improvement." Ibid.

29. Despite its efforts, DSCC was unable to hide all evidence of its discharges. On August 3, 1956, the PVSC issued a notice of violation to the Lister Plant for illegal discharges to the Passaic River. Exhibit 37. DSCC responded, not denying the discharges, but denying that the samples of effluents showed pollution as defined by the statute. Exhibit 38. Nevertheless, DSCC asked that further action be deferred until it finished the connection to the sanitary sewer. Id. Similarly, on October 13, 1964, the U.S. Army Corps of Engineers advised DSCC that the Lister Plant was in violation of federal law prohibiting discharges to navigable waters:

During a routine inspection of waterfront facilities along the south shore of the Passaic River, Newark, New Jersey, a concentration of foreign matter, which contained an acid content, was observed in the tidal waters along your waterfront property. Further investigation revealed that this pollution was caused by acid discharged from inside your plant into discharge pipes, located on the east and west end of your bulkhead and empties into the Passaic River, at the foot of Lister Avenue, Newark, New Jersey. (Exhibit 39 at OCCNJ0048798 ¶ 2.)

Furthermore, on September 18, 1968, the U.S. Army Corps of Engineers (“USACE”) again notified the Lister Plant that the Coast Guard had conducted a routine inspection and had found an acidic discharge emanating from the plant to the Passaic River in violation of federal law. Exhibit 40 at ¶¶ 2-4. On October 18, 1968, Mr. Gregoric reported to Taylor that the USACE had made two additional inspections of the plant finding violations. Exhibit 41 at ¶ 2. A puddle of sodium trichlorophenol was collecting on the ground and draining into the river. Ibid.

30. On November 12, 1968, Mr. Taylor, the “pollution control” specialist, drafted a memo on the subject of the plant’s repeated violations:

The Newark plant is building up a history of repeated violations. It seems that on every Coast Guard spot check of this plant we have a bad violation. We should recognize that this will not go on indefinitely. . . . It is imperative that we take care of the acid discharge promptly to avoid some very unpleasant consequences of repeated violations. (Exhibit 42 at ¶ 2.)

This memo also provides the reason that the Lister Plant could not tie into the sanitary sewer – the Lister Plant’s effluent was too acidic, it would damage the plant’s own sewer system, and the city would not take it. Ibid. at ¶ 3. Consequently, the Lister Plant’s effluent was discharged to the Passaic River, and DSCC refused to take steps or spend any money to resolve the problem.

31. In fact, as early as 1968, DSCC had already developed the “blame the enforcer” theory of corporate citizenship – a theory DSCC’s successors continue to this day in this litigation. In a September 1968 memo, Mr. Taylor has this to say about the USACE and its efforts to stop pollution by the Lister Plant:

The Newark Plant has been cited by the Corps of Engineers for the discharge of an acid stream. A copy of the letter from the Corps of Engineers is attached.

It has been our experience in other parts of the country that the Corps of Engineers is quite active in the pollution field despite their lack of background and competence. Their authority is based on the law referred to in their letter and they are capable of considerable harassment. (Exhibit 43 at ¶¶ 1-2.)

32. Finally, in 1968, more than a decade after the PVSC first contacted the Lister Plant about its discharges to the Passaic River, DSCC representatives had enough “harassment” from environmental authorities. One option, according to Mr. Taylor, was to discontinue discharges from the Lister Plant to the Passaic River: “Since we can look forward to intense activity on the Passaic River(,) I would like to see everything discharged to the city sewer and kept out of the Passaic, except uncontaminated cooling water.” Ibid. at ¶ 3. DSCC chose another option, by ceasing operations and closing the Lister Plant in 1969. Exhibit 1 at MAXUS034098 ¶ 1.

33. Since the conclusion of Lister Plant operations, numerous studies have revealed the widespread dioxin contamination plaguing the Passaic River adjacent to the Lister Plant. For instance, in March 1984, DEP and DSCC entered into an Administrative Consent Order, in which DSCC agreed to conduct investigations related to the dioxin contamination. Exhibit 10 at OCCNJ0022878 ¶ 3 – 0022884 ¶ 1. As part of that order, DSCC collected sediment samples from the Passaic River. The results of that testing were presented in DSCC’s Site Evaluation for 80 Lister Avenue released in February 1985. Exhibit 44 at NJDEP00141330 (noting that samples of Passaic River sediment contained dioxin).

34. In addition, Maxus commissioned a March 1986 Passaic River sediment sampling study. Exhibit 45 at NJDEP00387455-614. According to an administrative order signed by OCC and Tierra, these “sampling events taken across from and immediately downstream of the (Lister Plant) . . . show concentrations of 2,3,7,8-TCDD that significantly exceed the levels that can produce toxic effects to biota.” Exhibit 2 at MAXUS1355015 ¶ “m.” In fact, “the most concentrated inventory of 2,3,7,8-TCDD, a hazardous substance, appears to be in the sediments immediately adjacent to the (Lister Plant.)” Id. at MAXUS1355016 ¶ “r.”

POINT II

OCC'S, MAXUS'S AND TIERRA'S RELATIONSHIP TO DSCC AND THE LISTER PLANT.

35. In the decades after DSCC closed the Lister Plant and left its dioxin to further contaminate the Passaic River and Newark Bay Complex, DSCC and its substantial environmental liabilities have traveled a circuitous path to today's current defendants.

A. OCC is DSCC.

36. DSCC (f/k/a Diamond Alkali Company and Diamond Shamrock Corporation) operated the Lister Plant from 1951 to 1969. Exhibit 1 at MAXUS034098 ¶ 1; OCC's Amended Cross-Claims at ¶¶ 2-3; Maxus and Tierra's Answer to Amended Cross-Claims at ¶ 2-3. Diamond Alkali Company acquired the Lister Plant and began operations in 1951. Exhibit 3 at MAXUS036796 ¶ 1; OCC's Amended Cross-Claims at ¶ 2; Maxus and Tierra's Answer to Amended Cross-Claims at ¶ 2. Diamond Alkali Company changed its name to Diamond Shamrock Corporation in 1967, to Diamond Chemicals Company in July 1983, and to Diamond Shamrock Chemicals Company – "DSCC" – in October 1983. Exhibit 2 at MAXUS1355014 ¶ "f"; OCC's Amended Cross-Claims at ¶ 3, 6; Maxus and Tierra's Answer to Amended Cross-Claims at ¶¶ 3, 6. Diamond Shamrock Corporation is, at times, referred to as "DSC-1." Unless noted otherwise, Diamond Alkali Company, DSC-1 and DSCC are referred to collectively as "DSCC." See, supra, note 3.

37. Also in July 1983, a mere 30 days after the dioxin discovery at the Lister Plant and Governor Kean's Executive Order 40, DSCC (DSC-1) created "New Diamond Corporation" out of cloth to serve as DSCC's holding company. Exhibit 6; OCC's Amended Cross-Claims at ¶ 6; Maxus and Tierra's Answer to Amended Cross-Claims at ¶ 6. Ultimately, New Diamond Corporation changed its name to Diamond Shamrock Corporation, and then to Maxus Energy

Corporation – “Maxus” – in 1987. OCC’s Amended Cross-Claims at ¶ 6; Maxus and Tierra’s Answer to Amended Cross-Claims at ¶ 6. New Diamond Shamrock Corporation is, at times, referred to as “DSC-2.” Unless noted otherwise, DSC-2 and Maxus are referred to collectively as “Maxus.”

38. In September 1986, DSC-2 sold the stock of its wholly-owned subsidiary, DSCC, to Oxy-Diamond Alkali Corporation, an OCC affiliate. Exhibit 46 at OCCNJ0000204; OCC’s Amended Cross-Claims at ¶ 13; Maxus and Tierra’s Answer to Amended Cross-Claims at ¶ 13. The acquisition was conducted pursuant to the terms of a Stock Purchase Agreement (“SPA”). Exhibit 46 at OCCNJ0000204; OCC’s Amended Cross-Claims at ¶ 13; Maxus and Tierra’s Answer to Amended Cross-Claims at ¶ 13. 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; Maxus and Tierra’s Answer to 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; Maxus and Tierra’s Answer to Amended Cross-Claims at ¶ 13. Pursuant to New Jersey, New York and Delaware law, in the merger, OCC expressly assumed DSCC’s liabilities. Exhibit 48 at OCCNJ0011580 ¶ 2; N.J.S.A. 14A:10-6(e); N.Y. BUS. CORP. LAW § 906(b)(3); DEL. CODE ANN. tit. 8, § 259(a).

39. It has never before been disputed that OCC is the successor by merger to DSCC. In previous litigation involving Lister Plant liabilities (the “Agent Orange Litigation”), OCC admitted that it was the successor to DSCC and the proper party to defend against claims relating to those liabilities. Exhibit 49 at OCCNJ0124796-97. That admission came in the Affidavit of 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).

OCC is being defended, indemnified and held harmless in this action by (Maxus). (Id. at ¶¶ 2-7.)

Mr. Luss's Affidavit was filed in support of a motion for summary judgment in the Agent Orange Litigation, in which Maxus, Tierra and Occidental Petroleum Corporation ("OPC") sought dismissal of the claims against them as "misjoined" defendants. Id. at OCCNJ0124728-807. In that motion, OCC explained that it was the proper defendant for Lister Plant-related liabilities, as the successor to DSCC. Id. at OCCNJ0124733-34 ¶¶ 4-10.

40. Similarly, on June 19, 2008, OCC and Tierra signed a Settlement Agreement and Order on Consent that contained the following language:

This Administrative Settlement Agreement and Order on Consent ("Settlement Agreement") is entered into voluntarily by the United States Environmental Protection Agency ("EPA"), Occidental Chemical Corporation, and Tierra Solutions, Inc. This Settlement Agreement provides for the performance of a removal action by Respondent and the reimbursement of Future Response Costs incurred by the United States at or in connection with the Lower Passaic River Study Area ("LPRSA") portion of the Diamond Alkali Superfund Site (the "Site") generally located in and about Essex, Hudson, Bergen and Passaic Counties, New Jersey. (Exhibit 2 at MAXUS1355009 ¶ 1.)

Under the Settlement Agreement, “‘Respondent’ shall mean Occidental Chemical Corporation, which has its headquarters and principal place of business in Dallas, Texas and is successor to Diamond Shamrock Chemicals Company.” Id. at MAXUS1355012 ¶ “r.”

41. In addition, just before this lawsuit was filed, OCC’s counsel confirmed that OCC is, in fact, the direct successor by merger to DSCC. OCC’s counsel explained to DEP:

(I)n 1967, during a merger with Shamrock Oil and Gas Company, Diamond Alkali Company became Diamond Shamrock Corporation (DSC-1). In 1983, DSC-1 changed its corporate name first to Diamond Chemicals Company, and then to Diamond Shamrock Chemicals Company (DSCC). In 1986, following the sale of all of DSCC’s stock to Oxy-Diamond Alkali Corporation as its new parent corporation, DSCC changed its name to Occidental Electrochemicals Corporation (OEC). OEC, with its parent Oxy-Diamond Alkali, then merged into OCC. According to fundamentals of corporate law, OCC, then, stands as the successor corporation to the liabilities, if any, of DSC-1 (known at various times as Diamond Alkali Company, Diamond Shamrock Chemicals Company, and Occidental Electrochemicals Corporation). OCC’s liability would arise, not from any conduct of its own, but solely as the successor to any liabilities of DSC-1 for the Diamond Alkali Site (a/k/a the Lister Plant). (Exhibit 50 at p. 11, ¶ 1 (emphasis added).)

Thus, OCC has repeatedly admitted that it is the successor by merger to DSCC and is the successor to DSCC’s Lister Plant-related liabilities. See also Exhibit 10 at OCCNJ0022877 ¶ 1 (noting, before SPA and transfer to OCC, that DSCC was successor to Lister Plant owner and operator); Exhibit 51 at NJDEP00382472 ¶¶ 7-10; Exhibit 52 at OCCNJ0023767; Exhibit 53 at OCCNJ0046171; Exhibit 54 at OCCNJ0023709-10; and Exhibit 55 at OCCNJ0046187-190.

B. Diamond Shamrock Corporation (n/k/a Maxus), the Parent Seller of DSCC, Agreed to Indemnify OCC for Lister Plant Liabilities.

42. As mentioned above, DSC-2 was created out of cloth – just days after the dioxin discovery at the Lister Plant and then-Governor Kean’s Executive Order 40 – to serve as DSC-1’s holding company. See, infra, ¶ 37.

43. In early 1986, DSC-2 (Maxus) began to market DSC-1 (DSCC), but Maxus knew that DSCC’s environmental issues would complicate the sale. Accordingly, Maxus assured

potential buyers of DSCC, such as OPC, that Maxus would hold certain of DSCC's environmental liabilities in any sale. Exhibit 56. In an April 1986 letter, Maxus assured OPC that while some environmental liabilities would pass to the buyer with DSCC's stock,

(l) liabilities for cleanup costs mandated by any environmental protection law or regulation are excluded to the extent they arise out of or relate to . . . any site now owned by Diamond Shamrock or DSCC at which manufacturing operations have been permanently abandoned and . . . any site not now owned by Diamond Shamrock or DSCC which has been or may within three years from the date of closing be designated as a Superfund site (Id. at OCCNJ0027239 ¶ 2.)

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

44. In keeping with the April 1986 letter, as part of the SPA by which OCC acquired DSCC, Maxus agreed to indemnify OCC for certain environmental liabilities. Exhibit 46 at OCCNJ0000344 ¶ 4 – OCCNJ0000349 ¶ 2; Maxus Energy Corp. v. Occidental Chem. Corp., 244 S.W.3d 875 (Tex. App.—Dallas 2008, pet. denied). Among the environmental liabilities for which Maxus agreed to indemnify OCC were those related to "Superfund Sites," "Inactive Sites," and "Historical Obligations." Exhibit 46 at OCCNJ0000346-49 ¶ 2. Significantly, in July 1987, Maxus executed an agreement specifying that the Lister Plant site is an "Inactive Site" under the SPA and that OCC is entitled to indemnification under that provision for Lister Plant-related liabilities. Exhibit 57 at OCCNJ0022991 ¶ 1.

45. Moreover, consistent with the April 1986 letter, and as part of the SPA, Maxus was appointed DSCC's (now OCC's) "attorney in fact, for it in its name, place and stead . . . to pursue in its name in any reasonable manner . . . any Existing Claim." Exhibit 58. Under the SPA, an "Existing Claim" expressly included the Aetna litigation, which related specifically to

the Lister Plant. Exhibit 46 at OCCNJ0000324 ¶ 1. As such, during the Aetna litigation, in-house counsel for Maxus represented DSCC. Exhibit 4 at MAXUS0964734; Exhibit 14 at MAXUS032954.

C. Tierra Assumed Maxus's Indemnity Obligations with Respect to the Lister Plant and Is the Current Owner of the Lister Plant and Adjacent Property.

46. After ceasing operations, in 1971, DSCC sold the Lister Plant property to Chemicaland Corporation. Exhibit 3 at MAXUS036796 ¶ 2; OCC's Amended Cross-Claims at ¶ 3; Maxus and Tierra's Answer to Amended Cross-Claims at ¶ 3. In 1980, the Lister Plant property was purchased in a tax sale by Mr. William Leckie, who sold the property in 1981 to Marisol, Inc. Exhibit 3 at MAXUS036796 ¶ 2.

47. Soon thereafter, in 1983, environmental agencies discovered the massive dioxin contamination emanating from the Lister Plant, and Governor Kean issued Executive Order 40. Exhibit 6; Exhibit 7 at NJDEP00112132-33. In response, the then-Commissioner of DEP issued Administrative Order No. EO-40-1, which explicitly identified 80 Lister Avenue as the source of dioxin contamination in the area. Exhibit 8. The Commissioner also issued a "presumptive fishing advisory" for several waterways, including the Passaic River, until testing could be conducted to determine whether the fish and shellfish were contaminated with dioxin. Id. at ¶ 1. On October 19, 1983, the Commissioner issued Administrative Order No. EO-40-17, which provides that the "results of this testing has indicated that fish and shellfish from the Passaic River are contaminated with dioxin in excess of the safe level thereof established by the Food and Drug Administration(.)" Exhibit 9 at NJDEP00113027 ¶ 4. As such, the Commissioner directed that the "consumption of fish and shellfish taken from that portion of the Passaic River from the Dundee Dam in Garfield/Clifton to the mouth of that River at Newark Bay is hereby prohibited." Id. at ¶ 1. 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 59.

48. On March 13, 1984, DSCC – then a subsidiary of DSC-2 (Maxus) – and Marisol, Inc. – the then owner of 80 Lister Avenue – entered into an Administrative Consent Order with DEP, in which DSCC agreed to conduct certain activities at the Lister Plant site, including investigation of dioxin contamination in the Passaic River. Exhibit 10 at OCCNJ0022878 ¶ 9 – OCCNJ0022884 ¶ 1; Exhibit 44 at NJDEP00141330.

49. In April 1984, DSCC acquired Block 2438 Lot 57 – the property adjacent to the Lister Plant at 120 Lister Avenue – to facilitate compliance with that consent order. Exhibit 60; OCC’s Amended Cross-Claims at ¶ 10; Maxus and Tierra’s Answer to Amended Cross-Claims at ¶ 10. Then, on December 15, 1985, DSCC agreed to buy 80 Lister Avenue from Marisol, Inc. to settle Marisol’s claims against DSCC related to the widespread dioxin contamination. Exhibit 61 at MAXUS040082 ¶ 5. Accordingly, by the beginning of 1986 and before the SPA, DSCC was the owner of the Lister Plant site and the adjacent property at 120 Lister Avenue. Exhibit 1 at MAXUS034101 n. 5; Exhibit 61 at MAXUS040082 ¶ 5; Exhibit 62; OCC’s Amended Cross-Claims at ¶ 10; Maxus and Tierra’s Answer to Amended Cross-Claims at ¶ 10. Conversely, neither DSCC nor any of its related entities owned the Lister Plant site from 1971 until the end of 1985. See Exhibit 63 at MAXUS022033-038.

50. Against this backdrop, Tierra was born. On March 21, 1986, Tierra was incorporated under the name Diamond Shamrock Process Chemicals, Inc. Exhibit 64 at MAXUS0443863 ¶¶ 1-2. In June 1986, the corporation’s name was changed to Diamond Shamrock Chemical Land Holdings, Inc. (“DSCLHI”). Id. at MAXUS0443863 ¶¶ 4-5. In December 1987, DSCLHI changed its name to Chemical Land Holdings, Inc. Exhibit 49 at

OCCNJ0124735 ¶¶ 14-15, OCCNJ0124779 ¶¶ 15-16. Finally, in 2002, Chemical Land Holdings, Inc. changed its name to Tierra Solutions, Inc. Id. at OCCNJ0124779 ¶ 16. Diamond Shamrock Process Chemicals, Inc., DSCLHI, Chemical Land Holdings, Inc. and Tierra are referred to collectively as “Tierra.”

51. On August 28, 1986, Tierra acquired title to 80 and 120 Lister Avenue from DSCC for nominal consideration. Exhibit 65; Exhibit 66; see also OCC’s Amended Cross-Claims at ¶ 10; Maxus and Tierra’s Answer to Amended Cross-Claims at ¶ 10. At that time, Tierra shared officers with DSCC. For instance, Marcel Dumeny served as Tierra’s Secretary, Exhibit 64 at MAXUS0443863 ¶ 5, and he was Vice President, Secretary and General Counsel of DSCC. Exhibit 67 at OCCNJ0009602 ¶ 2. Similarly, J.W. McConnell was Vice President of Tierra in 1986, Exhibit 64 at MAXUS0443863 ¶ 5, and he was also Vice President and Chief Operating Officer of DSCC at the time. Exhibit 68 at OCCNJ0005284 ¶ 2.

52. Tierra admits that the purpose of its obtaining title to 80 and 120 Lister Avenue was to “facilitate continued environmental response actions after the 1986 SPA.” Maxus and Tierra’s Answer to Third-Amended Compl. at ¶ 35 (“Maxus and Tierra admit that, to facilitate continued environmental response actions after the 1986 SPA, DSCC transferred title to both 80 and 120 Lister Avenue to DSCLH, a real estate title-holding subsidiary of DSCC at the time, the name of which was subsequently changed to CLH, and then to Tierra.”). Similarly, Tierra admits that it “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.” Ibid. Furthermore, Tierra has also made the following admission in response to discovery:

Maxus and Tierra admit that, by 1986, when Tierra first acquired 80 Lister Avenue and 120 Lister Avenue, Tierra 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. Indeed, it was arranged for Tierra to take title to those parcels to ensure that . . . the environmental response actions commenced in 1983 could continue at the Site without unnecessary complications or interruptions. (Response No. 15 of Maxus and Tierra to Plaintiffs' Second Set of Requests for Admissions, attached as Exhibit 69.)

See also Exhibit 70 at MAXUS018146 ¶¶ 12-13.

53. On August 14, 1996, Maxus and Tierra entered into an "Assumption Agreement," whereby Tierra agreed to assume some of Maxus's environmental liabilities, including those covered under the 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").¹⁰ As such, like Maxus, Tierra has taken an active role in implementing remedial measures at the Lister Plant site. In fact, a recent Settlement Agreement and Order contains the following representation by OCC and Tierra:

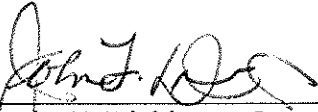
(OCC) and Tierra represent that pursuant to a 1986 stock transaction, the corporation now named (Maxus) indemnified (OCC) for (among other things) environmental liabilities arising from ownership and/or operation of 80 and 120 Lister Avenue by (DSCC) or its predecessors in interest. (OCC) and Tierra 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 them.

¹⁰ Maxus, Tierra, and their parents companies – Defendants CLH Holdings, Inc.; YPF Holdings, Inc.; YPF International S.A. (f/k/a YPF International Ltd.); and YPF, S.A. – entered into a "Contribution Agreement," whereby the parent companies agreed to contribute to the equity capital of Tierra, so that Tierra could make payments towards Maxus's liabilities that Tierra had assumed. Exhibit 72 at MAXUS1305778 ¶ 4.

Respectfully submitted,

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