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	X	
	:	SUPERIOR COURT OF NEW JERSEY
	:	LAW DIVISION: ESSEX COUNTY
	:	
	:	Docket No.: L-009868-05 (PASR)
	:	
	:	<u>CIVIL ACTION</u>
	:	
	:	COSAN CHEMICAL
	:	CORPORATION'S ANSWER TO
	:	THIRD-PARTY COMPLAINT "B"
	:	
	:	
	:	
NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE COMMISSIONER OF THE NEW JERSEY ENVIRONMENTAL PROTECTION AGENCY AND THE ADMINISTRATOR OF THE NEW JERSEY SPILL COMPENSATION FUND,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
	:	
	:	
OCCIDENTAL CHEMICAL CORPORATION, TIERRA SOLUTIONS, INC., MAXUS ENERGY CORPORATION, REPSOL YPF, s.a., YPF, S.A. YPF HOLDINGS, INC. AND CLH HOLDINGS,	:	
	:	
Defendants,	:	
	:	
	:	
MAXUS ENERGY CORPORATION AND TIERRA SOLUTIONS, INC.,	:	
	:	
	:	
Third-Party Plaintiffs,	:	
	:	
	:	
3M COMPANY, et. al.	:	
	:	
	:	
	X	

Defendant, Cosan Chemical Corporation (hereinafter "Cosan"), a Delaware corporation with its principal place of business at One Meadowlands Plaza, East

Rutherford, County of Bergen, State of New Jersey by way of Answer to Third-Party Plaintiffs' Complaint "B", states as follows:

GENERALLY

Cosan denies each and every allegation contained in Third-Party Complaint "B" that is not otherwise herein addressed, including, without limitation, any allegations concerning the relief sought in the First Count and the Second Count and all headings and titles used in Third Party Complaint "B."

PROCEDURAL BACKGROUND

1. Cosan denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 1-11 of the Third-Party Plaintiffs' Complaint "B".

2. The allegations in paragraph 12 of the Third-Party Complaint constitute conclusions of law or are a characterization of the Third-Party Plaintiffs' own claims, to which no response is required. To the extent a response is deemed required, Cosan admits that the Third-Party Plaintiffs purport to bring an action pursuant to the New Jersey Spill Compensation and Control Act and the New Jersey statutory provisions for contribution arising from the environmental contamination of the Newark Bay Complex.

3. The allegations in paragraph 13 of the Third-Party Complaint constitute conclusions of law or are a characterization of the Third-Party Plaintiffs' own claims, to which no response is required. To the extent a response is deemed required, Cosan admits that the Third-Party Plaintiffs purport to seek recovery of all or a proportionate

share of cleanup and removal costs for which Third-Party Plaintiffs may be held liable in this action.

4. The allegations in paragraph 14 of the Third-Party Complaint constitute conclusions of law or are a characterization of the Third-Party Plaintiffs' own claims, to which no response is required. To the extent a response is deemed required, Cosan admits that the Third-Party Plaintiffs purport to seek recovery of all or a proportionate share of cleanup and removal costs which Third-Party Plaintiffs incurred or will incur relating to the Newark Bay Complex.

5. The allegations in paragraph 15 of the Third-Party Complaint constitute conclusions of law or are a characterization of the Third-Party Plaintiffs' own claims, to which no response is required. To the extent a response is deemed required, Cosan admits that the Third-Party Plaintiffs claim they have agreed not to pursue claims against CPG members for costs incurred under the 1994 AOC, the CPG AOCs or the Newark Bay AOC to the extent the costs are attributable to the facilities identified in Exhibit B of the Third-Party Complaint.

THE PARTIES

Third-Party Plaintiffs

6. Cosan denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 16 of the Third-Party Plaintiffs' Complaint "B".

7. Cosan denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 17 of the Third-Party Plaintiffs' Complaint "B".

8. The allegations in paragraph 18 of the Third-Party Complaint constitute conclusions of law or are a characterization of the Third-Party Plaintiffs' own claims, to which no response is required.

Third Party Defendants

9. The allegations in paragraphs 19 through 66 of the Third-Party Plaintiffs' Complaint "B" are directed at parties other than Cosan and therefore no response is required.

10. Cosan admits the allegations of paragraph 67.

11. The allegations in paragraphs 68 through 210 of the Third-Party Plaintiffs' Complaint "B" are directed at parties other than Cosan and therefore no response is required.

DEFINITIONS

12. The allegations in paragraphs 211 through 236 are accessories to the characterizations of the Third-Party Plaintiffs own claims, to which no response is required.

FACTUAL ALLEGATIONS

COMMERCIAL SITES

13. The allegations in paragraphs 237 through 839 of the Third-Party Plaintiffs' Complaint "B" are directed at parties other than Cosan and therefore no response is required.

Cosan Chemical Site

14. Cosan admits only that the Third-Party Plaintiffs purport to define the "Cosan Chemical Site" in the fashion set forth paragraph 840.

15. In response to the allegations of paragraph 841, Cosan admits that it began operations on a portion of the property at 400 14th Street in 1973 but that it did not acquire or operate on other portions of the property until 1978 and 1980 (all portions collectively referred to hereinafter as the “Cosan Site”). Cosan admits the remaining allegations of paragraph 841.

16. Cosan admits the allegations of paragraph 842.

17. In response to the allegations of paragraph 843, Cosan admits that during its ownership and operation of the Cosan Site, certain compounds listed in paragraph 843 may have been utilized, processed, handled, consumed or stored. Cosan denies that the above compounds or Hazardous Substances were Discharged from the Cosan Site during its ownership or operation. Cosan denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 843 of the Complaint.

18. In response to the allegations contained in paragraph 844, Cosan admits that the Cosan Site abuts a drainage channel which received non-contact cooling water and storm water from the Cosan Site. Cosan denies the characterization of the direction of flow between the Cosan Site and Newark Bay. Cosan denies the remaining allegations of paragraph 844.

19. In response to the allegations contained in paragraph 845, Cosan admits that for a period of time in the mid-1980s, some process waste water was sent for treatment from the Cosan to the Rutherford-East Rutherford-Carlstadt Joint Meeting pursuant to authorized permit but that process waste water was either recycled or drummed and

shipped offsite prior to the mid-1980s. Cosan denies the remaining allegations contained in paragraph 845.

20. Cosan admits that from time to time during the period from 1986-1989, it was cited for minor exceedances of primarily temperature limitations for its non-contact cooling water that was discharged to a drainage channel abutting the Cosan Site pursuant to an authorized permit. Cosan admits that it was cited for occasional permit exceedances during the same period for its waste water that was discharged pursuant to authorized permit to the Bergen County Utilities Authority. Cosan denies the remaining allegations contained in paragraph 846.

21. In response to the allegations contained in paragraph 847, to the extent that they refer to written documents relating to Cosan's request for an extension of time in which to complete its pretreatment system, that document speaks for itself and Cosan denies any mischaracterization thereof. Cosan has insufficient information to admit or deny the remaining allegations contained in paragraph 847.

22. In response to the allegations contained in paragraph 848, to the extent that they refer to a written document from the BCUA, the document speaks for itself, and Cosan denies any mischaracterization thereof, including any omissions as to the analysis of contaminants of incoming water to the plant at the Cosan Site. Cosan denies the remaining allegations in paragraph 848.

23. In response to the allegations contained in paragraph 849, to the extent that they refer to a written document describing a follow-up inspection on or about February 5, 1988, that document speaks for itself and Cosan denies any mischaracterization thereof, including any implication that any improper of storage of hazardous materials

on paved surfaces resulted in any discharge of contaminants. Cosan has insufficient information to admit or deny the claims relating to a 1990 inspection, but to the extent a response is required, Cosan denies the remaining allegations contained in paragraph 849.

24. Cosan denies the allegations contained in paragraph 850.

25. In response to the allegations contained in paragraph 851, Cosan admits that certain compounds have been detected in the soil at the Cosan Site, including compounds, such as arsenic and chromium, which Cosan never used in its operations or for which Cosan is not responsible for the discharge.

26. In response to the allegations contained in paragraph 852, Cosan admits that the Cosan Site and neighboring sites flooded during heavy rain events, and upon information and belief, that contaminants from neighboring properties were transported onto the Cosan Site. Cosan denies the remaining allegations contained in paragraph 852.

27. In response to the allegations contained in paragraph 853, Cosan admits that certain compounds have been detected in the groundwater at the Cosan Site, including many compounds such as arsenic and chromium, which Cosan never used in its operations or for which Cosan is not responsible for the discharge.

28. In response to the allegations contained in paragraph 854, Cosan admits that certain compounds have been detected in the sediment core samples from Berry's Creek, including many compounds, such as chromium, which Cosan never used in its operations or for which Cosan is not responsible for the discharge.

29. Cosan denies the allegations contained in paragraph 855.

Other Commercial Sites

30. The allegations contained in paragraphs 772 through 3032 of the Third-Party Complaint are directed at parties other than Cosan and therefore no response is required.

LANDFILL AND DRUM SITES

31. The allegations contained in paragraphs 3033 through 3445 of the Third-Party Complaint are directed at parties other than Cosan and therefore no response is required.

FIRST COUNT

32. Cosan incorporates by reference its responses and denials as asserted in paragraphs 1 through 31 of this Third-Party Answer by reference herein.

33. The allegations contained paragraph 3447 of the First Count of the Third-Party Complaint contain general and conclusory statements that do not require a response. To the extent that the statements contain facts, Cosan denies the allegations contained in paragraph 3447 as they pertain to it. The remaining allegations are directed at parties other than Cosan and therefore no response is required.

34. The allegations in paragraph 3448 of the First Count of the Third-Party Complaint constitute conclusions of law or are a characterization of the Third-Party Plaintiffs' own claims, to which no response is required.

35. The allegations in paragraph 3449 of the First Count of the Third-Party Complaint constitute conclusions of law or are a characterization of the Third-Party Plaintiffs' own claims, to which no response is required. To the extent that the allegations are deemed statements of facts, Cosan denies the allegations as they pertain

to it. The remaining allegations are directed at parties other than Cosan and therefore no response is required.

36. Cosan denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 3450 of the Complaint. To the extent a response is required, Cosan denies the allegations contained in paragraph 3450.

37. Cosan denies the allegations contained in paragraph 3451 of the First Count of the Third-Party Complaint as they pertain to it. The remaining allegations are directed at parties other than Cosan and therefore no response is required.

WHEREFORE, Cosan demands entry of judgment in its favor and against Third-Party Plaintiffs dismissing with prejudice all claims for relief set forth in the First Count of the Third-Party Complaint with an award in favor of Cosan and against Third-Party Plaintiffs for attorney's fees, interest, costs of suit and such further relief as this Court deems just and appropriate.

SECOND COUNT

1. Cosan incorporates by reference its responses and denials as asserted in Cosan's Answer to the First Count as if fully set forth herein.

2. Cosan denies the allegations contained in paragraph 3453 of the First Count of the Third-Party Complaint as they pertain to it. The remaining allegations are directed at parties other than Cosan and therefore no response is required.

WHEREFORE, Cosan demands entry of judgment in its favor and against Third-Party Plaintiffs dismissing with prejudice all claims for relief set forth in the Second Count of the Third-Party Complaint with an award in favor of Cosan and

against Plaintiffs for attorney's fees, interest, costs of suit and such further relief as this Court deems just and appropriate.

AFFIRMATIVE DEFENSES

1. Third-Party Plaintiffs' Complaint fails to state a cause of action upon which relief may be granted.
2. Third-Party Plaintiffs' claims are barred by reason of applicable statutes of limitations.
3. Some or all of the Third-Party Plaintiffs lack standing.
4. The losses and/or injuries alleged suffered by Third-Party Plaintiffs resulted from and were proximately caused by the conduct of persons other than Cosan or was the conduct of persons or entities over whom and which Cosan had no control.
5. Third-Party Plaintiffs' claims are barred by the doctrines of waiver, estoppel, "unclean hands" and/or laches.
6. Third-Party Plaintiffs' claims should be reduced in the proportion that such parties' acts or omissions bear to the acts or omissions that caused the alleged injuries or damages.
7. Third-Party Plaintiffs' claims are barred, in whole or in part, by the entire controversy doctrine.
8. Recovery for Third-Party Plaintiffs' claims would result in unjust enrichment to the Third-Party Plaintiffs.
9. Third-Party Plaintiffs are barred under the collateral source doctrine.
10. Third-Party Plaintiffs have failed to join necessary and indispensable parties needed for adjudication of the claims in accordance with R. 4:28-1.

11. To the extent that Cosan is found liable in this matter, joint and several liability is inappropriate because there are distinct harms or a reasonable basis for apportionment of the harms suffered.

12. Without admitting any liability, in the event Cosan is found liable, Cosan is entitled to offset such liability by the equitable share of the liability of any person or entity not joined as a third-party defendant in this action that would be liable to Third-Party Plaintiffs.

13. Under N.J.S.A. 2A:15-97, the amount of damages, if any, should be reduced by any amounts recovered from any other source.

14. Cosan is not liable for Third-Party Plaintiffs' claims under the Joint Tortfeasors Contribution Law because Cosan is not liable for the "same injury" caused by Plaintiffs' discharges for which Plaintiffs seek recovery and/or remedy.

15. Upon information and belief, the Third-Party Plaintiffs are not the real parties in interest for pursuit of the claims set forth in Third-Party Complaint "B."

16. Third-Party Plaintiffs have failed to present a justiciable controversy in that the operative facts in connection with any alleged remediation are future, contingent and uncertain.

17. Third-Party Plaintiffs' claims are subject to recoupment and/or offset by settlements with other parties and must be reduced accordingly.

18. Third-Party Plaintiffs' claims are barred, in whole or in part, by the doctrines of accord and satisfaction and waiver.

19. Third-Party Plaintiffs' claims are barred, in whole or in part, by Third-Party Plaintiffs' failure to properly mitigate damages.

20. Third-Party Plaintiffs' claims are barred by the doctrine of *res judicata*.

21. Cosan complied with all applicable laws, regulations, codes and acted with governmental approval.

22. Cosan cannot be held liable for damages or claims based on actions or inactions by Cosan that arise out of conduct lawfully undertaken in compliance with permits or other approvals issued by governmental agencies including but not limited to the State of New Jersey or the United States and/or in compliance with applicable laws, regulations, rules, orders, ordinances, directives and common law and other requirements of all foreign, federal, state and local government entities.

23. Third-Party Plaintiffs' claims are barred to the extent that they seek to impose retroactive liability for acts that were previously authorized or condoned by law.

24. Third-Party Plaintiffs' claims are barred because at all relevant times Cosan exercised due care with respect to hazardous substances, if any that may have been handled at the site, took precautions against foreseeable acts or omissions of others.

25. Third-Party Plaintiffs' claims are barred to the extent that Cosan's conduct alleged to give rise to the liability in the Third-Party Complaint is the subject of a release, covenant not to sue, or has otherwise been excused by Plaintiffs or any other governmental agency, including without limitation, through issuance of a no further action letter, a negative declaration, consent order, settlement agreement or other similar document.

26. Third-Party Plaintiffs' claims are barred to the extent the relief sought by Third-Party Plaintiffs conflicts with Cosan's responsibilities to conduct ongoing environmental investigations or cleanups by state or federal governmental agencies.

27. Any discharge that allegedly originated from Cosan was investigated and remediated by a licensed professional under the direct oversight of state and/or federal agencies within the confines of accepted industrial practices and technology.

28. Any acts or omissions relating to any hazardous substance conformed to industry custom and practice.

29. To the extent that the Third-Party Complaint purports to seek any relief under the New Jersey Environmental Rights Act, N.J.S.A. 2A:35A-1 et seq., in whole or in part, the pleading is barred because Third-Party Plaintiffs have failed to meet the procedural and/or substantive requirements entitling them to sue Cosan under that statute.

30. Without admitting any liability, if it is determined that Cosan engaged in any of the conduct alleged by the Third-Party Plaintiffs, such activities were *de minimus*.

31. Plaintiffs' and Third-Party Plaintiffs' cost incurred or to be incurred at the site are unreasonable, duplicative, not cost effective, and not consistent with the National Contingency Plan.

32. Cosan is not a discharger or a person in any way responsible for a discharge under N.J.S.A. 58:10-23 et seq. (the "Spill Act").

33. Third-Party Plaintiffs' claims are barred to the extent that they seek relief for damages incurred prior to the effective date of the Spill Act.

34. Without admitting liability, if Cosan should be found to be liable under the Spill Act, its liability is several and not joint because a non-public party suing under the Spill Act's contribution provision is not entitled to joint and several liability.

35. The Spill Act does not authorize Plaintiffs and/or Third-Party Plaintiffs to recover future costs and thus all claims against Cosan relating to the Spill Act are premature and not ripe for adjudication.

36. Third-Party Plaintiffs' claims are barred in whole or in part by the statutory defenses to liability provided by the Spill Act.

37. Cosan did not own or operate a "Major Facility" as defined in the Spill Act.

38. Cosan's liability, if any, is limited to Spill Act and contribution claims and excludes any such claims which may properly be apportioned to parties pursuant to Burlington Northern and Santa Fe Railway Co., et al. v. United States et al., 556 U.S. ___, 129 S.Ct. 1870 (2009) and other comparable decisional law.

39. To the extent that Cosan is acting or has acted to conduct a cleanup at the site, claims for equitable contribution under the Spill Act are barred because equity will not compel action that is already being undertaken or is unnecessary.

40. Third-Party Plaintiffs have not incurred any costs authorized by the Spill Act and have failed to direct cleanup and removal activities in accordance with the National Contingency Plan to the greatest extent possible.

41. Third-Party Plaintiffs' claims are barred in whole or in part by the statutory defenses to liability provided by the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq. ("WPCA").

42. Third-Party Plaintiffs have no right of contribution against Cosan under the WPCA.

43. Third-Party Plaintiffs are volunteers for remediation of the environmental contamination for which they claim contribution and/or other relief from Cosan and thus not entitled to contribution under the Spill Act, the WCPA or any other environmental statute.

44. Certain of the costs incurred or to be incurred by the Plaintiffs and/or Third-Party Plaintiffs in connection with the site are not “response costs” recoverable from Cosan within the meaning of Sections 101(23), (24) and (25) of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§9601, et seq., as applied to the Spill Act.

45. Plaintiffs and Third-Party Plaintiffs failed to provide notice to Cosan that it was considered a potentially responsible party prior to undertaking any response actions.

46. Third-Party Plaintiffs’ claims are barred, in whole or in part, because they are preempted by federal law, including, without limitation the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§9601, et seq.

47. Third-Party Plaintiffs’ claims are barred, in whole or in part, because no actions or inactions by Cosan have resulted in any permanent impairment or damage to a natural resource.

48. Cosan hereby incorporates by reference any affirmative defense asserted by any other parties in this action to the extent such defenses respond to Third-Party Plaintiffs’ claims and do not impose liability on Cosan.

COUNTERCLAIMS AND CROSSCLAIMS

In accordance with Case Management Order V, Cosan is not asserting any counterclaims or cross claims at this time and reserves its rights to do so as specified by the Court's Order. All counterclaims and cross claims asserted by other parties against Cosan, whether filed in the past or future, are deemed denied by Cosan, without the need for responsive pleadings.

DESIGNATION OF TRIAL COUNSEL

In accordance with R. 4:25-4, Coleen J. McCaffery is designated as trial counsel.

Respectfully submitted,

COLEEN J MCCAFFERY LLC
Attorneys for Defendant Cosan Chemical
Corporation



By: _____
Coleen J. McCaffery, Esq.

Dated: December 29, 2009

CERTIFICATION PURSUANT TO R. 4:5-1

Pursuant to R. 4:5-1(b)(2), the undersigned hereby certifies that:

(a) The matter in controversy is not the subject of any other action pending in any court or a pending arbitration proceeding and no action or arbitration proceeding is contemplated by the undersigned; and

(b) Because it is the legal position of the undersigned that the potential liability, if any, of a Third-Party Defendant for the claims set forth in the Third-Party Complaint is several only, there are no non-parties which should be joined in the action pursuant to R. 4:28, but that

(c) In the event the Court shall determine that the potential liability of a Third-Party Defendant, if any, for the claims set forth in the Third-Party Complaint is in any respect joint and several (which is denied), then all or some of the non-parties listed on the October 7, 2009 posting by O'Melveny and Myers may constitute non-parties who should be joined in the action pursuant to R. 4:28; and

(d) In either event, some or all of such non-parties may be subject to joinder pursuant to R. 4:29-1(b) because of potential liability to any party on the basis of the same transactional facts.

COLEEN J MCCAFFERY LLC
Attorneys for Defendant Cosan Chemical
Corporation



By: _____
Coleen J. McCaffery, Esq.

Dated: December 29, 2009

CERTIFICATION OF SERVICE

1. I am an attorney-at-law in the State of New Jersey with the law firm of Coleen J. McCaffery LLC, attorneys for Cosan Chemical Corporation in the above-captioned matter.

2. On the date listed below, I caused an original and two copies of Cosan Chemical Corporation's Answer to Third-Party Complaint "B," Affirmative Defenses and Certification pursuant to R. 4:5-1(b)(2) to be filed with the Clerk of the Superior Court of New Jersey, Essex County, via first-class, regular mail.

3. On the date listed below, I caused a copy of same to be served on counsel for all parties which have consented to electronic service by posting to <http://njdepvoce.sfile.com> and upon the attached list of counsel of record by first-class mail.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.



Coleen J. McCaffery, Esq.

Dated: December 29, 2009

Third-Party Defendants for Regular Service as of December 16, 2009

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