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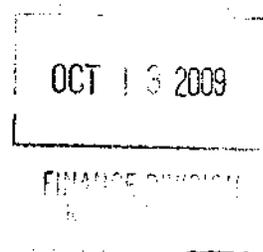
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October 13, 2009

**VIA HAND DELIVERY**

Clerk, Superior Court of New Jersey  
Essex County Court House  
Room 131  
50 West Market Street  
Newark, NJ 07102



Re: NJ Department of Environmental Protection, et al. v.  
Occidental Chemical Corporation et al. ESX-L-9868-05 (PASR)  
McKesson Corporation, McKesson EnviroSystems Company and Safety-  
Kleen EnviroSystem Company's Answer to Third-Party Complaint "D"

Dear Clerk:

Enclosed for filing, please find an original and two copies of McKesson Corporation, McKesson EnviroSystems Company and Safety-Kleen EnviroSystem Company's Answer to Third-Party Complaint "D".

Please note that the Case Information Statement and requisite fee were previously filed with our Notice of Appearance on July 21, 2009.

Thank you for your attention to this matter.

Kind regards,

**MICHAEL P MCTHOMAS PLLC**

Michael P McThomas

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<sup>1</sup> Licensed in New York, New Jersey, Texas and West Virginia

c: The Honorable Sebastian P. Lombardi, J.S.C. (via email)  
Simi Junior (via email)  
All Counsel on the Service List dated October 12, 2009 via Sfile and Email or  
paper service

Michael P. McThomas, Esq.  
**MICHAEL P. MCTHOMAS, PLLC**  
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Attorney for Third-Party Defendants McKesson Corporation, McKesson EnviroSystems Company and Safety-Kleen EnviroSystems Company

Shannon L. Fagan, Esq.  
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Pro Hac Vice Attorney for Third-Party Defendants McKesson Corporation, McKesson EnviroSystems Company and Safety-Kleen EnviroSystems Company

OCT 19 2009

FILED

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,

vs.

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,

vs.

AMERICAN CYANAMIC, BAYER CORPORATION, BAYONNE INDUSTRIES, INC., BP MARINE AMERICAS, INC., CHEMICAL WASTE MANAGEMENT INC., DOW CHEMICAL COMPANY.

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION: ESSEX COUNTY

DOCKET NO. L-9868-05 (PASR)

CIVIL ACTION

MCKESSON CORPORATION, MCKESSON ENVIROSYSTEMS COMPANY, AND SAFETY-KLEEN ENVIROSYSTEM COMPANY'S ANSWER TO THIRD-PARTY COMPLAINT "D"

DURAPORT REALTY TWO LLC,  
EPEC POLYMERS, INC.,  
GAESS ENVIRONMENTAL SERVICES, INC.,  
GATX TERMINALS CORPORATION,  
GOODRICH CORPORATION,  
HESS CORPORATION,  
IMTT-BAYONNE,  
KINDER MORGAN ENERGY PARTNERS, L.P.,  
McKESSON CORPORATION,  
McKESSON ENVIROSYSTEMS CO.,  
SAFETY-KLEEN CORPORATION,  
SHULTON INCORPORATED, USA,  
SUN PIPELINE CO.,  
SUN REFINING AND MARKETING CO.,  
SUN OIL CO.,  
SUPERIOR MPM LLC,  
THOMAS & BETTS CORP.,  
WASTE MANAGEMENT, INC.  
WYETH,

Third-Party Defendants.

**MCKESSON CORPORATION, MCKESSON ENVIROSYSTEMS COMPANY AND  
SAFETY-KLEEN ENVIROSYSTEM COMPANY'S ANSWER TO THIRD-PARTY  
COMPLAINT "D"**

Third-Party Defendant McKesson Corporation ("McKesson"), on behalf of itself, McKesson EnviroSystems Company ("MEC"), and Safety-Kleen EnviroSystems Company ("Safety-Kleen"), by and through its undersigned counsel, and in accordance with this Court's Case Management Order V, Section 9, entered April 16, 2009 ("CMO V"), hereby answer the Third-Party Complaint "D" by Defendants/Third-Party Plaintiffs Maxus Energy Corporation and Tierra Solutions, Inc. ("Third-Party Plaintiffs"), as follows:

**GENERALLY**

1. McKesson denies each and every allegation contained in Third Party Complaint "D" 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 "D".

**AS TO PROCEDURAL BACKGROUND**

**(Paragraphs 1 through 7)**

2. McKesson responds that the referenced pleadings speak for themselves. No response is required pursuant to CMO V.

**AS TO FIRST COUNT**

**New Jersey Spill Compensation and Control Act, N.J.S.A. 58:10-23.11.f.a.2(a)**

3. McKesson incorporates by reference as if fully set forth herein its responses and denials as asserted in Paragraphs 1 through 2 herein.

4. McKesson is without knowledge or information sufficient to form a belief as to the truth of the matters stated in Paragraphs 9 through 12, and therefore denies the same.

5. McKesson denies that it is liable to Third-Party Plaintiffs for contribution.

**AS TO FACTUAL ALLEGATIONS**

**(Paragraphs 14 through 89)**

6. The referenced pleadings speak for themselves. No response is required pursuant to CMO V, except to the extent noted below.

7. McKesson admits in part and denies in part the allegations in paragraph 82 of Third Party Complaint "D." McKesson admits that it is a Delaware corporation with its principal place of business in San Francisco, California. McKesson denies that it owns property located at 600 Doremus Avenue, but admits that it owns property located at 504-508 Doremus Avenue in Newark, New Jersey, designated as Block 5070, Lots 25 and 25A on the

tax map of the City of Newark, consisting of approximately 8.5 acres. McKesson denies that an explosion and fire occurred at the property on October 12, 1982, but admits that an explosion and fire occurred at the property on October 10, 1982 that was the subject of a closure order by the New Jersey Department of Environmental Protection.

8. McKesson admits in part and denies in part the allegations in paragraph 83 of Third Party Complaint "D." McKesson denies that McKesson Envirosystems Company occupied the property located at 504-508 Doremus Avenue from 1981 to 1987, and denies that McKesson Envirosystems Company operated a hazardous waste treatment facility during that time period. McKesson admits that Safety-Kleen Envirosystems Company acquired McKesson Envirosystems Company in 1987, but denies that Safety-Kleen Envirosystems Company operated hazardous a waste treatment facility at 504-508 Doremus Avenue. McKesson denies that either Safety-Kleen Envirosystems Company or "Safety-Kleen Corporation" currently occupies the property located at 504-508 Doremus Avenue. McKesson admits that Safety-Kleen Envirosystems Company is a Delaware corporation with its principal place of business in Plano, Texas.

9. McKesson is without knowledge or information sufficient to form a belief as to the truth of the matters stated in Paragraph 85, and therefore denies the same.

#### **AS TO SECOND COUNT**

##### **Statutory Contribution**

10. McKesson incorporates by reference as if fully set forth herein its responses and denials as asserted in Paragraphs 1 through 9 herein.

11. McKesson denies that it is liable to Third-Party Plaintiffs for contribution.

### **FIRST AFFIRMATIVE DEFENSE**

12. The Third-Party Complaint is barred in whole or in part as it fails to state a cause of action against McKesson upon which relief can be granted.

### **SECOND AFFIRMATIVE DEFENSE**

13. McKesson is not a discharger or a person in any way responsible for a discharge under N.J.S.A. 58:10-23 et seq. (“Spill Act”).

### **THIRD AFFIRMATIVE DEFENSE**

14. The claims of Third-Party Plaintiffs are barred in whole or in part by the statutory defenses to liability provided by the Spill Act and the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq. (“WPCA”).

### **FOURTH AFFIRMATIVE DEFENSE**

15. Third-Party Plaintiffs have no Spill Act claim against McKesson because they have not cleaned up and/or removed a discharge of hazardous substances within the meaning of the Spill Act.

### **FIFTH AFFIRMATIVE DEFENSE**

16. Third-Party Plaintiffs have no right of contribution against McKesson under the WPCA.

### **SIXTH AFFIRMATIVE DEFENSE**

17. Third-Party Plaintiffs’ claims are barred, in whole or in part, by the entire controversy doctrine.

### **SEVENTH AFFIRMATIVE DEFENSE**

18. To the extent the Third-Party Complaint purports to seek any relief under New Jersey’s 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 McKesson under that statute.

**EIGHTH AFFIRMATIVE DEFENSE**

19. Some or all of Third-Party Plaintiffs do not have standing to sue.

**NINTH AFFIRMATIVE DEFENSE**

20. Upon information and belief, Third-Party Plaintiffs are mere corporate shells who are periodically infused with cash or equivalent contributions by other corporate entities which money Third-Party Plaintiffs purport to use to address the environmental contamination at issue in this litigation. Consequently, the claims by Third-Party Plaintiffs are barred under the collateral source doctrine or its equitable equivalent.

**TENTH AFFIRMATIVE DEFENSE**

21. Third-Party Plaintiffs are not the real parties in interest for pursuit of the claims set forth in the Third-Party Complaint, nor are Third-Party Plaintiffs acting in the capacity of an executor, administrator, guardian of a person or property, trustee of an express trust, or a party with whom or in whose name a contract has been made for the benefit of another. Consequently, all claims are barred under R. 4:26-1 of the New Jersey Court Rules.

**ELEVENTH AFFIRMATIVE DEFENSE**

22. Third-Party Plaintiffs are mere volunteers for remediation of the environmental contamination for which they claim contribution and/or other relief from McKesson. Consequently, the claims in the Third-Party Complaint are barred, in whole or in part.

**TWELFTH AFFIRMATIVE DEFENSE**

23. The claims brought by Third-Party Plaintiffs reflect damages that are wholly speculative, conjectural, unreasonable, excessive and/or arbitrary and capricious.

### **THIRTEENTH AFFIRMATIVE DEFENSE**

24. McKesson cannot be held liable for or be required to pay Third-Party Plaintiffs' damages or other claims based on actions or inactions by McKesson that arise out of conduct lawfully undertaken in compliance with permits or other approvals issued by relevant government agencies, including the State of New Jersey and/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 ("applicable Environmental Laws").

### **FOURTEENTH THIRD AFFIRMATIVE DEFENSE**

25. At common law, McKesson held, and still holds, a usufructuary interest allowing it, along with all other citizens, the reasonable use of assets held for the benefit of the public by the State of New Jersey under the Public Trust Doctrine. McKesson has at all relevant times acted in accordance with its rights of reasonable use of publicly held assets. As a matter of law, Third-Party Plaintiffs' claims are derivative of, and cannot be any greater than, the claims that the State of New Jersey has or would have against McKesson directly. As a result, the claims set forth in the Third-Party Complaint are barred, in whole or in part.

### **FIFTEENTH AFFIRMATIVE DEFENSE**

26. The State of New Jersey is legally barred from asserting direct claims against McKesson for the damages sought in its Amended Complaint. Consequently, all claims that are or may be derivative of the State of New Jersey's claims are barred as to the McKesson as well, including the claims set forth in the Third-Party Complaint.

**SIXTEENTH AFFIRMATIVE DEFENSE**

27. The Third-Party Complaint is barred and/or is constitutionally impermissible to the extent that it seeks to impose retroactive liability for acts that were previously authorized or condoned by law including applicable Environmental Laws.

**SEVENTEENTH AFFIRMATIVE DEFENSE**

28. Third-Party Plaintiffs' Complaint is barred to the extent that it seeks relief for damages incurred prior to the effective date of the Spill Act.

**EIGHTEENTH AFFIRMATIVE DEFENSE**

29. At all relevant times, McKesson complied with all applicable Environmental Laws, regulations, industry standards and ordinances, and otherwise conducted itself reasonably, prudently, in good faith, and with due care for the rights, safety and property of others.

**NINETEENTH AFFIRMATIVE DEFENSE**

30. The claims asserted against McKesson in the Third-Party Complaint are barred because at all relevant times McKesson exercised due care with respect to hazardous substances, if any, that may have been handled at the subject property or properties, took precautions against foreseeable acts or omissions of others and the consequences that could reasonably result from such acts or omissions, and because any release or threat of release of any hazardous substances, if any, and any costs or damages resulting therefrom, were caused solely by the negligence, acts or omissions of third parties over whom McKesson had no control, whether by, in whole or part, contract or otherwise, or any duty to control, including without limitation the State of New Jersey and its agencies and officials, and the United States and its agencies and officials.

#### **TWENTIETH AFFIRMATIVE DEFENSE**

31. The claims set forth in the Third-Party Complaint are barred in whole or in part by the doctrine of preemption.

#### **TWENTY-FIRST AFFIRMATIVE DEFENSE**

32. Third-Party Plaintiffs suffered no losses or injuries that were proximately caused by McKesson.

#### **TWENTY-SECOND AFFIRMATIVE DEFENSE**

33. Third-Party Plaintiffs' claims against McKesson are barred, in whole or in part, by the applicable Statute of Limitations, Statute of Repose, and/or the equitable doctrines of laches and estoppel.

#### **TWENTY-THIRD AFFIRMATIVE DEFENSE**

34. Third-Party Plaintiffs' claims are barred in whole or in part by the doctrines of accord and satisfaction, waiver, consent, estoppel, release and/or assumption of risk.

#### **TWENTY-FOURTH AFFIRMATIVE DEFENSE**

35. Third-Party Plaintiffs' claims are barred, in whole or in part, by the doctrine of "coming to the nuisance."

#### **TWENTY-FIFTH AFFIRMATIVE DEFENSE**

36. Third-Party Plaintiffs' claims are barred, in whole or in part, by the "unclean hands" doctrine.

#### **TWENTY-SIXTH AFFIRMATIVE DEFENSE**

37. The claims for equitable contribution under the Spill Act in the Third-Party Complaint are barred because: (1) equity will not compel action that is impossible of performance; (2) equity will not exceed the rights of parties existing at law; (3) equity will not

consciously become an instrument of injustice; and/or (4) equity will not permit double satisfaction.

#### **TWENTY-SEVENTH AFFIRMATIVE DEFENSE**

38. Third-Party Plaintiffs' claims are barred, in whole or in part, by the doctrines of collateral estoppel, *res judicata*, and/or judicial estoppel including in connection with prior findings as to Third-Party Plaintiffs' intentional misconduct.

#### **TWENTY-EIGHTH AFFIRMATIVE DEFENSE**

39. Third-Party Plaintiffs' claims are barred because the relief sought against McKesson, were it claimed directly by Plaintiffs, would amount to unlawful taxation.

#### **TWENTY-NINTH AFFIRMATIVE DEFENSE**

40. Third-Party Plaintiffs' claims against McKesson are subject to setoff and recoupment and therefore must be reduced accordingly.

#### **THIRTIETH AFFIRMATIVE DEFENSE**

41. McKesson did not own or operate a "Major Facility" as defined by the Spill Act or the WPCA.

#### **THIRTY-FIRST AFFIRMATIVE DEFENSE**

42. Third-Party Plaintiffs' claims are barred, in whole or in part, by Third-Party Plaintiffs' failure to comply with the prerequisites to liability under the Spill Act including, without limitation to, Third-Party Plaintiffs' have not incurred costs authorized by the Spill Act and Third-Party Plaintiffs' have failed to direct cleanup and removal activities in accordance with the National Contingency Plan to the greatest extent possible.

### **THIRTY-SECOND AFFIRMATIVE DEFENSE**

43. Third-Party Plaintiffs' claims are barred because neither they nor Plaintiffs have incurred "costs of restoration and replacement ... of any natural resources damaged or destroyed by a discharge" under the Spill Act.

### **THIRTY-THIRD AFFIRMATIVE DEFENSE**

44. Third-Party Plaintiffs have failed to join necessary and indispensable parties needed for a just adjudication of the claims asserted in this action, in whose absence complete relief can not be afforded the existing parties pursuant to R. 4:28-1 of the New Jersey Court Rules. These necessary and indispensable parties include, without limitation, State of New Jersey agencies and instrumentalities, including without limitation the State trustees for tidelands, certain United States agencies and instrumentalities with liability under the Spill Act, and certain state and local governmental agencies located outside the boundaries of New Jersey, including the State of New York and its agencies and instrumentalities, all of whom are or may be separately liable for contamination allegedly located in the "Newark Bay Complex," as defined in Plaintiffs' Second Amended Complaint.

### **THIRTY-FOURTH THIRD AFFIRMATIVE DEFENSE**

45. Third-Party Plaintiffs' claims are not ripe for adjudication, inter alia, because Third-Party Plaintiffs have a joint liability to the Plaintiffs and have not paid and will not pay more than their fair or equitable share of the liability.

### **THIRTY-FIFTH AFFIRMATIVE DEFENSE**

46. McKesson denies that Third-Party Plaintiffs have suffered any harm whatsoever, but in the event that they did suffer any form of injury or damage cognizable under applicable Environmental Law, such injury was caused by the intervening acts, omissions, or superseding acts of persons or entities over whom McKesson exercised no control and for whose conduct

McKesson was not responsible including, without limitation, unpermitted and storm event discharges from publically owned treatment works.

**THIRTY-SIXTH AFFIRMATIVE DEFENSE**

47. If Third-Party Plaintiffs sustained any injury or are entitled to any damages, such injury and damages were wholly, or in part, caused by Third-Party Plaintiffs' own acts or omissions, negligence, lack of due care and fault and/or that of Third-Party Plaintiffs' agents or employees. In the event that Third-Party Plaintiffs are found to have sustained any injury and are entitled to damages, Third-Party Plaintiffs' recovery against McKesson, if any, must be reduced by the proportionate damages caused by the acts and conduct of Third-Party Plaintiffs and/or its agents or employees.

**THIRTY-SEVENTH AFFIRMATIVE DEFENSE**

48. Although McKesson denies that it is liable for the contamination described in Third-Party Plaintiffs' Complaint, in the event it is found liable, McKesson is entitled to an offset against any such liability on its part for the equitable share of the liability of any person or entity not joined as a defendant in this action that would be liable to Third-Party Plaintiffs.

**THIRTY-EIGHTH AFFIRMATIVE DEFENSE**

49. 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.

**THIRTY-NINTH AFFIRMATIVE DEFENSE**

50. Third-Party Plaintiffs' claims are barred to the extent that the conduct of McKesson alleged to give rise to liability in the Third-Party Complaint is the subject of a release, covenant not to sue, or has otherwise been excused by Plaintiffs, including, without limitation, through issuance of a no further action letter, consent order, settlement agreement or

other applicable document, with or without inclusion of contribution protection, or through the Plaintiffs' allowance of any applicable Statute of Limitations or Statute of Repose to lapse.

**FORTIETH AFFIRMATIVE DEFENSE**

51. The disposal of waste, if any, which allegedly originated from McKesson, was undertaken in accordance with the then state of the art, the then accepted industrial practice and technology, and the then prevailing legal requirements for which McKesson cannot be found retroactively liable.

**FORTY-FIRST AFFIRMATIVE DEFENSE**

52. Any discharge that allegedly originated from McKesson, was investigated and remediated by a licensed professional and under the direct oversight of state and/or federal agencies with the then state of the art, the then accepted industrial practice and technology, and the then prevailing requirements for which McKesson cannot be found retroactively liable.

**FORTY-SECOND AFFIRMATIVE DEFENSE**

53. Third-Party Plaintiffs are not entitled to recover costs incurred for cleanup actions not undertaken in coordination or conjunction with federal agencies.

**FORTY-THIRD AFFIRMATIVE DEFENSE**

54. The damages or other relief that Third-Party Plaintiffs seek, if awarded, would result in unjust enrichment to the Third-Party Plaintiffs.

**FORTY-FOURTH AFFIRMATIVE DEFENSE**

55. Third-Party Plaintiffs' claims are barred due to their own conduct in unilaterally, and without notice to McKesson, implementing clean-up plan(s) or taking other actions that resulted in the commingling of formerly divisible areas of environmental harm.

#### **FORTY-FIFTH AFFIRMATIVE DEFENSE**

56. Third-Party Defendants' liability to Third-Party Plaintiffs, 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.

#### **FORTY-SIXTH AFFIRMATIVE DEFENSE**

57. Third-Party Plaintiffs cannot assert contribution claims against McKesson because the discharges for which the Plaintiffs are seeking relief are different from McKesson's alleged discharges.

#### **FORTY-SEVENTH AFFIRMATIVE DEFENSE**

58. Third-Party Plaintiffs cannot seek contribution under the Joint Tortfeasors Contribution Law because McKesson is not liable for "the same injury" caused by Third-Party Plaintiffs' discharges and does not share a common liability to the State of New Jersey.

#### **FORTY-EIGHTH AFFIRMATIVE DEFENSE**

59. Third-Party Plaintiffs' claims are barred to the extent they seek to hold McKesson liable, in contribution, for any claims for which it would be a violation of public policy to hold McKesson liable, including but not limited to punitive damages and penalties.

#### **FORTY-NINTH AFFIRMATIVE DEFENSE**

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

### **FIFTIETH AFFIRMATIVE DEFENSE**

61. Third-Party Plaintiffs claims for contribution, whether under the Spill Act or the New Jersey statutory provisions for contribution, are derivative of, and are therefore no greater than, Plaintiffs' claims against Third-Party Plaintiffs. Consequently, Third-Party Plaintiffs' claims against McKesson are barred to the extent of any legal extinguishments of actual or potential claims by the Plaintiffs against McKesson pertaining to the alleged environmental contamination (including natural resource damage) of any site alleged by Third-Party Plaintiffs to be the subject of their contribution claims against McKesson. Examples of legal extinguishments that are or may be applicable to McKesson include, with respect to each such site:

1. Any release or covenant not to sue granted by Plaintiffs to McKesson;
2. Any settlement or other compromise between Plaintiffs and McKesson;
3. Any expiration of the statute of limitations or statute of repose governing Plaintiffs' right to maintain a claim against McKesson;
4. Any failure to join a claim relating to the "Newark Bay Complex" (as defined in the Third-Party Complaint) in a prior litigation between Plaintiffs and McKesson, which would result in relinquishment of such a claim by virtue of New Jersey's Entire Controversy Doctrine; and/or
5. Any issuance by Plaintiffs to McKesson, directly or indirectly, of any "No Further Action" (a/k/a "NFA") determination, "Negative Declaration," or similar determination.

### **FIFTY FIRST AFFIRMATIVE DEFENSE**

62. 51. Third-Party Plaintiffs' claims are barred because the relief sought against McKesson, were it claimed directly by Plaintiffs, would amount to a "taking" of McKesson's property in violation of its constitutional rights to due process and/or in violation of its rights under the Eminent Domain Act of 1971, N.J.S.A. 20:3-1 *et seq.*

### **FIFTY SECOND AFFIRMATIVE DEFENSE**

63. Third-Party Plaintiffs' claims are barred to the extent the relief sought by Third-Party Plaintiffs in the Complaint is at odds with McKesson's responsibilities to conduct ongoing environmental cleanups under oversight of the Plaintiffs at any site(s) alleged by Third-Party Plaintiffs to be the subject of their contribution claims against McKesson, thereby exposing McKesson to inconsistent responsibilities, penalties and liabilities, and the possibility of paying twice for the same actions (i.e., double recovery).

### **FIFTY THIRD AFFIRMATIVE DEFENSE**

64. To the extent McKesson is acting or has acted to conduct environmental cleanup at any site(s) alleged by Third-Party Plaintiffs to be the subject of their contribution claims against McKesson, the claims for equitable contribution under the Spill Act in the Third-Party Complaint are barred because equity will not compel action that is already being undertaken and/or is unnecessary.

### **FIFTY FOURTH AFFIRMATIVE DEFENSE**

65. Without admitting liability, McKesson alleges that if it is found to have been engaged in any of the activities alleged in the Third-Party Complaint, such activities were *de minimis* and not the cause of any damages or other claims by Third-Party Plaintiffs.

### **FIFTY FIFTH AFFIRMATIVE DEFENSE**

66. McKesson incorporates by reference any affirmative defense asserted by other parties in this action to the extent such affirmation defenses are defenses to Third-Party Plaintiffs' claims and do not impose liability on McKesson.

### **FIFTY SIXTH AFFIRMATIVE DEFENSE**

67. McKesson reserves the right to assert and hereby invoke each and every Environmental Law defense that may be available during the course of this action.

**COUNTER-CLAIMS, CROSS CLAIMS AND THIRD/FOURTH PARTY CLAIMS**

68. No such claims are required to be asserted at this time and are expressly reserved pursuant to CMO V.

**DESIGNATION OF TRIAL COUNSEL**

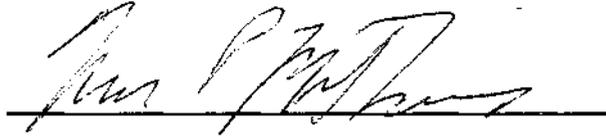
69. In accordance with Rule 4:25-4 you are hereby notified that Michael McThomas is assigned to try this case.

WHEREFORE, McKesson respectfully requests that the Court enter an Order dismissing the Third-Party Complaint "D" with prejudice, and awarding costs, attorney fees and any other relief the Court deems just and proper.

Dated: October 3, 2009

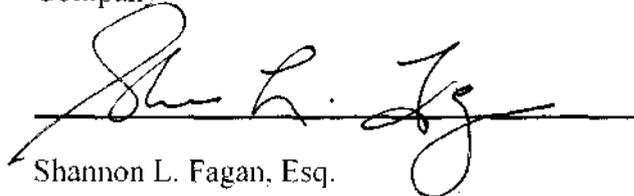
Respectfully submitted.

MICHAEL P. MCTHOMAS, PLLC  
Attorney for Third-Party Defendants McKesson  
Corporation, McKesson EnviroSystems Company,  
and Safety-Kleen EnviroSystems Company

A handwritten signature in black ink, appearing to read "Michael P. McThomas", written over a horizontal line.

Michael P. McThomas, Esq.

EDGCOMB LAW GROUP  
Pro Hac Vice Attorney for Third-Party Defendants  
McKesson Corporation, McKesson EnviroSystems  
Company, and Safety-Kleen EnviroSystems  
Company

A handwritten signature in black ink, appearing to read "Shannon L. Fagan", written over a horizontal line.

Shannon L. Fagan, Esq.

**CERTIFICATION PURSUANT TO R. 4:5-1(b)(2)**

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

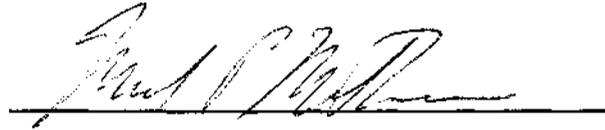
- (a) The matter in controversy is not the subject of any other action pending in any court or of a pending arbitration proceeding and no action or arbitration proceeding is contemplated by the undersigned; and
- (b) Since it is the legal position of the undersigned that the potential liability, if any, 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 \_\_, 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 are 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. Further, listed below is an additional non-party known to the undersigned counsel:

Bristol-Myers Squibb Company

Dated: October 13, 2009

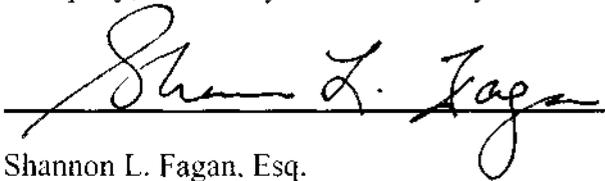
Respectfully submitted.

MICHAEL P. MCTHOMAS, PLLC  
Attorney for Third-Party Defendants McKesson  
Corporation, McKesson EnviroSystems Company, and  
Safety-Kleen EnviroSystems Company

A handwritten signature in black ink, appearing to read "Michael P. McThomas", is written over a solid horizontal line.

Michael P. McThomas, Esq.

EDGCOMB LAW GROUP  
Pro Hac Vice Attorney for Third-Party Defendants  
McKesson Corporation, McKesson EnviroSystems  
Company, and Safety-Kleen EnviroSystems Company

A handwritten signature in black ink, appearing to read "Shannon L. Fagan", is written over a solid horizontal line.

Shannon L. Fagan, Esq.

**CERTIFICATION OF SERVICE**

I, Michael P. McThomas, an attorney-at-law of the State of New Jersey, do hereby state upon my oath that I have served McKesson Corporation, McKesson EnviroSystems Company and Safety-Kleen EnviroSystem Company's Answer to Third-Party Complaint "D" electronically via email and via posting on Sfile upon all parties which have consented to service by posting, and upon the attached list of counsel of record by depositing the same with the United States Postal Service, and upon the Clerk of Court via Hand Delivery.

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 willingly false, I am subject to punishment.

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Attorneys for Third-Party Defendants McKesson Corporation, McKesson EnviroSystems Company and Safety-Kleen EnviroSystem Company

By: \_\_\_\_\_

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Dated: October 13, 2009

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