

BRESSLER, AMERY & ROSS
A Professional Corporation
325 Columbia Turnpike
Florham Park, New Jersey 07932
P.O. Box 1980
Morristown, New Jersey 07962
(973) 514-1200
Attorneys for Third Party Defendant
BASF Corporation

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,

Plaintiff,

v.

OCCIDENTAL CHEMICAL
CORPORATION, TIERRA SOLUTIONS,
INC., MAXUS ENERGY
CORPORATION, REPSOL YPF, S.A.,
YPF, S.A., YPF HOLDINGS, INC. and
CLH HOLDINGS,CC,

Defendant.

MAXUS ENERGY CORPORATION and
TIERRA SOLUTIONS, INC.,

Third-Party Plaintiffs

vs.

3M COMPANY, et al.

Third-Party Defendants

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – ESSEX COUNTY
DOCKET NO: L-9868-05 (PASR)

Civil Action

BASF CORPORATION'S ANSWER TO THIRD
PARTY PLAINTIFFS' COMPLAINT "B"

BASF CORPORATION'S ANSWER TO THIRD-PARTY COMPLAINT "B"

Third-Party Defendant BASF Corporation ("BASF"), 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 answers the Third-Party Complaint "B" (the "Complaint") by Defendants/Third-Party Plaintiffs Maxus Energy Corporation and Tierra Solutions, Inc. ("Third-Party Plaintiffs"), as follows:

GENERALLY

BASF 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".

AS TO PROCEDURAL BACKGROUND

(Paragraphs 1 through 15)

1-15. BASF responds that the referenced pleadings speak for themselves. No response is required pursuant to CMO V.

AS TO THE THIRD PARTY PLAINTIFFS

(Paragraphs 16 through 18)

16-18. No response is required pursuant to CMO V.

AS TO THE THIRD PARTY DEFENDANTS

(Paragraphs 19 through 209)

19-40. Since the allegations in Paragraphs 19 through 40 relate to other parties, no response is required pursuant to CMO V.

41. BASF admits the allegations in Paragraph 41 of the Complaint.

42-209. Since the allegations in Paragraphs 42 through 209 relate to other parties, no response is required pursuant to CMO V.

210. The allegations in Paragraph 210 state a legal conclusion as to which no response is required.

AS TO DEFINITIONS

211-236. Paragraphs 211 through 236 contain definitions. No response is required pursuant to CMO V.

AS TO FACTUAL ALLEGATIONS

(Paragraphs 237 through 3445)

237-3445. The referenced pleadings speak for themselves. No response is required pursuant to CMO V, except to the extent noted below.

BASF Hawthorne Site

552. BASF Corporation ("BASF") admits only that it is the current owner of property located at 150 Wagaraw Road, Hawthorne, New Jersey that is bounded on one side by the Passaic River. BASF denies the remaining allegations contained in Paragraph 552 of the Complaint and states that a portion of the real estate that is alleged to constitute the BASF Hawthorne Site is no longer owned by BASF.

553. BASF admits that the former Inmont Corporation, a Ohio Corporation, was created on April 15, 1969 as a result of the Interchemical Corporation's name change. BASF further admits that on or about December 27, 1977 Inmont Corporation merged into MEW Corporation, a Delaware Corporation, whose name was simultaneously changed to Inmont Corporation, a Delaware Corporation. BASF lacks knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations contained in Paragraph 553 of the Complaint.

554. BASF admits that in 1985, BASF America Corporation acquired Inmont Corporation. BASF further admits that on December 31, 1985, BASF Wyandotte Corporation was merged into Inmont Corporation, which simultaneously changed its name

to BASF Corporation. The remaining allegations in Paragraph 554 of the Complaint state legal conclusions to which no response is required.

555. BASF admits only that on or about May 21, 1985, BASF America Corporation acquired Inmont Corporation, which then owned and operated property located at 150 Wagaraw Road, Hawthorne, NJ (the "Hawthorne Site"). BASF lacks knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations contained in Paragraph 555 of the Complaint.

556. BASF lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 556 of the Complaint.

557. BASF admits only that from August of 1985 through the cessation of facility operations in November of 1986, BASF manufactured pigments, aqueous dispersions, and flush bases at the Hawthorne Site. BASF lacks knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations contained in Paragraph 557 of the Complaint.

558. BASF lacks knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations contained in Paragraph 558 of the Complaint.

559. BASF lacks knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations contained in Paragraph 559 of the Complaint.

560. BASF lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 560 of the Complaint.

561. BASF lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 561 of the Complaint.

562. BASF lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 562 of the Complaint.

563. BASF lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 563 of the Complaint.

564. BASF lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 564 of the Complaint.

565. BASF lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 565 of the Complaint.

566. BASF lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 566 of the Complaint.

567. BASF lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 567 of the Complaint.

568. BASF lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 568 of the Complaint.

569. BASF lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 569 of the Complaint.

570. BASF lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 570 of the Complaint.

571. BASF lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 571 of the Complaint.

572. BASF lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 572 of the Complaint.

573. BASF lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 573 of the Complaint.

574. BASF lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 574 of the Complaint.

575. BASF lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 575 of the Complaint.

576. BASF lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 576 of the Complaint.

577. BASF admits only that in September of 1986, the New Jersey Department of Environmental Protection ("NJDEP") Division of Water Resources issued a Directive to BASF. BASF neither admits nor denies the remaining allegations in Paragraph 577 of the Complaint but refers Third-Party Plaintiffs to said document, the content of which speaks for itself.

578. BASF lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 578 of the Complaint.

579. BASF lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 579 of the Complaint.

580. BASF lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 580 of the Complaint.

581. BASF lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 581 of the Complaint.

582. BASF lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 582 of the Complaint.

583. BASF lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 583 of the Complaint.

584. BASF admits only that it received a letter dated September 15, 2003 from the U.S. Environmental Protection Agency ("USEPA"). BASF neither admits nor denies the remaining allegations of Paragraph 584 of the Complaint, but refers Third-Party Plaintiffs to said document, the content of which speaks for itself.

585. The allegations contained in Paragraph 585 are legal conclusions to which no response is required. To the extent a response is required, BASF denies the allegations contained in Paragraph 585 of the Complaint.

BASF Kearny Site

586. BASF admits that it is the current owner of property located at 50 Central Avenue, Kearny, New Jersey (the "Kearny Site"), that the property consists of approximately 27 acres and is bounded to the west by the Passaic River. BASF denies that the Kearny Site is bounded on the east by the Hackensack River. BASF lacks knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations contained in Paragraph 586 of the Complaint.

587. BASF lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 587 of the Complaint.

588. BASF admits that the United Cork Company owned or operated a portion of the Kearny Site until approximately the mid-1960s. BASF lacks knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations contained in Paragraph 588 of the Complaint.

589. BASF lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 589 of the Complaint. Certain of the allegations of this Paragraph are also legal conclusions to which no response is required.

590. BASF admits that BASF Corporation, a New York corporation, owned and operated the Kearny Site beginning no later than 1968.

591. BASF lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 591 of the Complaint.

592. BASF lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 592 of the Complaint.

593. BASF lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 593 of the Complaint.

594. BASF lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 594 of the Complaint.

595. BASF lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 595 of the Complaint.

596. BASF lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 596 of the Complaint.

597. BASF lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 597 of the Complaint.

598. BASF lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 598 of the Complaint.

599. BASF lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 599 of the Complaint.

600. BASF lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 600 of the Complaint.

601. BASF lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 601 of the Complaint.

602. BASF lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 602 of the Complaint.

603. BASF admits that an incinerator operated at the Kearny Site. BASF further admits that in July of 1988, the NJDEP issued an Administrative Order/Notice of Civil Administrative Penalty Assessment ("AO/NCAPA") to BASF, the contents of which speak for itself. BASF lacks knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations contained in Paragraph 603 of the Complaint.

604. BASF admits only that it received a letter dated September 15, 2003 from the USEPA. BASF neither admits nor denies the remaining allegations of Paragraph 604 of the Complaint, but refers Third-Party Plaintiffs to said document, the content of which speaks for itself.

605. The allegations contained in Paragraph 605 are legal conclusions to which no response is required. To the extent a response is required, BASF denies the allegations contained in Paragraph 605 of the Complaint.

The Bayonne Barrel and Drum Site PRPs

3112. BASF admits that on or about September 26, 1996, it entered into an Administrative Order on Consent with the USEPA. BASF neither admits nor denies the remaining allegations of Paragraph 3112 of the Complaint, but refers Third-Party Plaintiffs to said document, the content of which speaks for itself.

3113. BASF lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 3113 of the Complaint.

3114. BASF admits that on or about July 6, 2001, the USEPA sent BASF a letter regarding the Bayonne Barrel and Drum Site. BASF neither admits nor denies the remaining allegations of Paragraph 3114 of the Complaint, but refers Third-Party Plaintiffs to said document, the content of which speaks for itself.

3115. BASF admits that on or about July 1, 2003, the USEPA and certain private parties entered into a Site Participation Agreement. BASF neither admits nor denies the remaining allegations of Paragraph 3115 of the Complaint, but refers Third-Party Plaintiffs to said document, the content of which speaks for itself.

3116. BASF admits only that it entered into an Administrative Order on Consent with the USEPA and neither admits nor denies the allegations contained in Paragraph 3116 of the Complaint, but refers Third-Party Plaintiffs to said document, the content of which speaks for itself.

3117. BASF admits only that on or about August 24, 2004, it entered into an Agreement for Recovery of Past Response Costs with the USEPA and neither admits nor denies the allegations contained in Paragraph 3117 of the Complaint, but refers Third-Party Plaintiffs to said document, the content of which speaks for itself.

3118. BASF lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 3118 of the Complaint.

The Bayonne Barrel and Drum Site PRP: BASF Corporation

3135. BASF admits submitting a letter dated November 21, 1995 responding to the USEPA's Request for Information. BASF neither admits nor denies the remaining allegations contained in Paragraph 3135 of the Complaint but refers Third-Party Plaintiffs to said document, the content of which speaks for itself.

3136. BASF lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 3136 of the Complaint.

3137. BASF admits submitting a letter dated November 21, 1995 responding to the USEPA's Request for Information. BASF neither admits nor denies the remaining allegations contained in Paragraph 3137 of the Complaint but refers Third-Party Plaintiffs to said document, the content of which speaks for itself.

3138. BASF admits that on or about September 26, 1996, it entered into an Administrative Order on Consent with the USEPA. BASF neither admits nor denies the remaining allegations of Paragraph 3138 of the Complaint, but refers Third-Party Plaintiffs to said document, the content of which speaks for itself.

3139. BASF admits that on or about July 6, 2001, the USEPA sent BASF a letter regarding the Bayonne Barrel and Drum Site. BASF neither admits nor denies the remaining allegations of Paragraph 3139 of the Complaint, but refers Third-Party Plaintiffs to said document, the content of which speaks for itself.

3140. BASF admits only that it entered into an Administrative Order on Consent with the USEPA and neither admits nor denies the allegations contained in Paragraph 3140 of the Complaint, but refers Third-Party Plaintiffs to said document, the content of which speaks for itself.

3141. BASF admits the allegations contained in Paragraph 3141 of the Complaint.

3142. The allegations contained in Paragraph 3142 are legal conclusions to which no response is required. To the extent a response is required, BASF denies the allegations contained in Paragraph 3142 of the Complaint.

Central Steel Drum Site

3288. BASF lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 3288 of the Complaint.

3289. BASF lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 3289 of the Complaint.

3290. BASF lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 3290 of the Complaint.

3291-3334. BASF lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraphs 3291 through 3334 of the Complaint.

Central Steel Drum Site PRP: BASF Corporation

3355. BASF lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 3355 of the Complaint.

3356. BASF admits that BASF sent USEPA a letter dated January 29, 1998 regarding the Central Steel Drum Site. BASF neither admits nor denies the remaining allegations of Paragraph 3356 of the Complaint, but refers Third-Party Plaintiffs to said document, the content of which speaks for itself.

3357. The allegations contained in Paragraph 3357 are legal conclusions to which no response is required. To the extent a response is required, BASF denies the allegations contained in Paragraph 3357 of the Complaint.

AS TO FIRST COUNT

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

3446. With respect to Paragraph 3446 of the Complaint, BASF incorporates by reference as if fully set forth herein its responses and denials as asserted in Paragraphs 1 through 3445 herein.

3447-3448. BASF is without knowledge or information sufficient to form a belief as to the truth of the matters stated in Paragraphs 3447 and 3448, and therefore denies the same.

3449-3451. BASF denies that it is liable to Third-Party Plaintiffs for contribution. BASF is without knowledge or information sufficient to form a belief as to

the truth of the matters alleged in Paragraphs 3449 through 3451, and therefore denies the same.

AS TO SECOND COUNT

Statutory Contribution

3452. With respect to Paragraph 3452 of the Complaint, BASF incorporates by reference as if fully set forth herein its responses and denials as asserted in Paragraphs 1 through 3451 herein.

3452-3453. BASF denies that it is liable to Third-Party Plaintiffs for contribution. BASF is without knowledge or information sufficient to form a belief as to the truth of the matters in Paragraphs 3452 and 3453, and therefore denies the same.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

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

SECOND AFFIRMATIVE DEFENSE

Third-Party Defendant is not a discharger or a person in any way responsible for a discharge under N.J.S.A. 58:10-23.11 *et seq.* (“Spill Act”).

THIRD AFFIRMATIVE DEFENSE

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

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

FIFTH AFFIRMATIVE DEFENSE

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

SIXTH AFFIRMATIVE DEFENSE

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

SEVENTH AFFIRMATIVE DEFENSE

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 Third-Party Defendant under that statute.

EIGHTH AFFIRMATIVE DEFENSE

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

NINTH AFFIRMATIVE DEFENSE

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

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

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

TWELFTH AFFIRMATIVE DEFENSE

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

THIRTEENTH AFFIRMATIVE DEFENSE

Third-Party Defendant cannot be held liable for or be required to pay Third-Party Plaintiffs' damages or other claims based on actions or inactions by Third-Party Defendant 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 AFFIRMATIVE DEFENSE

At common law, Third-Party Defendant 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. Third-Party Defendant 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 Third-Party Defendant directly. As a result, the claims set forth in the Third-Party Complaint are barred, in whole or in part.

FIFTEENTH AFFIRMATIVE DEFENSE

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.

SIXTEENTH AFFIRMATIVE DEFENSE

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.

SEVENTEENTH AFFIRMATIVE DEFENSE

At all relevant times, Third-Party Defendant 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.

EIGHTEENTH AFFIRMATIVE DEFENSE

The claims asserted against Third-Party Defendant in the Third-Party Complaint are barred because at all relevant times Third-Party Defendant 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 Third-Party Defendant 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.

NINETEENTH AFFIRMATIVE DEFENSE

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

TWENTIETH AFFIRMATIVE DEFENSE

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

TWENTY-FIRST AFFIRMATIVE DEFENSE

Third-Party Plaintiffs' claims against Third-Party Defendant 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-SECOND AFFIRMATIVE DEFENSE

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-THIRD AFFIRMATIVE DEFENSE

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

TWENTY-FOURTH AFFIRMATIVE DEFENSE

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-FIFTH AFFIRMATIVE DEFENSE

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-SIXTH AFFIRMATIVE DEFENSE

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

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

Third-Party Defendant did not own or operate a "Major Facility" as defined by the Spill Act or the WPCA.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

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.

TWENTY-NINTH AFFIRMATIVE DEFENSE

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.

THIRTIETH AFFIRMATIVE DEFENSE

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-FIRST AFFIRMATIVE DEFENSE

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-SECOND AFFIRMATIVE DEFENSE

Third-Party Defendant 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 Third-Party Defendant exercised no control and for whose conduct Third-Party Defendant was not responsible including, without limitation, unpermitted and storm event discharges from publicly owned treatment works.

THIRTY-THIRD AFFIRMATIVE DEFENSE

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 Third-Party Defendant, 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-FOURTH AFFIRMATIVE DEFENSE

Although Third-Party Defendant denies that it is liable for the contamination described in Third-Party Plaintiffs' Complaint, in the event it is found liable, Third-Party

Defendant 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-FIFTH AFFIRMATIVE DEFENSE

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-SIXTH AFFIRMATIVE DEFENSE

Third-Party Plaintiffs' claims are barred to the extent that the conduct of Third-Party Defendants 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.

THIRTY-SEVENTH AFFIRMATIVE DEFENSE

The disposal of waste, if any, which allegedly originated from Third-Party Defendant, 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 Third-Party Defendant cannot be found retroactively liable.

THIRTY-EIGHTH AFFIRMATIVE DEFENSE

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

THIRTY-NINTH AFFIRMATIVE DEFENSE

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

FORTIETH AFFIRMATIVE DEFENSE

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

FORTY-FIRST AFFIRMATIVE DEFENSE

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.*, 129 S.Ct. 1870 (2009), and other comparable decisional law.

FORTY-SECOND AFFIRMATIVE DEFENSE

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

FORTY-THIRD AFFIRMATIVE DEFENSE

Third-Party Plaintiffs cannot seek contribution under the Joint Tortfeasors Contribution Law because Third-Party Defendant(s) are not liable for "the same injury" caused by Third-Party Plaintiffs' discharges and do not share a common liability to the State of New Jersey.

FORTY-FOURTH AFFIRMATIVE DEFENSE

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

FORTY-FIFTH AFFIRMATIVE DEFENSE

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

FORTY-SIXTH AFFIRMATIVE DEFENSE

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 Third-Party Defendant are barred to the extent of any legal extinguishments of actual or potential claims by the Plaintiffs against Third-Party Defendant pertaining to the alleged environmental contamination (including natural resource damage) of any site(s) alleged by Third-Party Plaintiffs to be the subject of their contribution claims against Third-Party Defendant. Examples of legal extinguishments that are or may be applicable to Third-Party Defendant include, with respect to each such site:

1. Any release or covenant not to sue granted by Plaintiffs to Third-Party Defendant;
2. Any settlement or other compromise between Plaintiffs and Third-Party Defendant;

3. Any expiration of the statute of limitations or statute of repose governing Plaintiffs' right to maintain a claim against Third-Party Defendant;
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 Third-Party Defendant, 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 Third-Party Defendant, directly or indirectly, of any "No Further Action" (a/k/a "NFA") determination, "Negative Declaration," or similar determination.

FORTY-SEVENTH AFFIRMATIVE DEFENSE

Third-Party Plaintiffs' claims are barred because the relief sought against Third-Party Defendant, were it claimed directly by Plaintiffs, would amount to a "taking" of Third-Party Defendant'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.

FORTY-EIGHTH AFFIRMATIVE DEFENSE

Third-Party Plaintiffs' claims are barred to the extent the relief sought by Third-Party Plaintiffs in the Complaint is at odds with Third-Party Defendant'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 Third-Party Defendant, thereby exposing Third-Party Defendant to inconsistent responsibilities, penalties and liabilities, and the possibility of paying twice for the same actions (i.e., double recovery).

FORTY-NINTH AFFIRMATIVE DEFENSE

To the extent Third-Party Defendant 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 Third-Party Defendant, 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.

FIFTIETH AFFIRMATIVE DEFENSE

Without admitting liability, Third-Party Defendant 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-FIRST AFFIRMATIVE DEFENSE

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

FIFTY-SECOND AFFIRMATIVE DEFENSE

Third-Party Defendant reserves the right to assert and hereby invoke each and every Environmental Law defenses that may be available during the course of this action.

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

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

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 the undersigned states that there are other non-parties that may have discharged hazardous substances into the Newark Bay Complex contributing to the harm alleged by the Third-Party Plaintiffs. O'Melveny and Meyers has filed with the Special Master, a list of over 1,000 non-parties who, according to the New Jersey Department of Environmental Protection, discharged hazardous substances into the Newark Bay Complex. Subsequent investigation/discovery will determine which, if any of those non-parties or others not yet identified should be joined in this case.

DESIGNATION OF TRIAL COUNSEL


In accordance with Rule 4:25-4 you are hereby notified that David P. Schneider is assigned to try this case.

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

Dated: June 21, 2010

Respectfully submitted,

Bressler, Amery & Ross, P.C.
Attorney for Third-Party Defendant
BASF Corporation
325 Columbia Turnpike
Florham Park, NJ 07932
Tel: 973-514-1200
Fax: 973-514-1660

Signed: 
David P. Schneider


CERTIFICATE OF SERVICE

I, David P. Schneider, an attorney at law of the State of New Jersey, do hereby state upon my oath as follows:

1. I am a partner in the law firm of Bressler, Amery & Ross, P.C., 325 Columbia Turnpike, Florham Park, New Jersey 07932, which represents Third-Party Defendant BASF Corporation ("BASF") in the above-captioned matter.

2. I hereby certify that BASF's Answer to Third-Party Complaint "B" of Defendants Maxus Energy Corporation and Tierra Solutions, Inc. was served upon the Clerk of Court, Superior Court of New Jersey, Essex County, 50 W. Market Street, Newark, New Jersey 07102, via first class, regular mail on June 21, 2010.

3. I hereby certify that BASF's Answer to Third-Party Complaint "B" of Defendants Maxus Energy Corporation and Tierra Solutions, Inc. was served electronically on June 21, 2010 on all parties which have consented to service by posting on the following website, <http://njdepvocc.sfile.com>. All other Counsel of Record were served on June 21, 2010 via first class, regular mail.


David P. Schneider

Dated: June 21, 2010