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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.

3M COMPANY,
A.C.C., INC.,
ACH FOOD COMPANIES, INC.,
ACTIVE OIL SERVICE,
ADCO CHEMICAL COMPANY,
AGC CHEMICALS AMERICAS, INC.,
ALDEN-LEEDS, INC.,
ALLIANCE CHEMICAL, INC.,
ALUMAX MILL PRODUCTS, INC.,
AMCOL REALTY CO.,
AMERICAN INKS AND COATINGS CORPORATION,

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: ESSEX COUNTY

DOCKET NO. L-9868-05 (PASR)

CIVIL ACTION

**BAYER CORPORATION'S ANSWER
TO THIRD-PARTY COMPLAINT "B"**

APEXICAL, INC.,
APOLAN INTERNATIONAL, INC.,
ARKEMA, INC.,
ASHLAND INC.,
ASHLAND INTERNATIONAL HOLDINGS, INC.,
ASSOCIATED AUTO BODY & TRUCKS, INC.,
ATLAS REFINERY, INC.,
AUTOMATIC ELECTRO-PLATING CORP.,
AKZO NOBEL COATINGS, INC.,
BASF CATALYSTS LLC,
BASF CONSTRUCTION CHEMICALS INC.,
BASF CORPORATION,
BAYER CORPORATION,
BEAZER EAST, INC.,
BELLEVILLE INDUSTRIAL CENTER,
BENJAMIN MOORE & COMPANY,
BEROL CORPORATION,
B-LINE TRUCKING, INC.,
BORDEN & REMINGTON CORP.,
C.S. OSBORNE & CO.,
CAMPBELL FOUNDRY COMPANY,
CASCHEM, INC.,
CBS CORPORATION,
CELANESE LTD.,
CHEMICAL COMPOUNDS INC.,
CHEMTURA CORPORATION,
CLEAN EARTH OF NORTH JERSEY, INC.,
COSMOPOLITAN GRAPHICS CORPORATION,
CIBA CORPORATION,
COLTEC INDUSTRIES INC.,
COLUMBIA TERMINALS, INC.,
COMO TEXTILE PRINTS, INC.,
CONAGRA PANAMA, INC.,
CONOPCO, INC.,
CONSOLIDATED RAIL CORPORATION,
COOK & DUNN PAINT CORPORATION,
COSAN CHEMICAL CORPORATION,
COVANTA ESSEX COMPANY,
CRODA, INC.,
CRUCIBLE MATERIALS CORPORATION,
CURTISS-WRIGHT CORPORATION,
CWC INDUSTRIES, INC.,
DARLING INTERNATIONAL, INC.,
DAVANNE REALTY CO.,

DELEET MERCHANDISING CORPORATION,
DELVAL INK AND COLOR,
INCORPORATED, DILORENZO PROPERTIES
COMPANY, L.P.,
E.I. DU PONT DE NEMOURS AND COMPANY,
EASTMAN KODAK COMPANY,
EDEN WOOD CORPORATION,
ELAN CHEMICAL COMPANY, INC.,
EM SERGEANT PULP & CHEMICAL CO.,
EMERALD HILTON DAVIS, LLC,
ESSEX CHEMICAL CORPORATION,
EXXON MOBIL
F.E.R. PLATING, INC.,
FINE ORGANICS CORPORATION,
FISKE BROTHERS REFINING COMPANY,
FLEXON INDUSTRIES CORPORATION,
FLINT GROUP INCORPORATED,
FORT JAMES CORPORATION,
FOUNDRY STREET CORPORATION,
FRANKLIN-BURLINGTON PLASTICS, INC.,
GARFIELD MOLDING COMPANY, INC.,
GENERAL CABLE INDUSTRIES, INC.;
GENERAL DYNAMICS CORPORATION,
GENERAL ELECTRIC COMPANY,
GENTEK HOLDING LLC,
GIVAUDAN FRAGRANCES CORPORATION,
G. J. CHEMICAL CO.,
GOODY PRODUCTS, INC.,
GORDON TERMINAL SERVICE CO. OF N.J., INC.,
HARRISON SUPPLY COMPANY,
HARTZ MOUNTAIN CORPORATION,
HAVENICK ASSOCIATES L.P.,
HEXCEL CORPORATION,
HEXION SPECIALTY CHEMICALS, INC.,
HOFFMANN-LA ROCHE INC.,
HONEYWELL INTERNATIONAL INC.,
HOUGHTON INTERNATIONAL INC.,
HUDSON TOOL & DIE COMPANY, INC.,
HY-GRADE ELECTROPLATING CO.,
ICI AMERICAS INC.,
INNOSPEC ACTIVE CHEMICALS LLC,
INX INTERNATIONAL INK CO.,
ISP CHEMICALS INC.,
ITT CORPORATION,

KEARNY SMELTING & REFINING CORP.,
KAO BRANDS COMPANY,
KOEHLER-BRIGITT STAR, INC.,
LINDE, INC.,
LUCENT TECIINOLOGIES, INC.,
MACE ADHESIVES & COATINGS COMPANY, INC.,
MALLINCKRODT INC.,
MERCK & CO., INC.,
METAL MANAGEMENT NORTHEAST, INC.,
MI HOLDINGS, INC.,
MILLER ENVIRONMENTAL GROUP, INC.,
MORTON INTERNATIONAL, INC.,
N L INDUSTRIES, INC.,
NAPPWOOD LAND CORPORATION,
NATIONAL FUEL OIL, INC.,
NATIONAL-STANDARD, LLC,
NELL-JOY INDUSTRIES, INC.,
NESTLE U.S.A., INC.,
NEW JERSEY TRANSIT CORPORATION,
NEWS AMERICA, INC.,
NEWS PUBLISHING AUSTRALIA LIMITED,
NORPAK CORPORATION,
NOVELIS CORPORATION,
ORANGE AND ROCKLAND UTILITIES, INC.,
OTIS ELEVATOR COMPANY,
PRC-DESOTO INTERNATIONAL, INC.,
PASSAIC PIONEERS PROPERTIES COMPANY,
PFIZER INC.,
PHARMACIA CORPORATION,
PHELPS DODGE INDUSTRIES, INC.,
PHILBRO, INC.,
PITT-CONSOL CHEMICAL COMPANY,
PIVOTAL UTILITY HOLDINGS, INC.,
PPG INDUSTRIES, INC.,
PRC-DESOTO INTERNATIONAL, INC.,
PRAXAIR, INC.,
PRECISION MANUFACTURING GROUP, LLC,
PRENTISS INCORPORATED,
PROCTER & GAMBLE MANUFACTURING COMPANY,
PRYSMIAN COMMUNICATIONS CABLES AND
SYSTEMS USA LLC,
PSEG FOSSIL LLC,
PUBLIC SERVICE ELECTRIC AND GAS COMPANY,
PURDUE PHARMA TECHNOLOGIES, INC.,

QUALA SYSTEMS, INC.,
QUALITY CARRIERS, INC.,
RECKITT BENCKISER, INC.,
REICHHOLD, INC.,
REVERE SMELTING & REFINING CORPORATION,
REXAM BEVERAGE CAN COMPANY,
ROMAN ASPHALT CORPORATION,
ROYCE ASSOCIATES, A LIMITED PARTNERSHIP,
R.T. VANDERBILT COMPANY, INC.,
RUTHERFORD CHEMICALS LLC,
S&A REALTY ASSOCIATES, INC.,
SCHERING CORPORATION,
SEQUA CORPORATION,
SETON COMPANY,
SIEMENS WATER TECHNOLOGIES CORP.
SINGER SEWING COMPANY
SPECTRASERV, INC.,
STWB, INC.,
SUN CHEMICAL CORPORATION,
SVP WORLDWIDE, LLC,
TATE & LYLE INGREDIENTS AMERICAS, INC.,
TEVA PHARMACEUTICALS USA, INC.,
TEVAL CORP.,
TEXTRON INC.,
THE DIAL CORPORATION,
THE DUNDEE WATER POWER AND LAND COMPANY,
THE NEWARK GROUP, INC.,
THE OKONITE COMPANY, INC.,
THE SHERWIN-WILLIAMS COMPANY,
THE STANLEY WORKS,
THE VALSPAR CORPRATION,
THIRTY-THREE QUEEN REALTY INC.,
THREE COUNTY VOLKSWAGEN CORPORATION,
TIDEWATER BALING CORP.,
TIFFANY & CO.,
TIMCO, INC.,
TRIMAX BUILDING PRODUCTS, INC.,
TROY CHEMICAL CORPORATION, INC.,
UNIVERSAL OIL PRODUCTS COMPANY,
V. OTTILIO & SONS, INC.,
VELSICOL CHEMICAL CORPORATION,
VEOLIA ES TECHNICAL SOLUTIONS, L.L.C.,
VERTELLUS SPECIALTIES INC.,
VITUSA CORP.,

VULCAN MATERIALS COMPANY,
W.A.S. TERMINALS CORPORATION,
W.A.S. TERMINALS, INC.,
W.C. INDUSTRIES,
WHITTAKER CORPORATION,
WIGGINS PLASTICS, INC.,
ZENECA INC.,

Third-Party Defendants.

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

Third-Party Defendant Bayer Corporation ("Bayer"), 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" by Defendants/Third-Party Plaintiffs Maxus Energy Corporation and Tierra Solutions, Inc. ("Third-Party Plaintiffs"), as follows:

GENERALLY

1. Bayer 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)

2. Answering the allegations of Paragraphs 1 through 15, Bayer 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)

3. No response is required pursuant to CMO V.

AS TO THE THIRD PARTY DEFENDANTS

(Paragraphs 19 through 210)

4. To the extent that the allegations in Paragraphs 19 through 209 relate to other parties, no response is required pursuant to CMO V.

5. Bayer admits the allegations in Paragraph 42.

6. Answering the allegations of Paragraph 210, insofar as same constitute legal conclusions rather than allegations of fact, they are improper and call for no response. To the extent that a response is required, Bayer states that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of same and leaves Third-Party Plaintiffs to their proofs.

AS TO DEFINITIONS

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

AS TO FACTUAL ALLEGATIONS

(Paragraphs 237 through 3445)

8. Paragraphs 237 through 2157 contain allegations that are not directed to or against Bayer but rather are directed to or against other Third-Party Defendants and Bayer states that it lacks information or knowledge sufficient to form a belief as to the truth of same and leaves Third-Party Plaintiffs to their proofs.

9. Bayer admits the allegations in Paragraph 2158.

10. Bayer admits the allegations in Paragraph 2159.

11. Bayer admits the allegations in Paragraph 2160.

12. Bayer admits the allegations in Paragraph 2161.

13. Bayer admits the allegations in Paragraph 2162.

14. Bayer admits the allegations in Paragraph 2163
15. Bayer admits the allegations in Paragraph 2164.
16. Bayer admits the allegations in Paragraph 2165.
17. Bayer admits the allegations in Paragraph 2166.
18. Bayer admits the allegations in Paragraph 2167.

Pharma Chemical Plant 1 Site

19. Answering the allegations of Paragraph 2168, Bayer admits that Pharma Chemical Plant 1 is located at 169 West 52nd Street and consists of 3.067 acres, of which approximately .9 acres consists of Tidelands Grant. Bayer further admits that Pharma Chemical Plant 1 is bounded by J.F. Kennedy Blvd. and 53rd Street and is in proximity to Newark Bay. Except as expressly admitted herein, the allegations in Paragraph 2168 are denied.

20. Bayer is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 2169 and leaves Third-Party Plaintiffs to their proofs.

21. Answering the allegations of Paragraph 2170, Bayer admits that certain dyestuffs and optical brighteners were manufactured at the Pharma Chemical Plant 1 Site at certain times in the 1920s. Bayer further admits that at certain times in the 1920's or 1930's, certain chemical compounds were manufactured at Pharma Chemical Plant 1 in connection with the dyestuffs and optical brighteners industry. Bayer is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations set forth in Paragraph 2170 and leaves Third-Party Plaintiffs to their proofs.

22. Bayer is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 2171 and leaves Third-Party Plaintiffs to their proofs.

23. Bayer denies the allegations of Paragraph 2172.

24. Bayer is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 2173 and leaves Third-Party Plaintiffs to their proofs.

25. Answering the allegations of Paragraph 2174, Bayer admits that certain chemical compounds were manufactured at Pharma Chemical Plant 1 in connection with the dyestuffs and optical brighteners industry. Bayer is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations set forth in Paragraph 2174 and leaves Third-Party Plaintiffs to their proofs.

26. Answering the allegations of Paragraph 2175, Bayer admits that diethanolamine and fuel oil were stored in underground tanks at Pharma Chemical Plant 1 for a period of time. Bayer is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations set forth in Paragraph 2175 and leaves Third-Party Plaintiffs to their proofs.

27. Answering the allegations of Paragraph 2176, Bayer states that the term “hazardous substances” sets forth a legal conclusion to which no response is required. To the extent a response is required, the allegations in Paragraph 2176 are denied.

28. Answering the allegations of Paragraph 2177, Bayer admits that Woodward-Clyde Consultants issued a groundwater assessment report dated September 20, 1982, the

terms of which speak for themselves. Except as expressly admitted herein, the allegations in Paragraph 2177 are denied.

29. Answering the allegations of Paragraph 2178, Bayer admits that Woodward-Clyde Consultants issued a groundwater assessment report dated September 20, 1982, which report speaks for itself. Except as expressly admitted herein, the allegations in Paragraph 2178 are denied.

30. Answering the allegations of Paragraph 2179, Bayer admits that counsel for Mobay Corporation issued a letter to NJDEP dated March 1, 1985, which letter speaks for itself. Except as expressly admitted herein, the allegations in Paragraph 2179 are denied.

31. Answering the allegations of Paragraph 2180, since the allegations contain no specific timeframe, Bayer is without knowledge or information sufficient to form a belief as to the truth of same and leaves Third-Party Plaintiffs to their proofs.

32. Bayer is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 2181 and leaves Third-Party Plaintiffs to their proofs.

33. Answering the allegations of Paragraph 2182, Bayer admits that Weston Gavett issued a letter to the Bayonne Mayor and Board of Commissioners on October 19, 1954, which letter speaks for itself. Bayer is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations set forth in Paragraph 2182 and leaves Third-Party Plaintiffs to their proofs.

34. Bayer is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 2183 and leaves Third-Party Plaintiffs to their proofs.

35. Bayer is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 2184 and leaves Third-Party Plaintiffs to their proofs.

36. Bayer is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 2185 and leaves Third-Party Plaintiffs to their proofs.

37. Answering the allegations of Paragraph 2186, insofar as same constitute a legal conclusion rather than allegations of fact, they are improper and call for no response. To the extent that a response is required, the allegations in Paragraph 2186 are denied.

38. Answering the allegations of Paragraph 2187, insofar as same constitute a legal conclusion rather than allegations of fact, they are improper and call for no response. To the extent that a response is required, the allegations in Paragraph 2187 are denied.

Pharma Chemical Plant 2 Site

39. Answering the allegations of Paragraph 2188, Bayer admits that Pharma Chemical Plant 2 is located near the Kill Van Kull on East 2nd Street in the vicinity of Hobart Avenue in Bayonne, New Jersey. Except as expressly admitted herein, the allegations in Paragraph 2188 are denied.

40. Answering the allegations of Paragraph 2189, Bayer admits that Pharma Chemical Plant 2, Lot 1 was purchased on or about October 31, 1949. Bayer denies the remaining allegations contained in Paragraph 2189.

41. Answering the allegations of Paragraph 2190, Bayer admits that certain chemicals were manufactured at Pharma Chemical Plant 2 in connection with the dyestuffs and optical

brighteners industry. Except as expressly admitted herein, the allegations in Paragraph 2190 are denied.

42. Answering the allegations of Paragraph 2191, Bayer states that the term “hazardous substances” is a defined term and sets forth a legal conclusion to which no response is required. To the extent a response is required, the allegations in Paragraph 2191 are denied.

43. Answering the allegations of Paragraph 2192, Bayer admits that in April of 1985 Woodward-Clyde Consultants issued a report entitled “Results of Site Investigation and Proposed Cleanup Plan” regarding Pharma Chemical Plant 2, which report speaks for itself. Except as expressly admitted herein, the allegations in Paragraph 2192 are denied.

44. Answering the allegations of Paragraph 2193, Bayer admits that in April of 1985 Woodward-Clyde Consultants issued a report entitled “Results of Site Investigation and Proposed Cleanup Plan” regarding Pharma Chemical Plant 2, which report speaks for itself. Except as expressly admitted herein, the allegations in Paragraph 2193 are denied.

45. Answering the allegations of Paragraph 2194, Bayer admits that in April of 1985 Woodward-Clyde Consultants issued a report entitled “Results of Site Investigation and Proposed Cleanup Plan” regarding Pharma Chemical Plant 2, which report speaks for itself. Except as expressly admitted herein, the allegations in Paragraph 2194 are denied.

46. Bayer is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 2195 and leaves Third-Party Plaintiffs to their proofs.

47. Answering the allegations of Paragraph 2196, Bayer admits that NJDOH issued an inspection report in 1967, which report speaks for itself. Except as expressly admitted herein, the allegations in Paragraph 2196 are denied.

48. Answering the allegations of Paragraph 2197, Bayer admits that NJDOH issued an abatement order in April 1970, which order speaks for itself. Except as expressly admitted herein, the allegations in Paragraph 2197 are denied.

49. Answering the allegations of Paragraph 2198, Bayer admits that on July 25, 1984, NJDEP issued an inspection report regarding Pharma Chemical Plant 2, which report speaks for itself. Bayer is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations set forth in Paragraph 2198 and leaves Third-Party Plaintiffs to their proofs.

50. Answering the allegations of Paragraph 2199, Bayer admits that on August 13, 1984, NJDEP issued a report under file number C#23884, which report speaks for itself. Bayer is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations set forth in Paragraph 2199 and leaves Third-Party Plaintiffs to their proofs.

51. Answering the allegations of Paragraph 2200, Bayer admits that on August 13, 1984, NJDEP issued a report under file number C#23884, which report speaks for itself. Bayer is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations set forth in Paragraph 2200 and leaves Third-Party Plaintiffs to their proofs.

52. Answering the allegations of Paragraph 2201, insofar as same constitute a legal conclusion rather than allegations of fact, they are improper and call for no response. To the extent that a response is required, the allegations in Paragraph 2201 are denied.

53. Answering the allegations of Paragraph 2202, insofar as same constitute a legal conclusion rather than allegations of fact, they are improper and call for no response. To the extent that a response is required, the allegations in Paragraph 2202 are denied.

54. Paragraphs 2203 through 3445 contain allegations that are not directed to or against Bayer but rather are directed to or against other Third-Party Defendants and Bayer states that it lacks information or knowledge sufficient to form a belief as to the truth of same and leaves Third-Party Plaintiffs to their proofs.

AS TO FIRST COUNT

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

55. Bayer incorporates by reference as if fully set forth herein its responses and denials as asserted in Paragraphs 1 through 54 herein.

56. Bayer is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraphs 3447 and 3448, and therefore leaves Third-Party Plaintiffs to their proofs.

57. Bayer denies that it is liable to Third-Party Plaintiffs for contribution. Bayer is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations set forth in Paragraphs 3449 through 3451, and therefore leaves Third-Party Plaintiffs to their proofs.

AS TO SECOND COUNT

Statutory Contribution

58. Bayer incorporates by reference as if fully set forth herein its responses and denials as asserted in Paragraphs 1 through 56 herein.

59. Bayer denies that it is liable to Third-Party Plaintiffs for contribution. Bayer is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraphs 3452 and 3453, and therefore leaves Third-Party Plaintiffs to their proofs.

FIRST AFFIRMATIVE DEFENSE

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

SECOND AFFIRMATIVE DEFENSE

61. Bayer 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

62. 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

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

FIFTH AFFIRMATIVE DEFENSE

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

SIXTH AFFIRMATIVE DEFENSE

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

SEVENTH AFFIRMATIVE DEFENSE

66. 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 Bayer under that statute.

EIGHTH AFFIRMATIVE DEFENSE

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

NINTH AFFIRMATIVE DEFENSE

68. 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

69. 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

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

TWELFTH AFFIRMATIVE DEFENSE

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

THIRTEENTH AFFIRMATIVE DEFENSE

72. Bayer cannot be held liable for or be required to pay Third-Party Plaintiffs' damages or other claims based on actions or inactions by Bayer 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

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

FIFTEENTH AFFIRMATIVE DEFENSE

74. The State of New Jersey is legally barred from asserting direct claims against Bayer 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 Bayer as well, including the claims set forth in the Third-Party Complaint.

SIXTEENTH AFFIRMATIVE DEFENSE

75. 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

76. 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

77. At all relevant times, Bayer 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

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

79. 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

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

TWENTY-SECOND AFFIRMATIVE DEFENSE

81. Third-Party Plaintiffs' claims against Bayer 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

82. 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 THIRD AFFIRMATIVE DEFENSE

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

TWENTY-FIFTH AFFIRMATIVE DEFENSE

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

TWENTY-SIXTH AFFIRMATIVE DEFENSE

85. 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

86. 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

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

TWENTY-NINTH AFFIRMATIVE DEFENSE

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

THIRTIETH AFFIRMATIVE DEFENSE

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

THIRTY-FIRST AFFIRMATIVE DEFENSE

90. 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

91. 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

92. 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

93. 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

94. Bayer 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 Bayer exercised no control and for whose conduct Bayer

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

THIRTY-SIXTH AFFIRMATIVE DEFENSE

95. 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 Bayer, 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

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

97. 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

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

99. The disposal of waste, if any, which allegedly originated from Bayer, 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 Bayer cannot be found retroactively liable.

FORTY-FIRST AFFIRMATIVE DEFENSE

100. Any discharge that allegedly originated from Bayer 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 Bayer cannot be found retroactively liable.

FORTY-SECOND AFFIRMATIVE DEFENSE

101. 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

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

FORTY-FOURTH THIRD AFFIRMATIVE DEFENSE

103. Third-Party Plaintiffs' claims are barred due to its own conduct in unilaterally, and without notice to Bayer, 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

104. Bayer's 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

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

FORTY-SEVENTH AFFIRMATIVE DEFENSE

106. Third-Party Plaintiffs cannot seek contribution under the Joint Tortfeasors Contribution Law because Bayer is 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-EIGHTH AFFIRMATIVE DEFENSE

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

FORTY-NINTH AFFIRMATIVE DEFENSE

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

FIFTIETH AFFIRMATIVE DEFENSE

109. 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 Bayer are barred to the extent of any legal extinguishments of actual or potential claims by the Plaintiffs against Bayer 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 Bayer. Examples of legal extinguishments that are or may be applicable to Bayer include, with respect to each such site:

- A. Any release or covenant not to sue granted by Plaintiffs to Bayer;
- B. Any settlement or other compromise between Plaintiffs and Bayer;
- C. Any expiration of the statute of limitations or statute of repose governing Plaintiffs' right to maintain a claim against Bayer;
- D. 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 Bayer, which would result in relinquishment of such a claim by virtue of New Jersey's Entire Controversy Doctrine; and/or
- E. Any issuance by Plaintiffs to Bayer, directly or indirectly, of any "No Further Action" (a/k/a "NFA") determination, "Negative Declaration," or similar determination.

FIFTY-FIRST AFFIRMATIVE DEFENSE

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

111. Third-Party Plaintiffs' claims are barred to the extent the relief sought by Third-Party Plaintiffs in the Complaint is at odds with Bayer'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 Bayer, thereby exposing Bayer

to inconsistent responsibilities, penalties and liabilities, and the possibility of paying twice for the same actions (i.e., double recovery).

FIFTY-THIRD AFFIRMATIVE DEFENSE

112. To the extent Bayer 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 Bayer, 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

113. Without admitting liability, Bayer 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

114. Bayer 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 Bayer.

FIFTY-SIXTH AFFIRMATIVE DEFENSE

115. Third-Party Plaintiffs' claims are barred, in whole or in part, because Bayer has acted pursuant to the approval and direction of the State with regard to clean-up and remediation of the former Pharma Chemical Plant sites.

FIFTY-SEVENTH AFFIRMATIVE DEFENSE

116. Third-Party Plaintiffs' claims are barred, in whole or in part, to the extent same are covered by the terms and provisions of the "Newark Bay Study Area Agreement for Participation in Phase II Study."

FIFTY-EIGHTH AFFIRMATIVE DEFENSE

117. Third-Party Plaintiffs' claims in Complaint "D" are subsumed by the allegations contained herein, as the Duraport Realty Site consists, in part, of the former Pharma Chemical Plant 2 and, therefore, any such recovery by Third-Party Plaintiffs in Complaint "D" would constitute a double recovery. Insofar as there is any recovery in this matter, Bayer is entitled to a dollar-for-dollar set-off for any recovery under Complaint "D".

FIFTY-NINTH AFFIRMATIVE DEFENSE

118. Bayer 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

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

DESIGNATION OF TRIAL COUNSEL

120. In accordance with Rule 4:25-4 you are hereby notified that Timothy I. Duffy, Esq. is assigned to try this case.

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

121. 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 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 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 are certain additional non-parties known to the undersigned counsel:
- i. The Babcock & Wilcox Company, 800 Main Street, 4th Floor, Lynchburg, Virginia;
 - ii. The Muralo Company, Inc., 148 E. 5th Street, Bayonne, New Jersey;
 - iii. EMD Chemicals, Rona Division, 480 S. Democrat Rd., Gibbstown, New Jersey.

WHEREFORE, Third-Party Defendant Bayer 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: November 20, 2009

Respectfully submitted,

COUGHLIN DUFFY LLP
Attorneys for Third-Party Defendant
Bayer Corporation



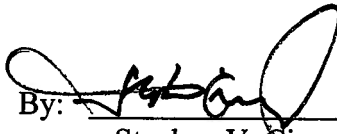
TIMOTHY A. DUFFY

CERTIFICATION OF SERVICE

I, Stephen V. Ciurczak, hereby certify that Bayer Corporation's Answer to Third-Party Complaint "B", Affirmative Defenses and Certification pursuant to R. 4:5-1(b)(2) were filed with the Clerk of Court, Superior Court of New Jersey, Essex County, by UPS overnight mail, and was served upon all parties which have consented to electronic service by posting to <http://njdepvoce.sfile.com>. All other Counsel of Record were served via first class, regular 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.

COUGHLIN DUFFY LLP
Attorneys for Third-Party Defendant
Bayer Corporation

By: 
Stephen V. Ciurczak

Dated: November 20, 2009