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Davanne Realty Co.

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL  
PROTECTION; THE COMMISSIONER OF THE NEW  
JERSEY DEPARTMENT OF ENVIRONMENTAL  
PROTECTION AND THE ADMINISTRATOR OF THE  
NEW JERSEY SPILL COMPENSATION FUND,

Plaintiffs,

v.

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

Defendants,

v.

MAXUS ENERGY CORPORATION and TIERRA  
SOLUTIONS, INC.,

Third-Party Plaintiffs,

v.

3M COMPANY;  
A.C.C., INC.;  
ACH FOOD COMPANIES, INC.;  
ACTIVE OIL SERVICE;  
ADCO CHEMICAL COMPANY;  
AGC CHEMICALS AMERICAS, INC.;  
AKZO NOBEL COATINGS, INC.;  
ALDEN-LEEDS, INC.;  
ALLIANCE CHEMICAL, INC.;  
ALUMAX MILL PRODUCTS, INC.;  
AMCOL REALTY CO.;  
AMERICAN CYANAMID COMPANY (N/K/A Wyeth

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION: ESSEX COUNTY

DOCKET NO.: ESX-L9868-05

Civil Action

**ANSWER, AFFIRMATIVE  
DEFENSES, DESIGNATION OF  
TRIAL COUNSEL, AND R. 4:5-1  
CERTIFICATION ON BEHALF OF  
DAVANNE REALTY COMPANY**

Holdings Corporation);  
AMERICAN INKS AND COATINGS CORPORATION;  
APEXICAL, INC.;  
APOLAN INTERNATIONAL, INC.;  
ARKEMA, INC.;  
ASHLAND, INC.;  
ASHLAND INTERNATIONAL HOLDINGS, INC.;  
ASSOCIATED AUTOBODY & TRUCKS;  
ATLAS REFINERY, INC.;  
AUTOMATIC ELECTRO-PLATING CORP.;  
BASF CATALYSTS, LLC.;  
BASF CONSTRUCTION CHEMICALS, INC.;  
BASF CORPORATION;  
BAYER CORPORATION;  
BAYONNE MUNICIPAL UTILITIES AUTHORITY;  
BEAZER EAST, INC.;  
BELLEVILLE INDUSTRIAL CENTER;  
BENJAMIN MOORE & COMPANY;  
BEROL CORPORATION;  
B-LINE TRUCKING, INC.;  
BORDEN & REMINGTON CORP.;  
BOROUGH OF CARTERET;  
BOROUGH OF EAST NEWARK;  
BOROUGH OF EAST RUTHERFORD;  
BOROUGH OF ELMWOOD PARK;  
BOROUGH OF FAIR LAWN;  
BOROUGH OF FANWOOD;  
BOROUGH OF FRANKLIN LAKES;  
BOROUGH OF GARWOOD;  
BOROUGH OF GLEN ROCK;  
BOROUGH OF HALEDON;  
BOROUGH OF HAWTHORNE;  
BOROUGH OF KENILWORTH;  
BOROUGH OF LODI;  
BOROUGH OF LYNDHURST;  
BOROUGH OF MOUNTAINSIDE;;  
BOROUGH OF NEW PROVIDENCE;  
BOROUGH OF NORTH ARLINGTON;  
BOROUGH OF NORTH CALDWELL;  
BOROUGH OF PROSPECT PARK;  
BOROUGH OF ROSELLE;  
BOROUGH OF ROSELLE PARK;  
BOROUGH OF RUTHERFORD;  
BOROUGH OF TOTOWA;  
BOROUGH OF WALLINGTON;  
BOROUGH OF WALLINGTON;  
BOROUGH OF WEST PATERSON;

BOROUGH OF WOOD-RIDGE;  
BP MARINE AMERICAS, INC.;  
C.S. OSBORNE & CO.;  
CAMPBELL FOUNDRY COMPANY;  
CASCHEM, INC.;  
CBS CORPORATION;  
CELANESE LTD;  
CHEMICAL COMPOUNDS.;  
CHEMICAL WASTE MANAGEMENT, INC. and  
WASTE MANAGEMENT, INC.;  
CHEMTURA CORPORATION;  
CIBA CORPORATION;  
CITY OF CLIFTON;  
CITY OF EAST ORANGE;  
CITY OF ELIZABETH;  
CITY OF GARFIELD;  
CITY OF HACKENSACK;  
CITY OF JERSEY CITY;  
CITY OF LINDEN;  
CITY OF NEWARK;  
CITY OF ORANGE TOWNSHIP;  
CITY OF PASSAIC;  
CITY OF PATERSON;  
CITY OF RAHWAY;  
CITY OF SUMMIT;  
CITY OF UNION CITY;  
CLEAN EARTH OF NORTH JERSEY, INC.;  
COLTEC INDUSTRIES INC.;  
COLUMBIA TERMINALS, INC.;  
COMO TEXTILE PRINTS, INC.;  
CONAGRA PANAMA, INC.;  
COPOPCO, INC.;  
CONSOLIDATED RAIL CORPORATION;  
COOK & DUNN PAINT CORPORATION;  
COSAN CHEMICAL CORPORATION;  
COSMOPOLITAN GRAPHICS CORPORATION;  
COVANTA ESSEX COMPANY;  
CRODA, INC.;  
CRUCIBLE MATERIALS CORPORATION;  
CURTISS-WRIGHT CORPORATION;  
CWC INDUSTRIES, INC.;  
CYTEC INDUSTRIES;  
CARLING INTERNATIONAL, INC.;  
DAVANNE REALTY CO.;  
DELEET MERCHANDISING CORPORATION;  
DELVAL INK AND COLOR, INCORPORATED;  
DILORENZO PROPERTIES COMPANY, L.P.;

THE DOW CHEMICAL CORPORATION;  
DURAPORT REALTY ONE LLC;  
DURAPORT REALTY TWO LLC;  
DUNDEE WATER POWER AND LAND COMPANY;  
EASTMAN KODAK COMPANY;  
EDEN WOOD CORPORATION;  
E.I. DU PONT DE NEMOURS AND COMPANY;  
ELAN CHEMICAL COMPANY, INC.;  
ELECTRIC BOAT CORPORATION (improperly  
identified as GENERAL DYNAMICS CORPORATION);  
EM SERGEANT PULP & CHEMICAL CO.;  
EPEC POLYMERS, INC.;  
ESSEX CHEMICAL CORPORATION;  
EXXON MOBIL;  
FER 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.;  
G.J. CHEMICAL CO.;  
GARFIELD MOLDING COMPANY, INC.;  
GATX TERMINALS CORP.;  
GENERAL CABLE INDUSTRIES, INC.;  
GENERAL DYNAMICS;  
GENERAL ELECTRIC COMPANY;  
GENTEK HOLDING LLC;  
GETTY PROPERTIES CORP.; GOODRICH  
CORPORATION (on behalf of KALAMA SPECIALTY  
CHEMICALS INC.);  
GIVAUDAN FRAGRANCES CORPORATION;  
GOODY PRODUCTS, INC.;  
GORDON TERMINAL SERVICE CO. OF NJ, INC.;  
HARRISON SUPPLY COMPANY;  
HARTZ MOUNTAIN CORPORATION;  
HAVENICK ASSOCIATES L.P.;  
HESS CORPORATION;  
HEXCEL CORPORATION;  
HEXION SPECIALTY CHEMICALS, INC.;  
HOFFMAN-LA ROCHE INC.;  
HONEYWELL INTERNATIONAL INC.;  
HOUGHTON INTERNATIONAL INC.;  
HOUSING AUTHORITY OF NEWARK;  
HUDSON TOOL & DIE COMPANY, INC.;  
HY-GRADE ELECTROPLATING CO.;

ICI AMERICAS INC.;  
IMTT-BAYONNE;  
INNOSPEC ACTIVE CHEMICALS LLC;  
INX INTERNATIONAL INK CO.;  
ISP CHEMICALS INC.;  
ITT CORPORATION;  
JERSEY CITY MUNICIPAL UTILITIES AUTHORITY;  
JOINT DEFENSE GROUP (JDG); A Group of Non-Municipal Third Party Defendants,  
JOINT MEETING OF ESSEX & UNION COUNTIES;  
KAO BRANDS COMPANY;  
KEARNY SMELTING & REFINING CORP.;  
KINDER MORGAN ENERGY PARTNERS, L.P.;  
KOEHLER-BRIGITT STAR, INC.;  
LEGACY VULCAN CORPORATION;  
LINDE, INC.;  
LINDEN ROSELLE SEWERAGE AUTHORITY;  
LUCENT TECHNOLOGIES, INC.;  
MACE ADHESIVES & COATINGS COMPANY, INC.;  
MALLINCKRODT INC.;  
McKESSON CORPORATION (on behalf of itself and SAFETY-KLEEN ENVIROSYSTEMS COMPANY);  
McKESSON ENVIROSYSTEMS;  
MERCK & CO., INC.;  
METALS MANAGEMENT NORTHEAST, INC.;  
MI HOLDINGS, INN.;  
MILLER ENVIRONMENTAL GROUP, INC.;  
MORTON INTERNATIONAL, 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;  
N L INDUSTRIES, INC.;  
NORPAK CORPORATION;  
NOVELIS CORPORATION;  
NPEC, INC.;  
ORANGE AND ROCKLAND UTILITIES, INC.;  
OTIS ELEVATOR COMPANY;  
PASSAIC PIONEERS PROPERTIES COMPANY;  
PASSAIC VALLEY SEWERAGE COMMISSIONERS (PVCS);  
PFIZER INC.;  
PHARMACIA CORPORATION;

PHELPS DODGE INDUSTRIES, INC.;  
PHILBRO, INC.;  
PITT-CONSOL CHEMICAL COMPANY;  
PIVOTAL UTILITY HOLDINGS, INC.;  
POWER TEST REALTY COMPANY, L.P.;  
PPG INDUSTRIES, INC.;  
PRC-DESOTO INTERNATIONAL, INC.;  
PRAXAIR, INC.;  
PRECISION MANUFACTURING GROUP, LLC;  
PRENTISS INCORPORATED;  
PROCTOR & 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.;  
RAHWAY VALLEY SEWERAGE AUTHORITY  
(RVSA);  
RECKITT BENSKISER, INC.;  
REICHHOLD, INC.;  
REVERE SMELTING & REFINING CORPORATION;  
REXAM BEVERAGE CAN COMPANY;  
ROMAN ASPHALA CORPORATION;  
ROYCE ASSOCIATES, A LIMITED PARTNERSHIP;  
RUTHERFORD CHEMICALS, LLC;  
R.T. VANDERBILT COMPANY, INC.;  
RUTHERFORD CHEMICALS LLC;  
S&A REALTY ASSOCIATES, INC.;  
SCHERING CORPORATION;  
SEQUA CORPORATION;  
SETON COMPANY;  
SHULTON, INC.;  
SIEMENS WATER TECHNOLOGIES CORP.;  
SINGER SEWING COMPANY;  
SPECTRASERV, INC.;  
STWB, INC.;  
SUN CHEMICAL CORPORATION;  
SUN PIPELINE CO.;  
SUNOCO, INC. (R&M) f/k/a SUN REFINING &  
MARKETING CO.;  
SUNOCO, INC. f/k/a SUN OIL CO.;  
SUPERIOR MPM LLC;  
SVP WORLDWIDE, LLC;  
TATE & LYLE INGREDIENTS AMERICAS, INC.;

TEVA PHARMACEUTICALS USA, INC.;  
TEVAL CORP.;  
TEXTRON INC.;  
THE DAVANNE CORPORATION;  
THE NEW JERSEY DEPARTMENT OF  
AGRICULTURE;  
THE NEW JERSEY DEPARTMENT OF  
TRANSPORTATION;  
THE NEWARK GROUP, INC.;  
THE OKONITE COMPANY, INC.;  
THE PORT AUTHORITY OF NY & NJ;  
THE SHERWIN-WILLIAMS COMPANY;  
THE STANLEY WORK;  
THE STATE OF NEW JERSEY;  
THIRTY-THREE QUEEN REALTY INC.;  
THOMAS & BETTS CORPORATION;  
THREE COUNTY VOLKSWAGON CORPORATION;  
TIDEWATER BALING CORP.;  
TIFFANY & CO.;  
TIMCO, INC.;  
TOWN OF BELLEVILLE;  
TOWN OF KEARNY;  
TOWN OF NUTLEY;  
TOWN OF WESTFIELD;  
TOWN OF WOODBRIDGE;  
TOWNSHIP OF BLOOMFIELD;  
TOWNSHIP OF CEDAR GROVE;  
TOWNSHIP OF CLARK;  
TOWNSHIP OF CRANFORD;  
TOWNSHIP OF IRVINGTON;  
TOWNSHIP OF LITTLE FALLS;  
TOWNSHIP OF LIVINGSTON;  
TOWNSHIP OF LYNDHURST;  
TOWNSHIP OF MAPLEWOOD;  
TOWNSHIP OF MILLBURN;  
TOWNSHIP OF MONTCLAIR;  
TOWNSHIP OF SADDLE BROOK;  
TOWNSHIP OF SCOTCH PLAINS;  
TOWNSHIP OF SOUTH HACKENSACK;  
TOWNSHIP OF SOUTH ORANGE VILLAGE;  
TOWNSHIP OF SPRINGFIELD;  
TOWNSHIP OF WEST ORANGE;  
TOWNSHIP OF WCKOFF;  
TRMI-H LLC;  
TRIMAX BUILDING PRODUCTS, INC.;  
TROY CHEMICAL CORPORATION, INC.;  
UNIVERSAL OIL PRODUCTS COMPANY;

V. OTTILIO & SONS, INC.;  
VALSPAR CORPORATION;  
VELSICOL CHEMICAL CORPORATION;  
VEOLIA ES TECHNICAL SOLUTIONS, L.L.C.;  
VERTELLUS SPECIALTIES, INC.;  
VILLAGE OF RIDGEWOOD;  
VITUSA CORP.;  
VOLCAN MATERIALS COMPANY;  
W.A.S. TERMINALS CORPORATION;  
W.A.S. TERMINALS, INC.;  
WASTE MANAGEMENT, INC.;  
W.C. INDUSTRIES;  
WHITTAKER CORPORATION;  
WIGGINS PLASTICS, INC.;  
WYETH and WYETH HOLDINGS CORPORATION;  
ZENECA INC.;

Third-Party Defendants.

Third-Party Defendant, Davanne Realty Company (“Davanne”), 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:

The paragraph numbers used herein respond to the paragraph numbers used in the Third-Party Complaint B.

### **PROCEDURAL BACKGROUND**

#### **(Paragraphs 1 through 15)**

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

## **THE PARTIES**

### **Third-Party Plaintiffs**

**(Paragraphs 16 through 18)**

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

### **Third-Party Defendants**

**(Paragraphs 19 through 210)**

To the extent that the allegations in Paragraphs 19 through 210 relate to other parties, no response is required pursuant to CMO V.

74. Davanne admits that it is a New Jersey Corporation.

210. The allegations in paragraph 210 of the Third-Party Complaint B express a legal opinion the accuracy of which Davanne is not required to admit or deny herein. To the extent a response by Davanne is necessary, Davanne denies the allegations contained in paragraph 210 of the Third-Party Complaint B.

## **DEFINITIONS**

**(Paragraphs 211 through 236)**

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

## **FACTUAL ALLEGATIONS**

**(Paragraphs 237 through 3445)**

To the extent that the allegations in Paragraphs 237 through 3445 relate to other parties, no response is required pursuant to CMO V.

### **Davanne Site**

987. Davanne admits the allegations contained in Paragraph 987 of the Third-Party

Complaint B.

995. Davanne admits that from March 1982 through December 20, 1985, Armour-Dial, Inc. leased the 179 Entin Road, Clifton, NJ property from Davanne Realty Co. Based on information and belief, on December 20, 1983, Armour-Dial, Inc. changed its name to The Dial Corporation and The Dial Corporation leased the 179 Entin Road, Clifton, NJ property from Davanne Realty Co. until approximately August 1988. Davanne further admits that Davanne Realty Co. was the owner of the 179 Entin Road, Clifton, NJ property in March 1982.

998. Davanne is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 998 of the Third-Party Complaint B and, accordingly, denies those allegations leaving Third-Party Plaintiffs to their proofs.

1002. Davanne is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 1002 of the Third-Party Complaint B and, accordingly, denies those allegations leaving Third-Party Plaintiffs to their proofs.

1004. The allegations in Paragraph 1004 express a legal conclusion the accuracy of which Davanne is not required to admit or deny. To the extent a response is necessary, Davanne denies the allegations contained in Paragraph 1004.

**FIRST COUNT**

**(New Jersey Spill Compensation and Control Act,**

**N.J.S.A. 58:10-23.11f.a. (2) (a))**

3446. Davanne repeats and makes a part hereof its responses to the allegations contained in the preceding paragraphs as if fully set forth at length herein.

3447. The allegations in paragraph 3447 of the Third-Party Complaint B express a legal opinion the accuracy of which Davanne is not required to admit or deny herein. To the extent a response is required Davanne denies the allegations that pertain to it in paragraph 3447 of the

Third-Party Complaint B. Davanne is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 3447 pertaining to the other Third-Party Defendants.

3448. The allegations in paragraph 3448 of the Third-Party Complaint B express a legal opinion the accuracy of which Davanne is not required to admit or deny herein. To the extent a response is required, Davanne submits that the New Jersey Spill Compensation and Control Act, *N.J.S.A. 58:10-23.11.f.a. (2) (a)* speaks for itself.

3449. Davanne denies that Maxus and Tierra are entitled to contribution from Davanne to recover a proportionate share of any cleanup and removal costs or damages, if any, for which Maxus or Tierra may be found liable under the Spill Act in this lawsuit. Davanne is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 3449 pertaining to the other Third-Party Defendants.

3450. The allegations in paragraph 3450 of the Third-Party Complaint B express a legal opinion the accuracy of which Davanne is not required to admit or deny herein. To the extent a response is required, Davanne is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 3450 and, accordingly, denies those allegations.

3451. Davanne denies that Maxus and Tierra are entitled to contribution from Davanne to recover a proportionate share of any cleanup and removal costs that Maxus or Tierra have incurred and will incur in the future. Davanne is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 3451 pertaining to the other Third-Party Defendants.

**WHEREFORE**, Davanne demands dismissal of the Third-Party Complaint “B” with prejudice, costs of litigation, attorney’s fees, and for such other costs as the Court deems just.

## **SECOND COUNT**

### **(Statutory Contribution)**

3452. Davanne repeats and makes a part hereof its responses to the allegations contained in the preceding paragraphs as if fully set forth at length herein.

3453. Davanne denies that Maxus and Tierra are entitled to contribution from Davanne, pursuant to the New Jersey statutory provisions for contribution (including *N.J.S.A. 2A:53A-1 et seq.*), for all or a proportionate share of response costs, cleanup and removal costs, damages, or other loss or harm, if any, for which Maxus or Tierra may be held liable, or which they have incurred or will incur in the future, relating to the Newark Bay Complex. Davanne is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 3453 pertaining to the other Third-Party Defendants.

**WHEREFORE**, Davanne demands dismissal of the Third-Party Complaint “B” with prejudice, costs of litigation, attorney’s fees, and for such other costs as the Court deems just.

## **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 Davanne upon which relief can be granted.

### **SECOND AFFIRMATIVE DEFENSE**

Davanne 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**

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 Davanne 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 Davanne 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 Davanne 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 Davanne. 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**

Davanne cannot be held liable for or be required to pay Third-Party Plaintiffs' damages or other claims based on actions or inactions by Davanne 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, Davanne 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. Davanne 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 Davanne directly. As a result, the claims set forth in the Third-Party Complaint are barred, in whole or in part.

#### **FIFTEENTH AFFIRMATIVE DEFENSE**

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

#### **SIXTEENTH 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.

#### **SEVENTEENTH 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.

#### **EIGHTEENTH AFFIRMATIVE DEFENSE**

At all relevant times, Davanne 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**

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

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**

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

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

Third-Party Plaintiffs' claims against Davanne 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**

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**

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

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

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

#### **TWENTY-SIXTH 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-SEVENTH 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-EIGHTH AFFIRMATIVE DEFENSE**

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

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

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

#### **THIRTIETH AFFIRMATIVE DEFENSE**

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

#### **THIRTY-FIRST 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.

#### **THIRTY-SECOND 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.

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

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

#### **THIRTY-SIXTH 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 Davanne, 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**

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

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**

Third-Party Plaintiffs' claims are barred to the extent that the conduct of Davanne, 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**

The disposal of waste, if any, which allegedly originated from Davanne or its site 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 Davanne cannot be found retroactively liable.

#### **FORTY-FIRST AFFIRMATIVE DEFENSE**

Any discharge that allegedly originated from Davanne or its site, 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 Davanne cannot be found retroactively liable.

#### **FORTY- SECOND AFFIRMATIVE DEFENSE**

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**

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**

Third-Party Plaintiffs' claims are barred due to its own conduct in unilaterally, and without notice to Davanne, 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**

Davanne'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**

Third-Party Plaintiffs cannot assert contribution claims against Davanne because the discharges for which the Plaintiffs are seeking relief are not related to Davanne.

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

Third-Party Plaintiffs cannot seek contribution under the Joint Tortfeasors Contribution Law because Davanne 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**

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

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

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

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

Any release or covenant not to sue granted by Plaintiffs to Davanne;

Any settlement or other compromise between Plaintiffs and Davanne;

Any expiration of the statute of limitations or statute of repose governing Plaintiffs' right to maintain a claim against Davanne;

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 Davanne, which would result in relinquishment of such a claim by virtue of New Jersey's Entire Controversy Doctrine; and/or

Any issuance by Plaintiffs to Davanne, directly or indirectly, of any "No Further Action" (a/k/a "NFA") determination, "Negative Declaration," or similar determination.

#### **FIFTY-FIRST AFFIRMATIVE DEFENSE**

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

To the extent cleanup is required, Third-Party Plaintiffs' claims are barred to the extent the relief sought by Third-Party Plaintiffs in the Complaint is at odds with Davanne's responsibilities to conduct ongoing environmental cleanups, if any, under oversight of the

Plaintiffs at any site(s) alleged by Third-Party Plaintiffs to be the subject of their contribution claims against Davanne, thereby exposing Davanne to inconsistent responsibilities, penalties and liabilities, and the possibility of paying twice for the same actions (i.e., double recovery).

#### **FIFTY-THIRD AFFIRMATIVE DEFENSE**

To the extent Davanne 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 Davanne, 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-FORTH AFFIRMATIVE DEFENSE**

Without admitting liability, Davanne 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**

Davanne 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 Davanne.

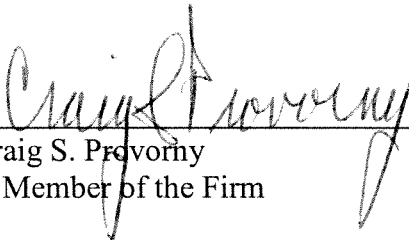
#### **FIFTY - SIXTH AFFIRMATIVE DEFENSE**

Davanne 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.

HEROLD LAW, P.A.  
Attorneys for Third-Party Defendant  
Davanne Realty Company

By:   
Craig S. Prevorny  
A Member of the Firm

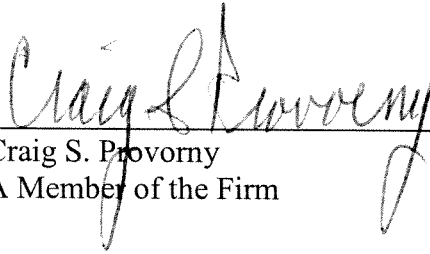
DATED: March 9, 2010

**DESIGNATION OF TRIAL COUNSEL**

Craig S. Provorny, Esq. is hereby designated by Davanne Realty Company as trial counsel.

HEROLD LAW, P.A.  
Attorneys for Third-Party Defendant  
Davanne Realty Company

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

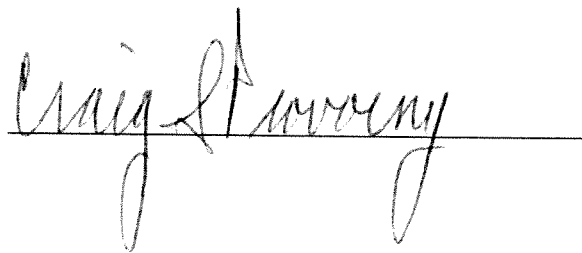
  
Craig S. Provorny  
A Member of the Firm

DATED:      March 9, 2010

### CERTIFICATION

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

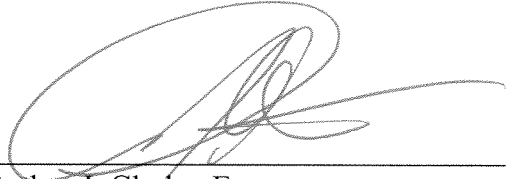
- (a) The matter in controversy is not the subject of any other action pending in any court or of a pending arbitration proceeding and no action or arbitration proceeding is contemplated by the undersigned; and
- (b) Because it is the legal position of the undersigned that the potential liability, if any, of Davanne 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 nonparties 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 same transactional facts.

A handwritten signature in cursive script, reading "Craig St. Mary", is written over a horizontal line.

DATED: March 9, 2010

**SUPPLEMENTAL CERTIFICATION OF SERVICE**

I hereby certify that on this date a copy the within Answer, Affirmative Defenses, *R. 4:5* certification and Designation of Trial Counsel of Davanne Realty Company, was served upon all counsel of record consenting to electronic service by posting the above-referenced pleadings on the Electronic Case Management Platform in NJDEP, *et al.* v. Occidental Chemical Corporation, *et al.*; Docket No. ESX-L-9868-05 (PASR) website.

  
\_\_\_\_\_  
Arthur J. Clarke, Esq.

DATED:      March 10, 2010

**Third-Party Defendants for Regular Service as of February 21, 2010**

<b>NAMED THIRD-PARTY DEFENDANT</b>	<b>THIRD-PARTY COMPLAINT</b>	<b>NOTICE OF APPEARANCE COUNSEL OF RECORD</b>
<b>Borough of Hasbrouck Heights</b>	<b>A</b>	Richard J. Dewland Coffey & Associates 465 South Street Morristown, NJ 07960 973.539.4500 rjd@coffeylaw.com
<b>City of Orange</b>	<b>A</b>	Assistant City Attorney City of Orange Township 29 North Day St. Orange, Ni 07050 973.266.4197 973.674.2021 -fax jmcgovern@ci.orange.nj.us
<b>Passaic Pioneers Properties Company</b>	<b>B</b>	John A. Daniels Daniels & Daniels LLC 6812 Park Ave. Guttenberg, NJ 07093 202.868.1868 201.868.2122 - fax jad1903@gmail.com
<b>Township of Hillside</b>	<b>A</b>	Christine M. Burgess Township Attorney Hillside Township Municipal Bldg. 1409 Liberty Ave. Hillside, NJ 07205 973.926.3000 973.926.9232 – fax
<b>Township of Irvington</b>	<b>A</b>	(Ilustavo Garcia Municipal Attorney Township of Irvington Irvington Municipal Building Civic Square Irvington, NJ 07111 973.399.6637 973.399.6723 - fax