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DiLorenzo Properties Company, L.P.

NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION. THE
COMMISSIONER OF THE NEW JERSEY
ENVIRONMENTAL PROTECTION
AGENCY, and THE ADMINISTRATOR OF
THE NEW JERSEY SPILL
COMPENSATION FUND,

Plaintiffs,

v.

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

Defendants,

v.

MAXUS ENERGY CORPORATION and
TIERRA SOLUTIONS, INC.,

Third-Party Plaintiffs,

v.

3M COMPANY, et al.

Third-Party
Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: ESSEX COUNTY
DOCKET NO. L-009868-05

Civil Action

**ANSWER AND AFFIRMATIVE
DEFENSES OF THIRD-PARTY
DEFENDANT DILORENZO
PROPERTIES
COMPANY, L.P. TO MAXUS ENERGY
CORPORATION'S AND TIERRA
SOLUTIONS, INC.'S THIRD-PARTY
COMPLAINT "B."**

Third-Party Defendant, DiLorenzo Properties, L.P. (“DiLorenzo”) answering the Complaint of Third-Party Plaintiffs, Maxus Energy Corporation and Tierra Solutions, Inc. (“Third-Party Plaintiffs”), states as follows:

PROCEDURAL BACKGROUND

1-15. DiLorenzo is without sufficient knowledge or information to form a belief as to the truth of the allegations in these paragraphs and, therefore, leaves Third-Party Plaintiffs to their proofs.

THE PARTIES **THIRD-PARTY PLAINTIFFS**

16-18. These paragraphs state legal conclusions for which no answer is required. To the extent that an answer is required, DiLorenzo is without sufficient knowledge or information to form a belief as to the truth of the allegations in these paragraphs and, therefore, denies same leaving Third-Party Plaintiffs to their proofs.

THIRD-PARTY DEFENDANTS

19-76. These paragraphs state legal conclusions for which no answer is required. To the extent that an answer is required, DiLorenzo is without sufficient knowledge or information to form a belief as to the truth of the allegations in these paragraphs and, therefore, denies same leaving Third-Party Plaintiffs to their proofs.

77. DiLorenzo admits that it is a limited partnership organized under the laws of the State of New York with its principal place of business at 1040 2nd Avenue, New York, New York.

78-210. These paragraphs state legal conclusions for which no answer is required. To the extent that an answer is required, DiLorenzo is without sufficient

knowledge or information to form a belief as to the truth of the allegations in these paragraphs and, therefore, denies same leaving Plaintiffs to their proofs.

DEFINITIONS

211-236. These paragraphs state legal conclusions for which no answer is required. To the extent that an answer is required, DiLorenzo is without sufficient knowledge or information to form a belief as to the truth of the allegations in these paragraphs and, therefore, denies same leaving Third-Party Plaintiffs to their proofs.

FACTUAL ALLEGATIONS **COMMERCIAL SITES**

237-386. The allegations in these paragraphs are not directed at DiLorenzo. DiLorenzo is without sufficient knowledge or information to form a belief as to the truth of the allegations in these paragraphs and, therefore, denies same leaving Third-Party Plaintiffs to their proofs.

387. DiLorenzo admits that the American Modern Metals Site is located at 65 Passaic Avenue, Kearny, New Jersey, also designated as Block 1, Lots 9, 10 and 11 and Block 14, Lots 3 and 4 on the tax maps of the Township of Kearny, Hudson County, New Jersey.

388. DiLorenzo admits that a number of reports have been submitted to the New Jersey Department of Environmental Protection ("NJDEP") for the American Modern Site, which contain a history of ownership of and operations at the American Modern Site. DiLorenzo refers the Third-Party Plaintiffs to these reports. To the extent an answer is required, DiLorenzo is without sufficient information to form a belief as to the truth of the allegations in this paragraph and, therefore, denies same leaving Third-Party Plaintiffs to their proofs.

389. DiLorenzo admits that a number of reports have been submitted to NJDEP for the American Modern Site, which contain a history of ownership of and operations at the American Modern Site. DiLorenzo refers the Third-Party Plaintiffs to these reports. To the extent an answer is required, DiLorenzo is without sufficient information to form a belief as to the truth of the allegations in this paragraph and, therefore, denies same leaving Third-Party Plaintiffs to their proofs.

390. With respect to the leasing history of the American Modern Site, DiLorenzo is without sufficient information to form a belief as to the truth of the allegations in this paragraph and, therefore, denies same leaving Third-Party Plaintiffs to their proofs. DiLorenzo denies the remaining allegations in Paragraph 390.

391. DiLorenzo admits that a number of reports have been submitted to NJDEP for the American Modern Site, which contain a history of ownership of and operations at the American Modern Site. DiLorenzo refers the Third-Party Plaintiffs to these reports. To the extent an answer is required, DiLorenzo is without sufficient information to form a belief as to the truth of the allegations in this paragraph and, therefore, denies same leaving Third-Party Plaintiffs to their proofs.

392. DiLorenzo admits that a number of reports have been submitted to NJDEP for the American Modern Site, which contain a history of ownership of and operations at the American Modern Site. DiLorenzo refers the Third-Party Plaintiffs to these reports. To the extent an answer is required, DiLorenzo is without sufficient information to form a belief as to the truth of the allegations in this paragraph and, therefore, denies same leaving Third-Party Plaintiffs to their proofs.

393. DiLorenzo admits that a Goldex Holding Company, a partnership comprised of The Estate of Sol Goldman, Irving Goldman and Di Lorenzo Properties Company sold the American Modern Site to DiLorenzo Properties Company.

394. DiLorenzo admits that it sold the American Modern Site. As to the balance of the allegations in this paragraph, DiLorenzo is without sufficient knowledge or information to form a belief as to the allegations in this paragraph and, therefore, denies same leaving Third-Party Plaintiffs to their proofs.

395. DiLorenzo is without sufficient knowledge or information to form a belief as to the allegations in this paragraph, and, therefore, denies same leaving Third-Party Plaintiffs to their proofs.

396. DiLorenzo is without sufficient knowledge or information to form a belief as to the allegations in this paragraph, and, therefore, denies same leaving Third-Party Plaintiffs to their proofs.

397. DiLorenzo admits that a number of reports have been submitted to NJDEP for the American Modern Site, which contain information regarding the environmental condition of and hazardous substances at the American Modern Site. DiLorenzo refers the Third-Party Plaintiffs to these reports. To the extent an answer is required, DiLorenzo is without sufficient information to form a belief as to the truth of the allegations in this paragraph and, therefore, denies same leaving Third-Party Plaintiffs to their proofs.

398. DiLorenzo admits that a number of reports have been submitted to NJDEP for the American Modern Site, which contain information regarding the environmental condition of and hazardous substances at the American Modern Site. DiLorenzo refers

the Third-Party Plaintiffs to these reports. To the extent an answer is required, DiLorenzo is without sufficient information to form a belief as to the truth of the allegations in this paragraph and, therefore, denies same leaving Third-Party Plaintiffs to their proofs.

399. DiLorenzo admits that a number of reports have been submitted to NJDEP for the American Modern Site, which contain information regarding the environmental condition of and hazardous substances at the American Modern Site. DiLorenzo refers the Third-Party Plaintiffs to these reports. To the extent an answer is required, DiLorenzo is without sufficient information to form a belief as to the truth of the allegations in this paragraph and, therefore, denies same leaving Third-Party Plaintiffs to their proofs.

400. DiLorenzo admits that a number of reports have been submitted to NJDEP for the American Modern Site, which contains information regarding the environmental condition of and hazardous substances at the American Modern Site. DiLorenzo refers the Third-Party Plaintiffs to these reports. To the extent an answer is required, DiLorenzo is without sufficient information to form a belief as to the truth of the allegations in this paragraph and, therefore, denies same leaving Third-Party Plaintiffs to their proofs.

401. To the extent NJDEP issued Directive No. 1 In the Matter of the Lower Passaic River (the "Directive") on September 19, 2003, DiLorenzo refers to the Directive for a true and accurate interpretation of its allegations. DiLorenzo denies the allegations that it is liable or in any way responsible for Hazardous Substances that were allegedly discharged at or from the American Modern Site.

402. To the extent the United States Environmental Protection Agency (“EPA”) in June 2004 sent a General Notice Letter to American Metals Company, DiLorenzo refers to the June 2004 letter for a true and accurate interpretation of the allegations. As to the balance of this paragraph, DiLorenzo is without sufficient knowledge or information to form a belief as to the truth of the allegations in this paragraph and, therefore, denies same leaving Third-Party Plaintiffs to their proofs.

403. To the extent the EPA on or about September 24, 2004 sent a General Notice Letter to DiLorenzo, DiLorenzo refers to the September 24, 2004 letter for a true and accurate interpretation of the allegations. DiLorenzo denies the allegations that it is liable or in any way responsible for Hazardous Substances that were allegedly discharged at or from the American Modern Site.

404. To the extent the EPA on or about August 13, 2004 sent a General Notice Letter to S&A Realty, DiLorenzo refers to the August 13, 2004 letter for a true and accurate interpretation of the allegations. As to the balance of this paragraph, DiLorenzo is without sufficient knowledge or information to form a belief as to the truth of the allegations in this paragraph and, therefore, denies same leaving Third-Party Plaintiffs to their proofs.

405. To the extent the EPA on or about August 13, 2004 sent a General Notice Letter to Kearny Industrial Associates, L.P., DiLorenzo refers to the August 13, 2004 letter for a true and accurate interpretation of the allegations. As to the balance of this paragraph, DiLorenzo is without sufficient knowledge or information to form a belief as to the truth of the allegations in this paragraph and, therefore, denies same leaving Third-Party Plaintiffs to their proofs.

406. To the extent the EPA on September 20, 2004 sent a General Notice Letter to Marshall Clark Manufacturing Corporation, DiLorenzo refers to the September 20, 2004 letter for a true and accurate interpretation of the allegations. As to the balance of this paragraph, DiLorenzo is without sufficient knowledge or information to form a belief as to the truth of the allegations in this paragraph and, therefore, denies same leaving Third-Party Plaintiffs to their proofs.

407. For the allegations contained in this paragraph that are directed at DiLorenzo, DiLorenzo denies those allegations.

408-3445. The allegations contained in these paragraphs are not directed towards DiLorenzo. DiLorenzo is without sufficient knowledge or information to form a belief as to the truth of the allegations in these paragraphs and, therefore, denies the allegations in these paragraphs leaving Third-Party Plaintiffs to their proofs.

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

3446. DiLorenzo repeats and incorporates by reference the answers set forth in the prior paragraphs of this Answer as if set forth at length herein.

3447. The allegations in this paragraph state a legal conclusion for which no answer is required. To the extent an answer is required, DiLorenzo is without sufficient knowledge or information to form a belief as to the truth of the allegations in this paragraph and, therefore, denies same leaving Third-Party Plaintiffs to their proofs.

3448. The allegations in this paragraph state a legal conclusion for which no answer is required. To the extent an answer is required, DiLorenzo is without sufficient knowledge or information to form a belief as to the truth of the allegations in this paragraph and, therefore, denies same leaving Third-Party Plaintiffs to their proofs.

3449. The allegations in this paragraph state a legal conclusion for which no answer is required. To the extent an answer is required, DiLorenzo is without sufficient knowledge or information to form a belief as to the truth of the allegations in this paragraph and, therefore, denies same leaving Third-Party Plaintiffs to their proofs.

3450. DiLorenzo is without sufficient knowledge or information to form a belief as to the truth of the allegations in this paragraph and, therefore, denies same leaving Third-Party Plaintiffs to their proofs.

3451. DiLorenzo denies the allegations contained in this paragraph.

WHEREFORE, DiLorenzo demands judgment dismissing Third-Party Plaintiffs' Complaint, with prejudice, together with attorneys' fees, costs of suit and such other and further relief as the Court deems just and equitable.

SECOND COUNT
(Statutory Contribution)

3452. DiLorenzo repeats and incorporates by reference the answers set forth in the prior paragraphs of this Answer as if set forth at length herein.

3453. DiLorenzo denies the allegations contained in this paragraph.

WHEREFORE, DiLorenzo demands judgment dismissing Third-Party Plaintiffs' Complaint, with prejudice, together with attorneys' fees, costs of suit and such other and further relief as the Court deems just and equitable.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

The Third-Party Complaint fails state a claim upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

The occurrences complained of were caused by third parties over whom DiLorenzo had no control.

THIRD AFFIRMATIVE DEFENSE

The Third-Party Complaint is barred by virtue of the statute of limitations.

FOURTH AFFIRMATIVE DEFENSE

The Third-Party Complaint is barred by virtue of applicable statutes of repose.

FIFTH AFFIRMATIVE DEFENSE

The Third-Party Complaint fails to set forth or support a cause of action for costs or other compensatory damages.

SIXTH AFFIRMATIVE DEFENSE

DiLorenzo did not engage in any activity or cause any harm that would render DiLorenzo in any way responsible under the New Jersey Spill Compensation and Control Act, N.J.S.A. 58:10-23 et seq. (“Spill Act”).

SEVENTH AFFIRMATIVE DEFENSE

The Third-Party Complaint is barred by the doctrine of laches.

EIGHTH AFFIRMATIVE DEFENSE

The Third-Party Complaint is barred by the doctrine of waiver.

NINTH AFFIRMATIVE DEFENSE

The Third-Party Complaint is barred by the doctrine of estoppel, equitable estoppel and other equitable doctrines.

TENTH AFFIRMATIVE DEFENSE

The Third-Party Complaint fails to assert claims for relief that can support an award of attorneys’ fees as against DiLorenzo.

ELEVENTH AFFIRMATIVE DEFENSE

If the Court finds that the Third-Party Plaintiffs are entitled to contribution from DiLorenzo, the Third-Party Plaintiffs may not recover more from DiLorenzo than their fair, equitable, and proportional share.

TWELFTH AFFIRMATIVE DEFENSE

At all relevant times, DiLorenzo complied with all applicable laws, rules and regulations.

THIRTEENTH 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”).

FOURTEENTH AFFIRMATIVE DEFENSE

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

FIFTEENTH AFFIRMATIVE DEFENSE

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

SIXTEENTH AFFIRMATIVE DEFENSE

One or both of the Third-Party Plaintiffs do not have standing to sue.

SEVENTEENTH AFFIRMATIVE DEFENSE

The claims by Third-Party Plaintiffs are barred under the collateral source doctrine or its equitable equivalent.

EIGHTEENTH 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, 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.

NINETEENTH 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 DiLorenzo, 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.

TWENTIETH AFFIRMATIVE DEFENSE

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

TWENTY-FIRST AFFIRMATIVE DEFENSE

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

TWENTY-SECOND AFFIRMATIVE DEFENSE

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

TWENTY-THIRD AFFIRMATIVE DEFENSE

Without admitting liability, DiLorenzo 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.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

DiLorenzo reserves the right to amend and supplement its answer and to assert such defenses and bring such other claims by way of cross-claim, counterclaim, complaint or otherwise as DiLorenzo may deem appropriate and as additional facts and circumstances become known and available.

WHEREFORE, DiLorenzo demands judgment dismissing Third-Party Plaintiffs' Complaint, with prejudice, together with attorney's fees, costs of suit and such other and further relief as the Court deems just and equitable.

COUNTERCLAIMS, CROSS-CLAIMS, THIRD/FOURTH PARTY CLAIMS

Counterclaims, cross-claims, third-party claims and fourth-party claims are expressly reserved pursuant to CMO V. Therefore, DiLorenzo is not required to assert such claims at this time.

DEMAND FOR TRIAL BY JURY

DiLorenzo hereby demands a trial by jury to all issues in this matter, which are triable.

DESIGNATION OF TRIAL COUNSEL

Pursuant to R. 4:25-4 and 4:5-1(c), David M. Kohane, Esq. is designated as trial counsel on behalf of Third-Party Defendant, DiLorenzo Properties Company, L.P.

DEMAND FOR STATEMENT OF DAMAGES

DiLorenzo hereby demands that Third-Party Plaintiffs furnish the undersigned, within five (5) days of the date hereof, pursuant to R. 4:5-2, with statement of all damages claimed in this action.

RESERVATION OF RIGHTS

Third-Party Defendant DiLorenzo Properties Company, L.P. reserves its right to amend this Answer to assert any additional defenses it may have which further investigation reveals to be appropriate.

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

Pursuant to R. 4:5-1(b)(2), the undersigned hereby certifies that the matter in controversy in this case is not the subject of any other action pending in any court or of any pending arbitration proceedings and that no other such action or arbitration proceeding is contemplated at this time.

COLE, SCHOTZ, MEISEL, FORMAN
& LEONARD, P.A.

Attorneys for Third-Party Defendant,
DiLorenzo Properties Company, L.P.

By: 

David M. Kohane, Esq.

DATED: December 16, 2010

CERTIFICATION OF FILING AND SERVICE

David P. Steinberger, Esq., states as follows:

1. I am an attorney-at-law in the State of New Jersey, associated with the law firm Cole, Schotz, Meisel, Forman & Leonard, P.A., counsel to Third-Party Defendant DiLorenzo Properties Company, L.P.


2. The Answer, Affirmative Defenses of Third-Party Defendant DiLorenzo Properties Company, L.P. to Maxus Energy Corporation's and Tierra Solutions, Inc.'s Third-Party Complaint "B" was served electronically on all parties which have consented to service by posting on <https://cvg.ctsummation.com/> on December 16, 2010. The following counsel of record were served via first class, regular mail:

(a) Richard J. Dewland, Coffey & Associates, 465 South Street,
Morristown, New Jersey 07960

(b) John P. McGovern, Assistant City Attorney, City of Orange
Township, 29 North Day St., Orange, New Jersey 07050.

3. The Answer, Affirmative Defenses of Third-Party Defendant DiLorenzo Properties Company, L.P. to Maxus Energy Corporation's and Tierra Solutions, Inc.'s Third-Party Complaint "B" was served upon the Clerk of Court, 50 West Market Street, Newark, New Jersey 07102 via Federal Express on December 16, 2010.

4. A courtesy copy of the Answer, Affirmative Defenses of Third-Party Defendant DiLorenzo Properties Company, L.P. to Maxus Energy Corporation's and Tierra Solutions, Inc.'s Third-Party Complaint "B" was served upon the Honorable Sebastian P. Lombardi, J.S.C., 470 Dr. Martin Luther King, Jr. Boulevard, Newark, New Jersey 07102 via Federal Express on December 16, 2010.

By: 
David P. Steinberger, Esq.

DATED: December 16, 2010