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The Dundee Water Power and Land Company

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 HOLDINGS, INC. AND CLH
HOLDINGS, INC.,

Defendants,

and

MAXUS ENERGY CORPORATION and
TIERRA SOLUTIONS, INC.,

Third-Party Plaintiffs,

v.

3M COMPANY, *et al*,

Third-Party Defendants.

Third-Party Defendant, The Dundee Water Power and Land Company ("Dundee"), by and through its undersigned counsel, hereby answers the Third-Party Complaint "B" asserted by Defendants/Third-Party Plaintiffs Maxus Energy Corporation and Tierra Solutions, Inc. ("Third-Party Plaintiffs") as follows:

X

: SUPERIOR COURT OF NEW JERSEY
: LAW DIVISION - ESSEX COUNTY

: DOCKET NO. L-9868-05 (PASR)

: Civil Action

: **THE DUNDEE WATER POWER AND**
: **LAND COMPANY'S ANSWER TO**
: **THIRD PARTY COMPLAINT "B"**

X

PROCEDURAL BACKGROUND

(Paragraphs 1 through 15)

1. Dundee responds that the referenced pleadings speak for themselves. To the extent a response is required, Dundee is without knowledge or information sufficient to form a belief as to the truth of the matters in Paragraphs 1 through 15, and therefore denies the same.

THE THIRD PARTY PLAINTIFFS

(Paragraphs 16 through 18)

2. Dundee is without knowledge or information sufficient to form a belief as to the truth of the matters stated in Paragraphs 16 through 18, and therefore denies the same.

THIRD PARTY DEFENDANTS

(Paragraphs 19 through 183)

3. The allegations in Paragraphs 19 through 183 relate to other parties. Accordingly, Dundee is without knowledge or information sufficient to form a belief as to the truth of the matters stated in Paragraphs 19 through 183, and therefore denies the same.

4. Dundee admits the allegations in Paragraph 184 stating that Dundee is a corporation organized under the laws of the State of New Jersey, but its principal place of business is at One F.A. Orechio Drive, Wanaque, NJ 07465.

5. The allegations in Paragraphs 185 through 209 relate to other parties. Accordingly, Dundee is without knowledge or information sufficient to form a belief as to the truth of the matters stated in Paragraphs 185 through 209, and therefore denies the same.

6. The allegations in Paragraph 210 state a legal conclusion as to which no response is required. To the extent a response is required, Dundee responds that the referenced statute speaks for itself and denies the allegations in Paragraph 210.

DEFINITIONS

7. Paragraphs 211 through 236 contain definitions to which no response is required.

FACTUAL ALLEGATIONS

8. Dundee responds that the referenced pleadings speak for themselves. To the extent a response is required, Dundee is without knowledge or information sufficient to form a belief as to the truth of the matters alleged in Paragraphs 237 through 1025, and therefore denies the same.

9. Dundee admits the allegations of Paragraph 1026.

10. Dundee denies the allegations in Paragraph 1027. It was Dundee's predecessor in interest; the Dundee Manufacturing Company, which was chartered by the State of New Jersey on March 15, 1932, failed in 1864, was reorganized in 1864 by an act of the State Legislature, and was renamed The Dundee Water Power and Land Company in 1872. The canal and dam were built sometime after 1861.

11. With respect to the allegations in Paragraph 1028, Dundee admits the Dundee Canal Site was built for transportation purposes, and may have been utilized for industrial water supply uses, but is without information and belief as to its uses for industrial purposes and therefore denies Paragraph 1028.

12. Dundee is without information or belief as to the allegations in Paragraph 1029 and therefore denies the allegations in same.

13. Dundee is without information or belief as to the allegations in Paragraph 1030 and therefore denies the allegations in same.

14. Dundee is without information or belief as to the allegations in Paragraph 1031 and therefore denies the allegations in same.

15. Dundee is without information or belief as to the allegations in Paragraph 1032 and therefore denies the allegations in same.

16. Dundee is without information or belief as to the allegations in Paragraph 1033 and therefore denies the allegations in same.

17. The allegations made in Paragraph 1034 constitute conclusions of law to which no response is required.

18. Dundee responds that the referenced pleadings speak for themselves. To the extent a response is required, Dundee is without knowledge or information sufficient to form a belief as to the truth of the matters alleged in Paragraphs 1035 through 3445, and therefore denies the same.

FIRST COUNT

(New Jersey Spill Compensation and Control Act,

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

19. Dundee incorporates by reference as if fully set forth herein its responses and denials to the preceding paragraphs as if set forth at length herein.

20. Dundee asserts that the allegations contained in Paragraph 3447 of the Third Party Complaint "B" call for a legal conclusion to which no response is required. To the extent a response is required; Dundee denies the allegations in Paragraph 3447 as they pertain to it. Further, Dundee is without knowledge or information sufficient to form a belief as to the truth of the allegations pertaining to other Third-Party Defendants.

21. Paragraph 3448 of Third-Party Complaint "B", which quotes the New Jersey Spill Compensation and Control Act, N.J.S.A. 58:10-23.11f.a.(2)(a), refers to a statute which speaks for itself.

22. The allegations contained in Paragraph 3449 to 3451 of Third-Party Complaint "B" call for a legal conclusion to which no response is required. To the extent a response is required; Dundee denies the allegations in Paragraph 3449 to 3451 as they pertain to it. Further, Dundee is without knowledge or information sufficient to form a belief as to the truth of the allegations pertaining to other Third-Party Defendants.

WHEREFORE, Dundee demands judgment dismissing the Third-Party Complaint, awarding attorney's fees and costs of suit, and such other relief as the Court may deem just and equitable.

SECOND COUNT

(Statutory Contribution)

23. Dundee incorporates by reference as if fully set forth herein its responses and denial to the preceding paragraphs as if fully set forth at length herein.

24. The allegations contained in Paragraph 3453 of the Third-Party Complaint "B" call for a legal conclusion to which no response is required. To the extent a response is required; Dundee denies the allegations contained in Paragraph 3453 as they pertain to it. Further, Dundee is without knowledge or information sufficient to form a belief as to the truth of the allegations pertaining to other Third-Party Defendants.

WHEREFORE, Dundee demands judgment dismissing the Third-Party Complaint, awarding attorney's fees and costs of suit, and such other relief as the Court may deem just and equitable.

DEFENSES

1. The Third Party Complaint "B" fails to state a claim upon which relief may be granted.
2. The Third Party Complaint "B" must be dismissed for failure to join necessary and indispensable parties.
3. Third-Party Plaintiffs have no Spill Act claim against Dundee because they have not cleaned up and/or removed a discharge of hazardous substances within the meaning of the Spill Act.
4. Third-Party Plaintiffs have failed to provide notice in accordance with N.J.S.A. 59:8-1 et seq.
5. Some or all of Third-Party Plaintiffs lack standing to sue.
6. Third-Party Plaintiffs have failed to exhaust administrative remedies.
7. The damages sought by Third-Party Plaintiffs are wholly speculative, conjectural, unreasonable, excessive and/or arbitrary and capricious.
8. Any wrongful conduct alleged in the Third-Party Complaint "B" resulted from and was proximately caused by the conduct of persons other than Dundee or by the conduct of persons over whom Dundee had no control, or by the superseding intervention, criminal, illegal or tortious acts of others outside the control of Dundee.
9. Third-Party Plaintiffs suffered no losses or injuries that were proximately caused by Dundee.
10. The claims asserted in the Third Party Complaint "B" are barred, in whole or in part, by the applicable Statutes of Limitations, Statute of Repose, and/or the equitable doctrines of laches and estoppel.

11. 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

12. To the extent that Dundee is found liable in this matter, joint and several liability is inappropriate because there are distinct harms or a reasonable basis for apportionment of the harm suffered.

13. 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 the parties existing at law; (3) equity will not consciously become an instrument of injustice; and/or (4) equity will not permit double satisfaction.

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

15. At all times relevant, Dundee complied with all applicable laws, regulations or standards and government approvals.

16. Plaintiffs and Defendants/Third-Party Plaintiffs failed to provide notice to Dundee that it was considered a potentially responsible party prior to undertaking numerous response actions relating to the site, which has precluded Dundee from commenting upon or participation in the selection of the remedial action at the site. This has resulted in a deprivation of Dundee's substantive and procedural due process rights under the Federal and State Constitutions.

17. Plaintiffs' and Defendants/Third-Party Plaintiffs' Complaints include costs not yet expended. The New Jersey Spill Compensation and Control Act ("Spill Act"), N.J.S.A. 58:10-23.11, et seq., does not authorize Plaintiffs and/or Third Party Plaintiffs to recover future costs. Therefore, any claims are premature and not yet ripe for adjudication.

18. The Third-Party Complaint "B" is an unauthorized retroactive application of the Spill Act and other applicable case law.

19. Dundee has at all times acted in good faith.

20. In the event Plaintiff's and/or Defendants/Third Party Plaintiffs' claims are not barred by their own conduct, then any recovery by these parties should be reduced in the proportion that such parties' acts or omissions bear to the acts or omissions that caused the alleged injuries or damages.

21. Plaintiffs and Defendants/Third Party Plaintiffs have failed to comply with the necessary conditions precedent for the maintenance of a claim under the Spill Act.

22. Dundee does not own or operate a "Major Facility" as defined by the Spill Act or the WPCA.

23. Dundee is not a "responsible party" under the Spill Act.

24. Certain of the costs incurred or to be incurred by the Plaintiffs and/or Defendants/Third Party Plaintiffs in connection with the site are not "response costs", recoverable from Dundee, within the meaning of section 101 (23), (24) and (25) of CERCLA, 42 U.S.C. 9601 (23), (24) and (25), as applied to the Spill Act.

25. Certain of the actions taken to date by Plaintiffs and/or Third Party Plaintiffs for which Third Party Plaintiffs are making a claim against the Dundee were not consistent with the National Contingency Plan because, among other things, Dundee was not provided with notice or an opportunity to comment.

26. Dundee exercised reasonable care under all the circumstances herein. Consequently, it is not liable to Plaintiffs or Defendants/Third Party Plaintiffs under the common law or any statutory theory of recovery averred herein.

27. The claims for relief are time barred by the terms of the Spill Act.

28. Third Party Plaintiffs have not paid more than their fair share of any damages, costs or other relief sought by the Plaintiffs, 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, and are, therefore, not entitled to contribution from Dundee.

29. Third-Party Plaintiffs' claims for indemnification are barred because any alleged liability of Dundee, liability Dundee denies, would be secondary, indirect, passive, constructive, technical and/or imputed, and the liability of all or some of the Defendants/Third-Party Plaintiffs is direct, active and primary.

30. Third-Party Plaintiffs are not entitled to recover attorney's fees or costs, or fees of litigation.

31. Third Party Plaintiffs are not entitled to recovery for any alleged unjust enrichment as there exists an adequate remedy at law to redress Third-Party Plaintiffs' claims.

32. Third-Party Plaintiffs' claims are barred by the statutory defenses to liability provided by the Spill Act.

33. Third-Party Plaintiffs' claims are barred to the extent they seek relief for conduct occurring, or damages incurred, before the effective date of the Spill Act.

34. Third-Party Plaintiffs' claims are barred to the extent they seek recovery for any punitive damages as such claims are barred by public policy and applicable laws.

35. To the extent that Third-Party Plaintiffs' claims against Dundee are subject to contribution or any reduction or offset from other parties, any damages recovered against Dundee shall be reduced accordingly.

36. Dundee hereby asserts and adopts all other defenses which have been or will be asserted at any time by any other party in this action, to the extent said defenses are applicable to Dundee.

37. Dundee reserves the right to assert additional defenses that may be uncovered during the course of this action.

COUNTERCLAIMS AND CROSSCLAIMS

In accordance with Case Management Order V, Dundee is not asserting any counter-claims or cross - claims at this time and reserves its rights to do so as specified by the Court's Order.

DESIGNATION OF TRIAL COUNSEL

In accordance with R. 4:25-4, Francis J. Borin and Daren R. Eppley are designated as trial counsel.

WHEREFORE, Third-Party Defendant, Dundee, 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.

CERTIFICATION PURSUANT TO R. 4:5-1

It is hereby certified in accordance with R. 4:5-1 that the specific matter in controversy is not, to my knowledge, the subject of any action pending in any Court, nor of any pending arbitration proceeding. Other than the above referenced actions, there are no other actions or arbitration proceedings in existence or contemplated at this time; and I know of no other party who should be joined in this action. I hereby certify that these statements made by me are true and that I am aware that if any of these statements is willfully false, I am subject to punishment.

DeCotiis, FitzPatrick & Cole, LLP
Attorneys for The Dundee Water
Power and Land Company

Dated: March 8, 2010

By: _____


FRANCIS J. BORIN


FILING CERTIFICATION

I certify that the original and copy of the within Answer and Separate Defenses have been sent by regular mail for filing to the Clerk of the Superior Court of New Jersey, Law Division, Essex County, at the Veterans Courthouse, 50 W. Market Street, Newark, NJ 07102, and a copy of the same has been sent *via* regular mail this date to Third-Party Plaintiffs' attorneys as follows:

William L. Warren, Esq.
Drinker, Biddle & Reath, LLP
105 College Road East, Suite 300
Princeton, NJ 08542-0627

Thomas E. Starnes, Esq.
Andrews Kurth, LLP
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I certify that a copy of said document has been posted on the electronic platform provided by Defendants. (<http://njdepvocc.sfile.com>).



DAREN R. EPPLEY

Dated: March 8, 2010