

James Stewart, Esq.  
Lowenstein Sandler PC  
65 Livingston Avenue  
Roseland, NJ 07068  
Tel: (973) 597-2522  
Fax: (973) 597-2523  
ATTORNEY FOR THIRD-PARTY DEFENDANT(S)  
DURAPORT REALTY ONE LLC AND  
DURAPORT REALTY TWO LLC

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.

AMERICAN CYANAMID,  
BAYER CORPORATION,  
BAYONNE INDUSTRIES, INC.,  
BP MARINE AMERICAS, INC.,  
CHEMICAL WASTE MANAGEMENT INC.,  
DOW CHEMICAL COMPANY,  
DURAPORT REALTY ONE LLC,

SUPERIOR COURT OF NEW  
JERSEY  
LAW DIVISION: ESSEX COUNTY

DOCKET NO. L-9868-05 (PASR)

CIVIL ACTION

DURAPORT REALTY ONE LLC'S &  
DURAPORT REALTY TWO LLC'S  
ANSWER TO THIRD-PARTY  
COMPLAINT "D"

DURAPORT REALTY TWO LLC,  
EPEC POLYMERS, INC.,  
GAESS ENVIRONMENTAL SERVICES, INC.,  
GATX TERMINALS CORPORATION,  
GOODRICH CORPORATION,  
HESS CORPORATION,  
IMTT-BAYONNE,  
KINDER MORGAN ENERGY PARTNERS,  
L.P.,McKESSON CORPORATION,  
McKESSON ENVIROSYSTEMS CO.,  
SAFETY-KLEEN CORPORATION,  
SHULTON INCORPORATED, USA,  
SUN PIPELINE CO.,  
SUN REFINING AND MARKETING CO.,  
SUN OIL CO.,  
SUPERIOR MPM LLC,  
THOMAS & BETTS CORP.,  
WASTE MANAGEMENT, INC.  
WYETH,

Third-Party Defendants.

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**DURAPORT REALTY ONE LLC AND DURAPORT REALTY TWO LLC'S**

**ANSWER TO THIRD-PARTY COMPLAINT "D"**

Third-Party Defendants Duraport Realty One LLC ("Duraport Realty One") and Duraport Realty Two LLC ("Duraport Realty Two"), by and through their undersigned counsel, and in accordance with this Court's Case Management Order V, Section 9, entered April 16, 2009 ("CMO V"), hereby answer the Third-Party Complaint "D" by Defendants/Third-Party Plaintiffs Maxus Energy Corporation and Tierra Solutions, Inc. ("Third-Party Plaintiffs"), as follows:

**GENERALLY**

1. Duraport Realty One and Duraport Realty Two deny each and every allegation contained in Third Party Complaint "D" 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 "D".

**AS TO PROCEDURAL BACKGROUND**

**(Paragraphs 1 through 7)**

2. Duraport Realty One and Duraport Realty Two respond that the referenced pleadings speak for themselves. No response is required pursuant to CMO V.

**AS TO FIRST COUNT**

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

3. Duraport Realty One and Duraport Realty Two incorporate by reference as if fully set forth herein their responses and denials as asserted in Paragraphs 1 through 2 herein.

4. Duraport Realty One and Duraport Realty Two are without knowledge or information sufficient to form a belief as to the truth of the matters stated in Paragraphs 9 through 12, and therefore deny the same.

5. Duraport Realty One and Duraport Realty Two deny that they are liable to Third-Party Plaintiffs for contribution.

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**AS TO FACTUAL ALLEGATIONS**

**(Paragraphs 14 through 89)**

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

7. Duraport Realty One and Duraport Realty Two deny the allegations contained in Paragraph 75 of Third Party Complaint D, except they admit that they own certain property at the foot of East Second Street, Bayonne, New Jersey.

8. Duraport Realty One and Duraport Realty Two do not answer the allegations contained in Paragraph 76 of the Third Party Complaint D and respectfully refer the Court to the June 17, 2008 Directive for terms.

9. Duraport Realty One and Duraport Realty Two lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 77-80 of Third Party Complaint D.

10. Duraport Realty One and Duraport Realty Two deny the allegations contained in Paragraph 81 of Third Party Complaint D that refer to them and lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 81.

#### **AS TO SECOND COUNT**

##### **Statutory Contribution**

11. Duraport Realty One and Duraport Realty Two incorporate by reference as if fully set forth herein their responses and denials as asserted in Paragraphs 1 through 10 herein.

12. Duraport Realty One and Duraport Realty Two deny that they are liable to Third-Party Plaintiffs for contribution.

#### **FIRST AFFIRMATIVE DEFENSE**

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

#### **SECOND AFFIRMATIVE DEFENSE**

14. Neither Duraport Realty One nor Duraport Realty Two 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**

15. 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.

#### **FOURTH AFFIRMATIVE DEFENSE**

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

#### **FIFTH AFFIRMATIVE DEFENSE**

17. Third-Party Plaintiffs have no right of contribution against Third-Party Defendant under the Spill Act.

#### **SIXTH AFFIRMATIVE DEFENSE**

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

#### **SEVENTH AFFIRMATIVE DEFENSE**

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

#### **EIGHTH AFFIRMATIVE DEFENSE**

20. Third-Party Defendant cannot be held liable for or be required to pay Third-Party Plaintiffs' damages or other claims based on actions or inactions by Third-Party Defendants 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").

#### **NINTH AFFIRMATIVE DEFENSE**

21. At all relevant times, Third-Party Defendant complied with all Applicable Environmental Laws, regulations, industry standards and ordinances, and otherwise conducted

itself reasonably, prudently, in good faith, and with due care for the rights, safety and property of others.

#### **TENTH AFFIRMATIVE DEFENSE**

22. The claims asserted against Third-Party Defendantst in the Third-Party Complaint are barred because at all relevant times Third-Party Defendants exercised due care with respect to hazardous substances, if any, that may have been handled at the subject property or properties, took precautions against foreseeable acts or omissions of others and the consequences that could reasonably result from such acts or omissions, and because any release or threat of release of any hazardous substances, if any, and any costs or damages resulting therefrom, were caused solely by the negligence, acts or omissions of third parties over whom Third-Party Defendants 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.

#### **ELEVENTH AFFIRMATIVE DEFENSE**

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

#### **TWELFTH AFFIRMATIVE DEFENSE**

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

#### **THIRTEENTH AFFIRMATIVE DEFENSE**

25. Third-Party Plaintiffs' claims against Third-Party Defendant are barred, in whole or in part, by the applicable Statute of Limitations, Statute of Repose, and/or the equitable doctrines of laches and estoppel.

#### **FOURTEENTH AFFIRMATIVE DEFENSE**

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

#### **FIFTEENTH AFFIRMATIVE DEFENSE**

27. 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.

#### **SIXTEENTH AFFIRMATIVE DEFENSE**

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

#### **SEVENTEENTH AFFIRMATIVE DEFENSE**

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

#### **EIGHTEENTH AFFIRMATIVE DEFENSE**

30. 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.

#### **NINETEENTH AFFIRMATIVE DEFENSE**

31. Third-Party Defendant denies that Third-Party Plaintiffs have suffered any harm whatsoever, but in the event that they did suffer any form of injury or damage cognizable under applicable Environmental Law, such injury was caused by the intervening acts, omissions, or superseding acts of persons or entities over whom Third-Party Defendants

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

#### **TWENTYTH AFFIRMATIVE DEFENSE**

32. If Third-Party Plaintiffs sustained any injury or are entitled to any damages, such injury and damages were wholly, or in part, caused by Third-Party Plaintiffs' own acts or omissions, negligence, lack of due care and fault and/or that of Third-Party Plaintiffs' agents or employees. In the event that Third-Party Plaintiffs are found to have sustained any injury and are entitled to damages, Third-Party Plaintiffs' recovery against Third-Party Defendant, if any, must be reduced by the proportionate damages caused by the acts and conduct of Third-Party Plaintiffs and/or its agents or employees.

#### **TWENTY-FIRST AFFIRMATIVE DEFENSE**

33. Although Third-Party Defendant denies that it is liable for the contamination described in Third-Party Plaintiffs' Complaint, in the event it is found liable, Third-Party Defendant is entitled to an offset against any such liability on its part for the equitable share of the liability of any person or entity not joined as a defendant in this action that would be liable to Third-Party Plaintiffs.

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

34. Third-Party Plaintiffs' claims are barred to the extent that the conduct of Third-Party Defendants alleged to give rise to liability in the Third-Party Complaint is the subject of a release, covenant not to sue, or has otherwise been excused by Plaintiffs, including, without limitation, through issuance of a no further action letter, consent order, settlement agreement or other applicable document, with or without inclusion of contribution protection, or through the Plaintiffs' allowance of any applicable Statute of Limitations or Statute of Repose to lapse.



#### **TWENTY-THIRD AFFIRMATIVE DEFENSE**

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

#### **TWENTY-FOURTH AFFIRMATIVE DEFENSE**

36. Third-Party Plaintiffs' claims are barred due to their own conduct in implementing clean-up plan(s) or taking other actions that resulted in the commingling of formerly divisible areas of environmental harm.

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

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

#### **TWENTY-SIXTH AFFIRMATIVE DEFENSE**

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

#### **TWENTY-SEVENTH AFFIRMATIVE DEFENSE**

39. Third-Party Plaintiffs' claims are barred to the extent they seek to hold Third-Party Defendants liable, in contribution, for punitive damages and penalties.

#### **TWENTY-EIGHTH AFFIRMATIVE DEFENSE**

40. Third-Party Plaintiffs claims for contribution, whether under the Spill Act or the New Jersey statutory provisions for contribution, are derivative of, and are therefore no greater than, Plaintiffs' claims against Third-Party Plaintiffs. Consequently, Third-Party Plaintiffs' claims against Third-Party Defendant are barred to the extent of any legal extinguishments of

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

1. Any release or covenant not to sue granted by Plaintiffs to Third-Party Defendant;
2. Any settlement or other compromise between Plaintiffs and Third-Party Defendant;
3. Any expiration of the statute of limitations or statute of repose governing Plaintiffs' right to maintain a claim against Third-Party Defendant;
4. Any failure to join a claim relating to the "Newark Bay Complex" (as defined in the Third-Party Complaint) in a prior litigation between Plaintiffs and Third-Party Defendant, which would result in relinquishment of such a claim by virtue of New Jersey's Entire Controversy Doctrine; and/or
5. Any issuance by Plaintiffs to Third-Party Defendant, directly or indirectly, of any "No Further Action" (a/k/a "NFA") determination, "Negative Declaration," or similar determination.

#### **TWENTY-NINETH AFFIRMATIVE DEFENSE**

41. Without admitting liability, Third-Party Defendant alleges that if it is found to have been engaged in any of the activities alleged in the Third-Party Complaint, such activities were *de minimis* and not the cause of any damages or other claims by Third-Party Plaintiffs.

#### **THIRTIETH AFFIRMATIVE DEFENSE**

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

**THIRTY-FIRST AFFIRMATIVE DEFENSE**

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

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

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

**DESIGNATION OF TRIAL COUNSEL**

45. Duraport Realty One and Duraport Realty Two designate James Stewart as trial counsel in this case.

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

Dated: October 20, 2009

Respectfully submitted,

Lowenstein Sandler PC

Attorney for Third-Party Defendant(s) Duraport  
Realty One LLC and Duraport Realty Two LLC

By: James Stewart  
James Stewart

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

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


- (a) The matter in controversy is not the subject of any other action pending in any court or of a pending arbitration proceeding and no action or arbitration proceeding is contemplated by the undersigned; and
- (b) Since it is the legal position of Duraport Realty One and Duraport Realty Two that their potential liability, if any, as 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.

Respectfully submitted,

Lowenstein Sandler PC

Attorney for Third-Party Defendant(s) Duraport  
Realty One LLC and Duraport Realty Two LLC

By:   
James Stewart

### CERTIFICATION OF SERVICE

Annetta Benedict hereby certifies as follows:

1. I am the legal secretary to James Stewart, Esq. of the law firm of Lowenstein Sandler, which law firm represents Third-Party Defendants Duraport Realty One and Duraport Realty Two in connection with this matter.

2. I hereby certify that Duraport Realty One's and Duraport Realty Two's Answer to the Third Party Complaint "D" brought by Defendants/Third-Party Plaintiffs Maxus Energy Corporation and Tierra Solutions, Inc., and separate defenses was served upon the Clerk of the Court, Superior Court of New Jersey, Essex County, 50 W. Market Street, Newark, New Jersey, 07102, by regular mail, postage pre-paid, on October 19, 2009.

3. I hereby certify that Duraport Realty One's and Duraport Realty Two's Answer to the Third Party Complaint "D" brought by Defendants/Third-Party Plaintiffs Defendants, Maxus Energy Corporation and Tierra Solutions, Inc., and separate defenses was served electronically on all parties who have consented to service by electronic posting on the following website, <http://njdepvocc.sfile.com> on October 19, 2009.

4. I hereby certify that Duraport Realty One's and Duraport Realty Two's Answer to the Third Party Complaint "D" brought by Defendants/Third-Party Plaintiffs Maxus Energy Corporation and Tierra Solutions, Inc., and separate defenses was served by regular mail, postage pre-paid, on counsel for all parties who have not consented to service by electronic posting.

Dated: October 20, 2009

  
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Annetta Benedict