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Elan Chemical Company, Inc.

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, S.A., YPF  
HOLDINGS, INC. and CLH HOLDINGS, INC.,  
Defendants.

MAXUS ENERGY CORPORATION and  
TIERRA SOLUTIONS, INC.,

Third-Party Plaintiffs,

vs.

3M COMPANY, *et al.*,

Third-Party Defendants.

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION: ESSEX COUNTY

DOCKET NO. L-9868-05 (PASR)

CIVIL ACTION

**ELAN CHEMICAL COMPANY  
INC.'S ANSWER TO THIRD-PARTY  
COMPLAINT "B"**

**ELAN CHEMICAL COMPANY, INC.'S  
ANSWER TO THIRD-PARTY COMPLAINT "B"**

Third-Party Defendant Elan Chemical Company, Inc. ("Elan"), by and through its undersigned counsel, and in accordance with the 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".

### **GENERALLY**

Elan denies each and every allegation contained in Third-Party Complaint "B" that is not otherwise herein addressed, including, without limitation, any allegations concerning the relief sought in the First Count and the Second Count and all headings and titles used in Third-Party Complaint "B".

### **PROCEDURAL BACKGROUND**

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

Elan 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)**

Elan 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.

81. Elan admits that it is a corporation organized under the laws of the State of New Jersey with its principal place of business at 268 Doremus Avenue, Newark, New Jersey.

210. The allegations contained in Paragraph 210 of Third-Party Complaint "B" states a legal conclusion as to which no response is required. To the extent a response is required, Elan denies the allegations contained in Paragraph 210 of 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.

### **Elan Chemical Company Site**

1080. Elan admits that it is the current owner and operator of real property located at or about 268 Doremus Avenue in Newark, New Jersey, but denies the remaining allegations contained in Paragraph 1080.

1081. Elan admits that it manufactures flavoring extracts, assorted organic materials, synthetic flavors, and synthetic perfume materials, but denies the remaining allegations contained in Paragraph 1081.

1082. Elan admits that it has used, at various times, the following substances in its manufacturing process: acetophenone, cedarwood oil geraniol, acetic anhydride; styrene oxide; methanol, ethanol, toluene, and assorted organic acids, and denies the remaining allegations contained in Paragraph 1082.

1083. Elan denies the allegations contained in Paragraph 1083, and refers Third Party Plaintiffs to the December 8, 1988 investigation report from the New Jersey Department of Environmental Protection ("NJDEP"), and the February 3, 1989 investigation report from the NJDEP, the true and accurate contents of which speak for themselves.

1084. Elan denies the allegations contained in Paragraph 1084, and refers Third Party Plaintiffs to the June 14, 1990 Generator Inspection Report from the NJDEP, the true and accurate contents of which speak for themselves.

1085. Elan denies the allegations contained in Paragraph 1085.

1086. Elan admits that, on November 8, 1993, a portion of the Elan Chemical Site was flooded due to overflow from the Passaic River. Elan further admits that, on December 11, 1992, a portion of the Elan Chemical Site was flooded due to overflow from the Passaic River and from a sanitary sewer backup. Elan also admits that, in January 1998, a portion of the Elan Chemical Site was flooded due to overflow from the Passaic River. Elan denies the remaining allegations contained in Paragraph 1086.

1087. Elan admits that it received a General Notice Letter dated September 15, 2003 from the EPA, and refers Third-Party Plaintiffs to that letter for its true and accurate contents, but denies the remaining allegations contained in Paragraph 1087.

1088. Elan denies the allegations contained in Paragraph 1088.

#### **FIRST COUNT**

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

3446. Elan incorporates by reference as if fully set forth herein its responses and denials to the preceding paragraphs as if fully set forth at length herein.

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

3448. 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.

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

3450. The allegations contained in Paragraph 3450 of Third-Party Complaint “B” call for a legal conclusion to which no response is required. To the extent a response is required, Elan denies the allegations contained in Paragraph 3450 as they pertain to it. Further, Elan is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 3450.

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

**SECOND COUNT**  
**(Statutory Contribution)**

3452. Elan incorporates by reference as if fully set forth herein its responses and denials to the preceding paragraphs as if fully set forth at length herein.

3453. The allegations contained in Paragraph 3453 of Third-Party Complaint “B” call for a legal conclusion to which no response is required. To the extent a response is required,

Elan denies the allegations contained in Paragraph 3453 as they pertain to it. Further, Elan is without knowledge or information sufficient to form a belief as to the truth of the allegations pertaining to the other Third-Party Defendants.

### **AFFIRMATIVE DEFENSES**

#### **FIRST AFFIRMATIVE DEFENSE**

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

#### **SECOND AFFIRMATIVE DEFENSE**

Third-Party Defendant 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 the 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 ("WPCA"), N.J.S.A. 58:10A-1, et seq.

#### **FOURTH AFFIRMATIVE DEFENSE**

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**

Third-Party Plaintiffs have no right to contribution against Third-Party Defendant under either the Spill Act or 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 Third-Party Defendant under that statute.

### **EIGHTH AFFIRMATIVE DEFENSE**

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

### **NINTH AFFIRMATIVE DEFENSE**

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 Defendant 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").

### **TENTH AFFIRMATIVE DEFENSE**

At common law, Third-Party Defendant 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. Third-Party Defendant 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 Third-Party Defendant

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

#### **ELEVENTH AFFIRMATIVE DEFENSE**

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

#### **TWELFTH AFFIRMATIVE DEFENSE**

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

#### **THIRTEENTH AFFIRMATIVE DEFENSE**

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.

#### **FOURTEENTH AFFIRMATIVE DEFENSE**

The claims asserted against Third-Party Defendant in Third-Party Complaint "B" are barred because at all relevant times Third-Party Defendant 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 other 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 Defendant 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.

**FIFTEENTH AFFIRMATIVE DEFENSE**

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

**SIXTEENTH AFFIRMATIVE DEFENSE**

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.

**SEVENTEENTH AFFIRMATIVE DEFENSE**

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

**EIGHTEENTH 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.

**NINETEENTH AFFIRMATIVE DEFENSE**

Third-Party Plaintiffs' claims against Third-Party Defendant are subject to setoff and recoupment, including but not limited to, by any settlements entered into by Third-Party Plaintiffs with any other party, and therefore, must be reduced accordingly.

**TWENTIETH AFFIRMATIVE DEFENSE**

The damages as alleged by Third-Party Plaintiffs were caused by pre-existing conditions over which Third-Party Defendant had no control.

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

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

#### **TWENTY-SECOND 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, that 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.

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

Although Third-Party Defendant denies that it is liable for the contamination described in Third-Party Complaint "B", in the event it is found liable, Third-Party Defendant is entitled to an offset against any such liability found 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-FIFTH 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.

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

Third-Party Plaintiffs' claims are barred to the extent that the conduct of Third-Party Defendant alleged to give rise to liability in Third-Party Complaint "B" is the subject of a release, covenant not to sue, or has otherwise been excused by Third-Party Plaintiffs, including, without limitation, through the execution of an agreement, contract or other applicable document, with or without inclusion of contribution protection.

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

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

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

Third-Party Plaintiffs' claims are barred due to its own conduct in unilaterally, and without notice to Third-Party Defendant, implementing clean-up plan(s) or taking other actions that resulted in the commingling of formerly divisible areas of environmental harm.

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

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

#### **THIRTIETH AFFIRMATIVE DEFENSE**

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

### **THIRTY-FIRST AFFIRMATIVE DEFENSE**

Third-Party Plaintiffs cannot seek contribution under the Joint Tortfeasors Contribution Law because Third-Party Defendant is not liable for “the same injury” caused by Third-Party Plaintiffs’ discharges and does not share a common liability to the State of New Jersey.

### **THIRTY-SECOND AFFIRMATIVE DEFENSE**

Third-Party Plaintiffs’ Complaint is barred to the extent it seeks relief for damages incurred prior to the effective date of the Spill Act.

### **THIRTY-THIRD AFFIRMATIVE DEFENSE**

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

### **THIRTY-FOURTH 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.

### **THIRTY-FIFTH 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.

### **THIRTY-SIXTH AFFIRMATIVE DEFENSE**

Third-Party Plaintiffs are mere volunteers for remediation of the environmental contamination for which they claim contribution and/or other relief from Third-Party

Defendant. Consequently, the claims in Third-Party Complaint "B" are barred, in whole or in part.

#### **THIRTY-SEVENTH AFFIRMATIVE DEFENSE**

Third-Party Complaint "B" 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.

#### **THIRTY-EIGHTH 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.

#### **THIRTY-NINTH AFFIRMATIVE DEFENSE**

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

#### **FORTIETH AFFIRMATIVE DEFENSE**

The claims for equitable contribution under the Spill Act in Third-Party Complaint "B" 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.

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

Third-Party Plaintiffs' claims are barred because neither they nor Plaintiffs have incurred "costs of restoration and replacement ... of any natural resources damages or destroyed by a discharge" under the Spill Act.

#### **FORTY-SECOND 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.

#### **FORTY-THIRD AFFIRMATIVE DEFENSE**

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 Laws, such injury was caused by the intervening acts, omissions, or superseding acts of persons or entities over whom Third-Party Defendant exercised no control and for whose conduct Third-Party Defendant was not responsible including, without limitation, unpermitted and storm event discharges from publically owned treatment works.

#### **FORTY-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.

#### **FORTY-FIFTH AFFIRMATIVE DEFENSE**

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.

#### **FORTY-SIXTH AFFIRMATIVE DEFENSE**

The disposal of waste, if any, which allegedly originated from Third-Party Defendant, 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 Third-Party Defendant cannot be found retroactively liable.

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

Any discharge that allegedly originated from Third-Party Defendant, 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 Third-Party Defendant cannot be found retroactively liable.

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

Third-Party Defendants' 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.

#### **FIFTIETH AFFIRMATIVE DEFENSE**

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

### **FIFTY-FIRST 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 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:

- Any release or covenant not to sue granted by Plaintiffs to Third-Party Defendant;
- Any settlement or other compromise between Plaintiffs and Third-Party Defendant;
- Any expiration of the statute of limitations or statute of repose governing Plaintiffs' right to maintain a claim against Third-Party Defendant;
- 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
- 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.

### **FIFTY-SECOND AFFIRMATIVE DEFENSE**

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

Third-Party Plaintiffs' claims are barred to the extent the relief sought by Third-Party Plaintiffs in the Complaint is at odds with Third-Party Defendant's responsibilities to conduct ongoing environmental cleanups under oversight of the Plaintiffs at any site(s) alleged by Third-Party Plaintiffs to be the subject of their contribution claims against Third-Party Defendant, thereby exposing Third-Party Defendant to inconsistent responsibilities, penalties and liabilities, and the possibility of paying twice for the same actions (*i.e.*, double recovery).

#### **FIFTY-FOURTH AFFIRMATIVE DEFENSE**

To the extent Third-Party Defendant 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 Third-Party Defendant, 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-FIFTH AFFIRMATIVE DEFENSE**

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.

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

Third-Party Plaintiffs' claims are not ripe because clean up and remediation have not been completed.

#### **FIFTY-SEVENTH AFFIRMATIVE DEFENSE**

Third-Party Plaintiffs' claims are barred, in whole or in part, by their failure to properly mitigate damages.

#### **FIFTY-EIGHTH AFFIRMATIVE DEFENSE**

Third-Party Plaintiffs' claims are barred, in whole or in part, because they seek costs beyond costs allowed for under the Spill Act.

#### **FIFTY-NINTH AFFIRMATIVE DEFENSE**

Third-Party Plaintiffs' claims are barred, in whole or in part, because they seek damages, costs or expenses beyond costs for "cleanup" and "removal" as those terms are defined under the Spill Act.

#### **SIXTIETH AFFIRMATIVE DEFENSE**

Third-Party Defendant 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 Third-Party Defendant.

#### **SIXTY-FIRST AFFIRMATIVE DEFENSE**

Third-Party Defendant reserves the right to assert and hereby invoke any and all defenses under applicable Environmental Laws that may be available during the course of this action.

#### **COUNTER-CLAIMS, CROSS CLAIMS AND FOURTH-PARTY CLAIMS**

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

WHEREFORE, Third-Party Defendant Elan Chemical Company, Inc. 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.

**DESIGNATION OF TRIAL COUNSEL**

In accordance with Rule 4:25-4, you are hereby notified that Melissa A. Provost, Esq. is assigned to try this case.

**SAIBER LLC**  
Attorneys for Third-Party Defendant  
Elan Chemical Company, Inc.

By:   
RANDI SCHILLINGER

Dated: January 4, 2010

**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 the undersigned that the potential liability, if any, of a third party defendant for the claims set forth in the Third Party Complaint is several, only, there are no non-parties which should be joined in the action pursuant to R.4:28; but that

(c) In the event the Court shall determine that the potential liability of a third party defendant, if any, for the claims set forth in the Third Party Complaint is in any respect joint and several (which is denied), then all or some of the non-parties listed on the October 7, 2009 posting by O'Melveny and Myers may constitute non-parties who should be joined in the action pursuant to R. 4:28; and

(d) In either event, some or all of such non-parties are subject to joinder pursuant to R.4:29-1(b) because of potential liability to any party on the basis of the same transactional facts.

**SAIBER LLC**

Attorneys for Third-Party Defendant  
Elan Chemical Company, Inc.

By:

  
RANDI SCHILLINGER

Dated: January 4, 2010

**SAIBER LLC**

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SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION: ESSEX COUNTY

DOCKET NO. L-9868-05 (PASR)

CIVIL ACTION

**CERTIFICATION OF SERVICE**

Katherine A. Escanlar, in lieu of oath or affidavit, certifies that:

1. I am an attorney-at-law in the State of New Jersey and am an associate of the law firm of Saiber LLC, attorneys for Third-Party Defendant Elan Chemical Company, Inc. in the above captioned matter.

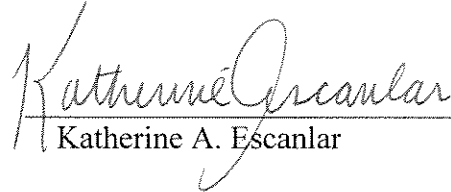
2. On January 4, 2010, I caused an original and two copies of the Answer and Case Information Statement to be filed with the Clerk of the Superior Court, Essex County via Hand Delivery.

3. On January 4, 2010, I also emailed a copy of same to the Honorable Sebastian P. Lombardi, J.S.C.

4. On January 4, 2010, I also filed same via the sfile website, which will be distributed to all counsel who have consented to such service.

5. On January 4, 2010, I also mailed a copy, via regular mail, to all counsel who have not consented to service by electronic posting.

I certify that the foregoing statements made by me are true. I am aware that if any of the statements made by me are willfully false, I am subject to punishment.

  
Katherine A. Escanlar

Date: January 4, 2010

**Third-Party Defendants for Regular Service as of January 4, 2010**

| <b>NAMED THIRD-PARTY DEFENDANT</b>  | <b>THIRD-PARTY COMPLAINT</b> | <b>NOTICE OF APPEARANCE: COUNSEL OF RECORD</b>  |
|-------------------------------------|------------------------------|---|
| City of Clifton                     | A                            | Thomas M. Egan, Esq.<br>Assistant Municipal Attorney<br>City of Clifton Law Department<br>900 Clifton Avenue<br>Clifton, NJ 07013<br>973.470.5815<br>973.470.5254 – fax<br><a href="mailto:tegan@cliftonnj.org">tegan@cliftonnj.org</a>   |
| City of Orange                      | A                            | John P. McGovern, Esq.<br>Assistant City Attorney<br>City of Orange Township<br>29 North Day St.<br>Orange, NJ 07050<br>973.266.4197<br>973.674.2021 – fax<br><a href="mailto:jmcgovern@ci.orange.nj.us">jmcgovern@ci.orange.nj.us</a>  |
| Clean Earth of North Jersey, Inc.   | B                            | Eric S. Aronson, Esq.<br>Greenberg Traurig, LLP<br>200 Park Avenue<br>Florham Park, NJ 07932<br>973.360.7900<br>973.301.8410 – fax<br><a href="mailto:aronson@gtlaw.com">aronson@gtlaw.com</a>  |
| Passaic Pioneers Properties Company | B                            | John A. Daniels, Esq.<br>Daniels & Daniels LLC<br>6812 Park Ave.<br>Guttenberg, NJ 07093<br>202.868.1868<br>201.868.2122 – fax<br><a href="mailto:Jad1903@gmail.com">Jad1903@gmail.com</a>  |
| Township of Cranford                | A                            | Carl R. Woodward, III, Esq.<br><a href="mailto:cwoodward@carellabyrne.com">cwoodward@carellabyrne.com</a><br>Brian H. Fenlon, Esq.<br><a href="mailto:bfenlon@carellabyrne.com">bfenlon@carellabyrne.com</a><br>Carella, Byrne, Bain, Gilfillan,<br>Cecchi, Stewart & Olstein<br>5 Becker Farm Road<br>Roseland, NJ 07068<br>973.994.1700 |

**Third-Party Defendants for Regular Service as of January 4, 2010**

| <b>NAMED THIRD-PARTY<br/>DEFENDANT</b> | <b>THIRD-PARTY<br/>COMPLAINT</b> | <b>NOTICE OF APPEARANCE:<br/>COUNSEL OF RECORD</b>   |
|--|----------------------------------|--|
| Roman Asphalt Corporation              | B                                | Michael V. Calabro<br>Law Offices of Michael V.<br>Calabro<br>466 Bloomfield Ave., Suite 200<br>Newark, NJ 07107<br>973.482.1085<br>973.482.7930 – fax<br><a href="mailto:Michaelvcalabro@verizon.net">Michaelvcalabro@verizon.net</a> |
| Township of Irvington                  | A                                | Gustavo Garcia<br>Municipal Attorney<br>Township of Irvington<br>Irvington Municipal Building<br>Civic Square<br>Irvington, NJ07111<br>973.399.6637<br>973.399.6723 - fax  |