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Attorney for Third-Party Defendant

Hoffmann-La Roche 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,

v.

3M COMPANY, *et al.*,

Third-Party Defendants.

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION: ESSEX COUNTY

DOCKET NO. L-9868-05 (PASR)

CIVIL ACTION

**HOFFMANN-LA ROCHE INC.'S ANSWER TO**

**THIRD-PARTY COMPLAINT "B"**

Third Party Defendant Hoffmann-La Roche Inc. ("Roche"), and affiliates by and through its undersigned counsel, hereby answers the Third Party Complaint "B" asserted by Defendants/Third Party Plaintiffs Maxus Energy Corporation ("Maxus") and Tierra Solutions, Inc. ("Tierra"), as follows:

## **PROCEDURAL BACKGROUND**

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

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

## **THE THIRD PARTY PLAINTIFFS**

### **(Paragraphs 16 through 18)**

2. Roche 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.

## **THE THIRD PARTY DEFENDANTS**

### **(Paragraphs 19 through 209)**

3. The allegations in Paragraphs 19 through 107 relate to other parties. Accordingly, Roche is without knowledge or information sufficient to form a belief as to the truth of the matters stated in Paragraph 19 through 107, and therefore denies the same.

4. Roche admits the allegations in Paragraph 108

5. Roche is without knowledge or information sufficient to form a belief as to the truth of the matters stated in Paragraph 109 through 209, and therefore denies the same.

6. Roche admits the allegations in Paragraph 210, that it is a “person” within the meaning of the Spill Act, N.J.S.A. §58:10-23.11b.o., but denies the allegations as they relate to other parties.

## **DEFINITIONS**

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

### **FACTUAL ALLEGATIONS**

8. Roche responds that the referenced pleadings speak for themselves. To the extent a response required, Roche is without knowledge or information sufficient to form a belief as to the matters alleged in Paragraphs 237 through 423, and therefore denies the same.

9. With respect to the allegations of paragraph 424 of the Third-Party Complaint, Roche admits that it purchased the property at 1 Franklin Avenue, Belleville, New Jersey (former 'Jergen Site') from the Andrew Jergens Company in 1975. Roche admits that it conducts business at the Jergen Site. Roche lacks information or knowledge upon which to form a belief to the truth of the remaining allegations of Paragraph 424.

10. Roche lacks information or knowledge upon which to form a belief to the truth of the allegations of Paragraph 425, 426, 427 and 428.

11. Without identification of the source, if any, of the information in paragraph 429 or reference to a specific document, Roche lacks information or knowledge upon which to form a belief to the truth of the allegations of Paragraph 429. However, Roche denies the presence of benzene in the groundwater at the Jergen Site.

12. Without identification of the source, if any, of the information in paragraph 430 or reference to a specific document, Roche lacks information or knowledge upon which to form a belief to the truth of the allegations of Paragraph 430. Further the allegations do not state that any substance in the sediment samples came from the Jergen Site.

13. With respect to the allegations of Paragraph 431, on information and belief, the Third-Party Plaintiffs urged the EPA, on the bases of an inadequate factual foundation presented to the EPA which issued a General Notice Letter. Roche admits it received such a general notice letter, as alleged in Paragraph 431, but denies that the issuance of such a letter resulted from the Release of Hazardous Substances from the Jergen Site.

14. Roche denies each and every allegation in Paragraph 432 as Roche neither caused, permitted or allowed a release to occur from the property during its ownership. Roche lacks information or knowledge upon which to form a belief to the truth of the remaining allegations of Paragraph 432.

15. Roche responds that the referenced pleadings speak for themselves. To the extent a response required, Roche is without knowledge or information sufficient to form a belief as to the matters alleged in Paragraphs 433 through 1534, and therefore denies the same.

16. Roche admits the allegations of Paragraph 1535.

17. Roche denies the allegations of Paragraph 1536. Currently, only the western portion of the site, west of the Conrail right of way discharges storm water into St. Paul's Brook along with some parking lot drainage. Roche has never discharged process waste waters or sanitary sewerage to any storm sewer system leading to St. Paul's Brook. All of Roche's manufacturing operations occurred on the east side of the Conrail right of way at a distance from the right of way.

18. Roche admits the allegations of Paragraph 1537.

19. With respect to Paragraph 1538, Roche admits that it did have a small-scale incinerator duly licensed on site for disposal of certain materials. Roche no longer operates the incinerator. To the extent that the allegations of Paragraph 1538 are inconsistent therewith, they are denied.

20. Roche denies any unpermitted Disposal, Release or Discharge of Hazardous Substances occurred on its site as alleged in Paragraph 1539. Any release was a permitted release and none were released directly into any media connected to St. Paul's Brook or contributed to Third River contamination. The remaining allegations are too vague and

without any reference to any data, sampling or the like for Roche to form a believe or provide knowledge as to the truth of the remaining allegations.

21. Roche denies the allegation contained in paragraph 1540 of the Complaint. The PVSC report of 1947 indicated the oil was cleaned up and “Nichols Brook and The Third River [were] saved from receiving a messy combination of Fuel oil.” See Report of April 10, 1947.

22. In 1947, Route 3 was being constructed. The highway was constructed with cement. It was a common practice at that time to wash out cement trucks at the construction site right after a pour. This would result in a whitish substance being discharged. However, any such actions were those of the state not Roche. Moreover, Roche maintains 100 groundwater monitoring wells and no such substance has been discovered. Therefore, Roche denies the allegations of Paragraph 1541.

23. Roche has never discharged process waste waters or sanitary waste waters into any storm system. Any test of process waste water would have no impact on St. Paul’s Brook or The Third River. All process and sanitary waste from Nutley site goes directly to PVSC by way of a closed interceptor pipe. There is not impact to St. Paul’s Brook. Further, without specifying the document or source of the information contained in Paragraph 1542, Roche is without knowledge or information sufficient to form a belief as to the remaining matters alleged in Paragraph 1542.

24. Roche denies the allegations of Paragraph 1543.

25. All process and sanitary discharges would have been directed to PVSC and not St. Paul’s Brook. Therefore, Roche denies the allegations of Paragraph 1544.

26. Roche denies the allegations contained in Paragraph 1545. Roche admits that it conducted a Preliminary Assessment and identified the process sewer system as a potential

area of concern. In the 1990s the entire process sewer system was re-furbished and sealed. Roche is not aware of any discharges from the process sewer system to have impacted either St. Paul's Brook or the Passaic River. Further staff gauges surveys and water quality surveys of St. Paul's Brook have not shown any impact from Roche's operations. There are however, upgradient sources, off Roche's site, of VOCs are known to contaminate the site. This finding concurred in by NJDEP.

27. Roche denies the allegations of Paragraph 1546. The soil samples are beneath capped asphalt or concrete surfaces not in contact with surface water run off. The subsoil contaminants therefore have no impact on St. Paul's Brook or the Third River.

28. Roche conducted an investigation that demonstrated that the ground water contamination found under the Roche site on the north side is an off site plume that is migrating onto Roche property from an off site source. NJDEP has approved and concurred with Roche's conclusions. Thus the contaminants found in the groundwater are from sources other than Roche.

29. Roche denies the allegations of paragraph 1548 to the extent the allegations are directed to Roche. The report submitted to NJDEP details the results of a contaminant survey below Roche's sub grade sewer systems. Due to groundwater compared to surface water elevations, groundwater down gradient of our facility is receiving water from surface waters (St. Paul's Brook) and St. Paul's Brook appears to be a "losing" stream south of Roche property. Thus, St. Paul's is not being contaminated by contaminants listed therein from Roche.

30. With respect to the allegations of Paragraph 1549, they are denied. Regional groundwater does appear to flow to the Passaic River. The shallow groundwater from Roche's

southern portion of the does not discharge in to St Paul's Brook. St. Paul's Brook is a "losing stream" south of the Roche Site. There is no scientific or reasonable basis for the assertion that the Roche subsurface has impacted Newark Bay in any way.

31. The allegations of Paragraph 1550 are denied. Roche has no record of St. Paul's Brook overflowing its banks onto the main portion of Roche's site. There is no factual basis for the assumptions alleged in that paragraph. St. Paul's Brook runs entirely within the Conrail right of way and at no time erodes any portion of the Roche Site where manufacturing occurred. The Conrail rail bed is a barrier preventing the St. Paul's Brook from the Roche Site.

32. The allegations of Paragraph 1551 are denied.

33. With respect to the allegations of Paragraph 1552, on information and belief, the Third-Party Plaintiffs urged the EPA, on the bases of an inadequate factual foundation presented to the EPA which issued a General Notice Letter. Roche admits it received such a general notice letter, as alleged in Paragraph 1552, but denies that the issuance of such a letter resulted from the Release of Hazardous Substances from the Roche Site.

34. Roche denies the allegations of Paragraph 1553.

35. Roche responds that the referenced pleadings speak for themselves. To the extent a response required, Roche is without knowledge or information sufficient to form a belief as to the matters alleged in Paragraphs 1554 through 3110, and therefore denies the same.

36. Roche lacks information or knowledge upon which to form a belief as to the allegations of Paragraphs 3111, 3112 and 3113.

37. Roche admits it receive a General Notice Letter from EPA as alleged in Paragraph 3114, but denies the remaining allegations of that paragraph.

38. Roche admits the allegations of Paragraphs 3115 and 3116 except to state that there are no admissions of liability contained in the Administrative Order on Consent (AOC).

39. Roche admits the allegations of Paragraph 3117, except to assert that the Agreement expressly disclaimed any admission of liability.

40. The allegations of Paragraph 3118 are too vague to either inform Roche or provide knowledge upon which to form a belief as to the truth of the allegations. To the extent that they seek to imply that Roche is responsible for any off-site discharge, those allegations are denied.

41. Roche responds that the referenced pleadings speak for themselves. To the extent a response required, Roche is without knowledge or information sufficient to form a belief as to the matters alleged in Paragraphs 3119 through 3168, and therefore denies the same.

42. Roche admits that it operated during one or more years as a pharmaceutical research and development facility at 340 Kingsland Street, Nutley New Jersey during the period of time the Bayonne Barrel and Drum Site was operating. Roche admits that it generated hazardous substances at the Roche Site, but states it complied in all ways with the laws regarding solid or hazardous wastes at the Roche Site. Roche denies all remaining allegations of Paragraph 3169.

43. Roche denies the allegations of Paragraph 3170, except to admit it received such a general notice letter, as alleged in Paragraph 3170, but denies that the issuance of such a letter resulted from the Release of Hazardous Substances from the Roche Site.

44. Roche admits it entered into ACO along with other cooperating PRPs, without admitting any liability therefor which allowed the PRP group to conduct certain removal activities. The remaining allegations of Paragraph 3171 are denied



45. Without admitting any liability therefor, Roche, along with several other PRPs signed the 2004 Agreement as a Settling Party as set forth in Paragraph 3172.

46. Roche denies the allegations of Paragraph 3173.

47. Roche responds that the referenced pleadings speak for themselves. To the extent a response required, Roche is without knowledge or information sufficient to form a belief as to the matters alleged in Paragraphs 3174 through 3445, and therefore denies the same.

### **FIRST COUNT**

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

48. Roche incorporates by reference as if fully set forth herein its responses and denials as asserted in Paragraphs 1 through 8 herein.

49. Roche is without knowledge or information sufficient to form a belief as to the truth of the matters stated in Paragraph 3447 through 3448, and therefore denies the same.

50. Roche denies that it is liable to Third Party Plaintiffs for contribution. Roche is without knowledge or information sufficient to form a belief as to the truth of the matters asserted in Paragraphs 3449 through 3451, and therefore denies the same.

### **SECOND COUNT**

#### **Statutory Contribution**

51. Roche incorporates by reference as if fully set forth herein its responses and denials as asserted in Paragraphs 1 through 11 herein.

52. Roche denies that it is liable to Third Party Plaintiffs for contribution. Roche is without knowledge or information sufficient to form a belief as to the truth of the matters in Paragraphs 3452 through 3453, and therefore denies the same.

### **FIRST AFFIRMATIVE DEFENSE**

53. 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**

54. 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**

55. Claims of third-party plaintiffs, their agents, employees, successors and assigns (“Third-Party Plaintiffs”) are barred, in whole or in part, by the statutory defenses to liability provided by the Spill Act and Water Pollution Control Act (“WPCA”).

### **FOURTH AFFIRMATIVE DEFENSE**

56. 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**

57. Third-Party Plaintiffs’ claims are barred by the entire controversy doctrine.

### **SIXTH AFFIRMATIVE DEFENSE**

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

### **SEVENTH AFFIRMATIVE DEFENSE**

59. The damages sought by Third-Party Plaintiffs are wholly speculative, conjectural, unreasonable, excessive and/or arbitrary and capricious.

### **EIGHTH AFFIRMATIVE DEFENSE**

60. Third-Party Defendant cannot be liable for or be required to pay Third-Party Plaintiffs’ damages that arise out of conduct lawfully undertaken in compliance with permits or

other approvals issued by relevant government agencies, including the State 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**

61. The Third-Party Complaint is barred and/or is constitutionally impermissible to the extent that it seeks to impose retroactive liability for acts that were previously authorized or condoned by law including applicable Environmental Laws.

#### **TENTH AFFIRMATIVE DEFENSE**

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

#### **ELEVENTH AFFIRMATIVE DEFENSE**

63. At all relevant times, Third-Party Defendant complied with all applicable Environmental Laws, regulations, industry standards and ordinances, and otherwise conducted themselves reasonably, prudently, in good faith, and with due care for the rights, safety and property of others.

#### **TWELFTH AFFIRMATIVE DEFENSE**

64. The claims asserted against Third-Party Defendant in the Complaint 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, 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 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.

#### **THIRTEENTH AFFIRMATIVE DEFENSE**

65. The Third-Party claims are barred in whole or in part by the doctrine of preemption.

#### **FOURTEENTH THIRD AFFIRMATIVE DEFENSE**

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

#### **FIFTEENTH AFFIRMATIVE DEFENSE**

67. 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.

#### **SIXTEENTH AFFIRMATIVE DEFENSE**

68. 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.

#### **SEVENTEENTH AFFIRMATIVE DEFENSE**

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

#### **EIGHTEENTH AFFIRMATIVE DEFENSE**

70. The claims for equitable contribution under the Spill Act in the Third-Party Complaint are barred because: (1) equity will not compel action that is impossible of performance; (2) equity will not exceed the rights of parties existing at law; (3) equity will not

consciously become an instrument of injustice; and/or (4) equity will not permit double satisfaction.

#### **NINETEENTH AFFIRMATIVE DEFENSE**

71. 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.

#### **TWENTIETH AFFIRMATIVE DEFENSE**

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

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

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

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

74. Third-Party Defendant did not own or operate a "Major Facility" as defined by the Spill Act or the WPCA, N.J.S.A.

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

75. 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.

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

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

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

77. 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* including, without limit, State of New Jersey agencies and instrumentalities, including without limit Trustees for tidelands, and United States agencies and instrumentalities with liability under the Spill Act.

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

78. 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 more than their equitable share of the liability.

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

79. 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 Defendant exercised no control and for whose conduct Third-Party Defendant was not responsible including, without limit, unpermitted and storm event discharges from publicly owned treatment works.

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

80. 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-NINTH AFFIRMATIVE DEFENSE**

81. 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.

#### **THIRTIETH AFFIRMATIVE DEFENSE**

82. Under N.J.S.A. 2A:15-97, the amount of damages, if any, should be reduced by any amounts recovered from any other source.

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

83. Third-Party Plaintiffs' claims are barred to the extent that the conduct of Third-Party Defendants alleged to give rise to liability in the Complaint is the subject of a release, covenant not to sue, or otherwise excused by Plaintiffs, including, without limit, through issuance of a no further action letter, consent order, settlement agreement or other applicable document.

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

84. 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.

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

85. 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.

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

86. Third-Party Plaintiffs are not entitled to recover costs incurred for cleanup actions not undertaken in coordination or conjunction with federal agencies.

### **THIRTY-FIFTH AFFIRMATIVE DEFENSE**

87. The damages Third-Party Plaintiffs seek, if awarded, would result in unjust enrichment to the Third-Party Plaintiffs.

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

88. 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.

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

89. Third-Party Defendants' liability to Third-Party Plaintiffs, if any, is limited to Spill Act and contribution claims by Third Parties 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.

#### **THIRTY-EIGHTH AFFIRMATIVE DEFENSE**

90. 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.

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

91. 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.

#### **FORTIETH AFFIRMATIVE DEFENSE**

92. 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.

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

93. Third-Party Defendant reserves the right to assert and hereby invoke each and every Environmental Law defenses that may be available during the course of this action.

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

94. 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 Defendant liable, including but not limited to punitive damages and penalties.

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

95. 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.

#### **FORTY-FOURTH AFFIRMATIVE DEFENSE**

96. Third-Party Plaintiffs' claims for contribution, whether under the Spill Act or the New Jersey statutory provisions for contribution (including N.J.S.A. 2A:53A-1 et seq.), 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:

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

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

97. 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.

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

98. 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).

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

99. 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.

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

100. 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.

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

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

**DESIGNATION OF TRIAL COUNSEL**

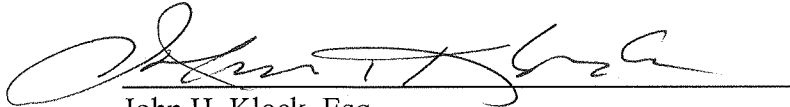
102. In Accordance with Rule 4:25-4 you are hereby notified that John H. Klock is assigned to try this case.

WHEREFORE, Third Party Defendant Roche-La Roche, Inc. respectfully requests that the Court enter an Order dismissing the Third Amended Third Party Complaint with prejudice, and awarding costs, attorney fees and any other relief the Court deems just and proper.

Dated: November 28, 2009

Respectfully submitted,

**Gibbons P.C.**

A handwritten signature in black ink, appearing to read "John H. Klock", is written over a horizontal line.

John H. Klock, Esq.  
One Gateway Center  
Newark, New Jersey 07102-5310  
Attorney for Third-Party Defendant  
Hoffmann-La Roche Inc.

**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

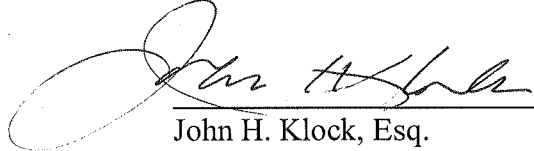
(b) Since it is the legal position of the undersigned that the potential liability, if any, of a third-party defendant for the claims set forth in the Third-Party Complaint is several, only, there are no non-parties which should be joined in the action pursuant to R. 4:28; but that

(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.

Dated: November 23, 2009

Respectfully submitted,  
**Gibbons P.C.**



John H. Klock, Esq.  
One Gateway Center  
Newark, New Jersey 07102-5310  
Attorney for Third-Party Defendant  
Hoffmann-La Roche Inc.