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NEW JERSEY DEPARTMENT OF  
ENVIRONMENTAL PROTECTION, et al.,

Plaintiffs,

vs.

OCCIDENTAL CHEMICAL CORPORATION,  
et als.,

Defendants,

MAXUS ENERGY CORPORATION, et al.,

Third-Party Plaintiffs,

vs.

3M COMPANY, et als.

Third-Party Defendants.

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION: ESSEX COUNTY

DOCKET NO. L-9868-05 (PASR)

CIVIL ACTION

**ICI AMERICAS INC.'S  
ANSWER TO THIRD-PARTY  
COMPLAINT "B"**

**ICI AMERICAS, INC.'S ANSWER TO THIRD-PARTY COMPLAINT "B"**

Third-Party Defendant ICI Americas Inc. ("ICI"), by and through its undersigned counsel, and in accordance with this 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:

### **GENERALLY**

1. ICI 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".

### **AS TO PROCEDURAL BACKGROUND**

**(Paragraphs 1 through 15)**

2. ICI responds that the referenced pleadings speak for themselves. No response is required pursuant to CMO V.

### **AS TO THE THIRD PARTY PLAINTIFFS**

**(Paragraphs 16 through 18)**

3. No response is required pursuant to CMO V.

### **AS TO THE THIRD PARTY DEFENDANTS**

**(Paragraphs 19 through 209)**

4. To the extent that the allegations in Paragraphs 19 through 209 relate to other parties, no response is required pursuant to CMO V.

5. In response to Paragraph 113, ICI admits the allegations in Paragraph 113

6. The allegations in Paragraph 210, state a legal conclusion as to which no response is required.

### **AS TO DEFINITIONS**

7. Paragraphs 211 through 236 contain definitions. No response is required pursuant to CMO V.

## **AS TO FACTUAL ALLEGATIONS**

### **(Paragraphs 237 through 3445)**

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

9. In response to Paragraph 1601, to the extent that Paragraph 1601 is directed to a party other than ICI, ICI denies the allegations and leaves Third-Party Plaintiffs to their proofs. ICI is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations stated in Paragraph 1601 and therefore denies the same.

10. In response to Paragraph 1602, without admitting the accuracy of Third-Party Plaintiffs' definition of the "ICI Americas Site," ICI admits that it formerly owned property located at 229 East 22<sup>nd</sup> Street in Bayonne, New Jersey (the "Plant Property"). The remainder of the allegations of Paragraph 1602 are denied.

11. In response to Paragraph 1603, to the extent that Paragraph 1603 contains conclusions of law, ICI denies the allegations and leaves Third-Party Plaintiffs to their proofs. To the extent that Paragraph 1603 contains factual allegations to which a response is required, ICI admits that it formerly owned the Plant Property between 1965 and 1999, and that at times it manufactured Fluon® (a trade name of polytetrafluoroethylene). ICI denies the remainder of the allegations in Paragraph 1603 and leaves Third-Party Plaintiffs to their proofs. In particular, ICI specifically denies that it manufactured poly vinyl chloride ("PVC") at the plant.

12. In response to Paragraph 1604, Paragraph 1604 is misleading inasmuch ICI did not manufacture PVC, and therefore, in this context, ICI denies the allegations of Paragraph 1604.

13. In response to Paragraph 1605, upon information and belief ICI admits that a hydrochloric acid spill may have occurred at the Plant Property, but ICI denies the remainder of the allegations of Paragraph 1605.

14. In response to Paragraph 1606, to the extent that Paragraph 1606 contains conclusions of law ICI denies the allegations and leaves Third-Party Plaintiffs to their proofs. To the extent that Paragraph 1606 contains factual allegations to which a response is required, ICI admits that in November of 1999 it sold the Plant Property to Asahi Glass Fluoropolymers USA, Inc.

15. In response to Paragraph 1607, Paragraph 1607 is directed to a party other than ICI, and therefore ICI denies the allegations and leaves Third-Party Plaintiffs to their proofs.

16. In response to Paragraph 1608, Paragraph 1608 is directed to a party other than ICI and therefore ICI denies the allegations and leaves Third-Party Plaintiffs to their proofs.

17. In response to Paragraph 1609, Paragraph 1609 contains conclusions of law and ICI denies the allegations and leaves Third-Party Plaintiffs to their proofs. Further to the extent that Paragraph 1609 is directed to a party other than ICI, ICI denies the allegations and leaves Third-Party Plaintiffs to their proofs. The remainder of the allegations of Paragraph 1609 are denied.

18. In response to Paragraph 1610, Paragraph 1610 contains conclusions of law and ICI denies the allegations and leaves Third-Party Plaintiffs to their proofs.

19. In response to Paragraph 1611, Paragraph 1611 contains conclusions of law and ICI denies the allegations and leaves Third-Party Plaintiffs to their proofs.

20. In response to Paragraph 1612, Paragraph 1612 is denied.

21. In response to Paragraph 1613, Paragraph 1613 is denied.

22. In response to Paragraph 1614, Paragraph 1614 is directed to a party other than ICI, and therefore ICI denies the allegations and leaves Third-Party Plaintiffs to their proofs.

### **AS TO FIRST COUNT**

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

23. ICI incorporates by reference as if fully set forth herein its responses and denials as asserted in Paragraphs 1 through 22 herein.

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

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

### **AS TO SECOND COUNT**

#### **Statutory Contribution**

26. ICI incorporates by reference as if fully set forth herein its responses and denials as asserted in Paragraphs 1 through 25 herein.

27. ICI denies that it is liable to Third-Party Plaintiffs for contribution. ICI 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**

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**

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 Third-Party Plaintiffs are barred in whole or in part by the statutory defenses to liability provided by the Spill Act and the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq. (“WPCA”).

### **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 of contribution against Third-Party Defendant under 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**

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

### **NINTH 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.

#### **TENTH 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.

#### **ELEVENTH 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 the Third-Party Complaint are barred, in whole or in part.

#### **TWELFTH AFFIRMATIVE DEFENSE**

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

#### **THIRTEENTH 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").

#### **FOURTEENTH 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.

#### **FIFTEENTH 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.

#### **SIXTEENTH AFFIRMATIVE DEFENSE**

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.

#### **SEVENTEENTH AFFIRMATIVE DEFENSE**

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.

#### **EIGHTEENTH 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.

#### **NINETEENTH AFFIRMATIVE DEFENSE**

The claims asserted against Third-Party Defendant in the Third-Party 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 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 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.

#### **TWENTIETH AFFIRMATIVE DEFENSE**

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

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

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

#### **TWENTY-SECOND 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.

### **TWENTY-THIRD 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.

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

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

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

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

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

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.

### **TWENTY-SEVENTH 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.

### **TWENTY-EIGHTH 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 unlawful taxation.

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

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

### **THIRTIETH AFFIRMATIVE DEFENSE**

Third-Party Defendant did not own or operate a “Major Facility” as defined by the Spill Act or the WPCA.

### **THIRTY-FIRST 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 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.

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

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.

### **THIRTY-THIRD 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.

#### **THIRTY-FOURTH THIRD 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.

#### **THIRTY-FIFTH 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 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 limitation, unpermitted and storm event discharges from publically owned treatment works.

#### **THIRTY-SIXTH 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.

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

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.

**THIRTY-EIGHTH 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.

**THIRTY-NINTH 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.

**FORTIETH 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-FIRST 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-SECOND 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-THIRD AFFIRMATIVE DEFENSE**

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

#### **FORTY-FOURTH THIRD 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.

#### **FORTY-FIFTH 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.

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

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.

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

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.

#### **FORTY-EIGHTH 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 Defendant liable, including but not limited to punitive damages and penalties.

#### **FORTY-NINTH 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.

#### **FIFTIETH 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:

- 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 or statute of repose 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.

#### **FIFTY-FIRST 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-SECOND 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-THIRD 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-FOURTH 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-FIFTH AFFIRMATIVE DEFENSE**

Any injury or damages suffered by Plaintiffs were the product of conduct for which ICI cannot have liability to Plaintiffs, because Plaintiffs and other agencies of the State of New Jersey ratified ICI's actions at the site in question, including those actions that are the subject of the Third-Party Complaint "B".

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

Third-Party Plaintiffs' claims are barred, in whole or in part, because ICI has acted pursuant to the approval and direction of the State with regard to clean-up and remediation of the site in question.

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

Any injury or damages suffered by Third-Party Plaintiffs have been increased by Plaintiffs' failure to mitigate their damages.

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

Third-Party Plaintiffs' claims are barred, in whole or in part, by the New Jersey Comparative Negligence Act, N.J.S.A. 2A:15-5.2.

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

Plaintiffs, the New Jersey Department of Environmental Protection, commissioner of the NJDEP and the Administrator of the Spill Compensation Fund, Complaint is barred, in whole or in part, because the claims asserted are preempted by federal law, including, without

limitation the Comprehensive Environmental Response, Compensation and Liability Act, 42 USC §§ 9601.

#### **SIXTIETH AFFIRMATIVE DEFENSE**

Plaintiffs, the New Jersey Department of Environmental Protection, Commissioner of the NJDEP and the Administrator of the Spill Compensation Fund, claim for damages is barred by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and the equal protection doctrine of this State.

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

Plaintiffs, the New Jersey Department of Environmental Protection, Commissioner of the NJDEP and the Administrator of the Spill Compensation Fund, claim for damages is barred by the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution, and Article 1, paragraph 1 of the New Jersey State Constitution, because, among other reasons (1) Plaintiffs would impose on ICI retroactive liability for conduct that was legal when it occurred; (2) Plaintiffs would impose unlawful double or multiple liability for the same conduct; (3) Plaintiffs would give themselves a double or multiple recovery for the same injury and damages; (4) the law of this State governing the damages sought provides inadequate procedural protections against arbitrary or erroneous awards of such damages; and (5) ICI lacked adequate notice either of the type of conduct that could warrant an award of damages under the law of this State, or of the amount of such damages that could be awarded.

#### **SIXTY-SECOND AFFIRMATIVE DEFENSE**

Plaintiffs, the New Jersey Department of Environmental Protection, Commissioner of the NJDEP and the Administrator of the Spill Compensation Fund, claim for punitive damages is barred by the Due Process Clause of the U.S. Constitution, amend. V and XIV, Section 1 and by

the Due Process Clause of the New Jersey Constitution because the law of this State governing punitive damages provides inadequate procedural protections against arbitrary or erroneous awards of such damages. A state may constitutionally award punitive damages only if the law of that state provides significant and effective procedural protections, which the law of this state does not.

#### **SIXTY-THIRD AFFIRMATIVE DEFENSE**

Plaintiffs, the New Jersey Department of Environmental Protection, commissioner of the NJDEP and the Administrator of the Spill Compensation Fund, claim for punitive damages is barred by the Due Process Clause of the U.S. Constitution, amend. V and XIV, Section 1 and by the Due Process Clause of the New Jersey Constitution because defendant lacked adequate notice either of the type of conduct that could warrant an award of punitive damages under the law of this state, or of the amount of such damages that could be awarded. The lack of fair notice bars any award of punitive damages.

#### **SIXTY-FOURTH AFFIRMATIVE DEFENSE**

Plaintiffs, the New Jersey Department of Environmental Protection, Commissioner of the NJDEP and the Administrator of the Spill Compensation Fund, claim for punitive damages is barred by the Due Process Clause of the U.S. Constitution, amend. V and XIV, Section 1 and by the Due Process Clause of the New Jersey Constitution because the law of this state fails to require that any award of punitive damages bear a close relationship to appropriate civil fines or penalties established by the legislature, or by administrative agencies under authority delegated by the legislature.

#### **SIXTY-FIFTH AFFIRMATIVE DEFENSE**

Plaintiffs, the New Jersey Department of Environmental Protection, Commissioner of the NJDEP and the Administrator of the Spill Compensation Fund, claim for punitive damages is barred by the Due Process Clause of the U.S. Constitution, amend. V and XIV, Section 1 and by the Due Process Clause of the New Jersey Constitution because the law of this state may permit the introduction of “net worth” with respect to the quantum of punitive damages. The introduction of such evidence violates Due Process by inviting the jury to award an arbitrary amount of punitive damages based on defendant’s status as an industrial enterprise.

#### **SIXTY-SIXTH AFFIRMATIVE DEFENSE**

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

#### **SIXTY-SEVENTH 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.

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

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

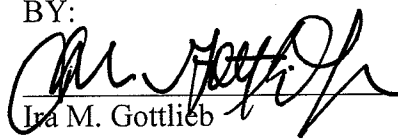
WHEREFORE, Third-Party Defendant ICI Americas Inc. respectfully requests that the Court enter an Order dismissing the Third-Party Complaint “B” with prejudice, and awarding costs, attorney fees and any other relief the Court deems just and proper.

**DESIGNATION OF TRIAL COUNSEL**

In accordance with Rules 4:5-1(c) and 4:25-4 Ira M. Gottlieb is hereby designated as trial counsel for Third-Party Defendant ICI Americas Inc.

**McCARTER & ENGLISH, LLP**  
ATTORNEYS FOR THIRD-PARTY  
DEFENDANT ICI AMERICAS INC.

BY:

  
Ira M. Gottlieb  
A Member of the Firm

**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;
- (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.

**McCARTER & ENGLISH, LLP**  
ATTORNEYS FOR THIRD-PARTY  
DEFENDANT ICI AMERICAS INC.

BY:

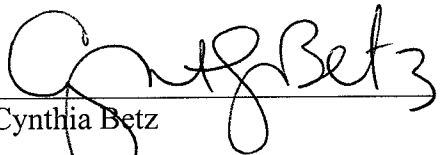
  
Ira M. Gottlieb  
A Member of the Firm

Dated: November 23, 2009

**CERTIFICATION OF SERVICE**

I, Cynthia S. Betz, hereby certify that, on the date listed below, I filed Third Party Defendant ICI America Inc.'s Answer to Third-Party Complaint "B", Affirmative Defenses and Certification Pursuant to R. 4:5-1(b)(2) were filed with the Clerk of the Court, Superior Court of New Jersey, Essex County, by overnight mail, and caused same to be served on all parties which have consented to electronic service by posting to <http://njdepvoce.sfile.com> and upon the attached list of counsel of record by first class regular mail.

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

  
Cynthia Betz

Dated: November 23, 2009  
Newark, New Jersey

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