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ATTORNEYS FOR THIRD-PARTY DEFENDANT,
MALLINCKRODT INC.

NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION, ET
AL.,

Plaintiffs,

v.

OCCIDENTAL CHEMICAL
CORPORATION, ET AL.,

Defendants,

MAXUS ENERGY CORPORATION and
TIERRA SOLUTIONS, INC.,

Third-Party Plaintiffs,

v.

3M COMPANY, ET AL.,

Third-Party Defendants.

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SUPERIOR COURT OF NEW JERSEY
ESSEX COUNTY
LAW DIVISION
DOCKET NO. L-009868-05

Civil Action

**ANSWER,
AFFIRMATIVE DEFENSES,
DESIGNATION OF TRIAL COUNSEL,
AND R. 4:5-1 CERTIFICATION
ON BEHALF OF
MALLINCKRODT INC.**

Third-Party Defendant, Mallinckrodt Inc.
("Mallinckrodt") 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:

The paragraph numbers used herein respond to the paragraph
numbers used in the Third-Party Complaint B.

PROCEDURAL BACKGROUND

(Paragraphs 1 through 15)

Mallinckrodt 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)

Mallinckrodt 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.

123. Mallinckrodt denies the allegations contained in Paragraph 123 of Third-Party Complaint B and clarifies those allegations as follows. Mallinckrodt admits that St. Louis, MO is the principal place of business of Mallinckrodt Inc., a Delaware corporation.

210. The allegations in paragraph 210 of the Third-Party Complaint B express a legal opinion the accuracy of which Mallinckrodt is not required to admit or deny herein. To the extent a response by Mallinckrodt is necessary, Mallinckrodt denies the allegations contained in paragraph 210 of the 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.

Mallinckrodt Site

1807. Mallinckrodt denies the allegations contained in Paragraph 1807 of Third-Party Complaint B and clarifies those allegations as follows. Mallinckrodt admits that from approximately December 1968 to approximately April 1974 Mallinckrodt Chemical Works owned and operated a facility located at or about 165-167 Main Street, Lodi, New Jersey, and from approximately April 1974 to approximately August 1978 Mallinckrodt, Inc., a Missouri corporation ("Mallinckrodt I") owned and operated a facility located at or about 165-167 Main Street, Lodi, New Jersey. Mallinckrodt is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 1807 of the Third-Party Complaint B regarding the alleged Blocks and Lots and, accordingly, denies those allegations leaving Third-Party Plaintiffs to their proofs.

1808. Mallinckrodt admits that Mallinckrodt Chemical Works received its Certificate of Corporate Existence from the State of Missouri on April 18, 1882.

1809. Mallinckrodt admits that Mallinckrodt Chemical Works entered into an agreement dated September 18, 1968 for the purchase of the issued and outstanding capital stock of the Washine Chemical Corporation. Mallinckrodt further admits that at the time of the acquisition, Washine Chemical Corporation was a New York corporation with its principal place of business located at 165 Main Street, in Lodi, New Jersey. Mallinckrodt is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 1809 of the Third-Party Complaint B as to whether Washine Chemical Corporation became a wholly-owned subsidiary of Mallinckrodt Chemical Works and, accordingly, denies those allegations leaving Third-Party Plaintiffs to their proofs.

1810. Mallinckrodt admits the allegations contained in Paragraph 1810 of Third-Party Complaint B.

1811. Mallinckrodt denies the allegations contained in Paragraph 1811 of Third-Party Complaint B.

1812. Mallinckrodt denies the allegations contained in Paragraph 1812 of Third-Party Complaint B and clarifies those allegations as follows. Mallinckrodt admits that on December 14, 1981, Avon Products, Inc. formed a Missouri corporation named AVP Holdings, Inc. Mallinckrodt, Inc. merged with and into AVP Holdings, Inc. on March 8, 1982. The surviving corporation was Mallinckrodt I.

1813. Mallinckrodt denies the allegations contained in Paragraph 1813 of Third-Party Complaint B and clarifies those allegations as follows. Mallinckrodt admits that on November 5, 1985, a company known as MALCO, Inc. was incorporated in Delaware by International Minerals and Chemical Corporation ("IMC") in preparation for the sale of Mallinckrodt I, by Avon Products, Inc., to IMC. On January 1, 1986, Mallinckrodt I transferred its assets, with the exception of some of its New Jersey and North Carolina assets and some capital stock of certain foreign corporations, to MALCO, Inc., a Delaware corporation. On January 2, 1986, Mallinckrodt I changed its name to M.I. Holdings, Inc. M.I. Holdings, Inc. continued to be held by Avon Products, Inc. and retained the New Jersey and North Carolina assets referenced above. The new company established by IMC, MALCO, Inc. the Delaware corporation, changed its name to Mallinckrodt, Inc. ("Mallinckrodt II"). On June 17, 1996, Mallinckrodt II merged

with and into Mallinckrodt Holdings (U.S.A.), Inc. On June 19, 1996, Mallinckrodt Holdings (U.S.A.), Inc. merged with and into Mallinckrodt Group Inc. On October 16, 1996, Mallinckrodt Group Inc. was renamed Mallinckrodt Inc. ("Mallinckrodt"). In 1988, Mallinckrodt II took steps toward restructuring by incorporating three subsidiaries, one of which is Mallinckrodt. Mallinckrodt is without knowledge or information sufficient to form a belief as to the truth of the remainder of the allegations in Paragraph 1813 of the Third-Party Complaint B and, accordingly, denies those allegations leaving Third-Party Plaintiffs to their proofs.

1814. Mallinckrodt denies the allegations contained in Paragraph 1814 of Third-Party Complaint B and refers third-party plaintiffs to the corporate history set forth in Paragraphs 1812 and 1813 above.

1815. Mallinckrodt admits that IMC changed its name to IMCERA Group, Inc. in 1990, that IMCERA Group, Inc. changed its name to Mallinckrodt Group Inc. in 1996, that Mallinckrodt Group Inc. changed its name to Mallinckrodt Inc., a New York corporation in 1996, and that Mallinckrodt Inc. was a New York company headquartered in Missouri. Mallinckrodt denies the remainder of the allegations contained in Paragraph 1815 of Third-Party Complaint B.

1816. Mallinckrodt admits that the Mallinckrodt Site abuts the Saddle River. Mallinckrodt is without knowledge or information sufficient to form a belief as to the truth of the remainder of the allegations in Paragraph 1816 of the Third-Party Complaint B and, accordingly, denies those allegations leaving Third-Party Plaintiffs to their proofs.

1817. Mallinckrodt is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 1817 of the Third-Party Complaint B with respect to whether the Mallinckrodt Site flooded during heavy rains and, accordingly, denies those allegations leaving Third-Party Plaintiffs to their proofs. Mallinckrodt denies the remainder of the allegations contained in Paragraph 1817 of the Third-Party Complaint B.

1818. Mallinckrodt admits that sodium propionate, calcium propionate and sodium acetate were manufactured at the Mallinckrodt Site prior to 1973. Mallinckrodt denies the remainder of the allegations contained in Paragraph 1818 of Third-Party Complaint B.

1819. Mallinckrodt admits that various materials were handled, processed, blended, produced, utilized, and/or stored at

the Mallinckrodt Site. Mallinckrodt is without knowledge or information sufficient to form a belief as to the truth of the remainder of the allegations in Paragraph 1819 of the Third-Party Complaint B and, accordingly, denies those allegations leaving Third-Party Plaintiffs to their proofs.

1820. Mallinckrodt admits that the allegations contained in Paragraph 1820 of the Third-Party Complaint B come from the alleged nexus documents that Third-Party Plaintiffs posted on February 15, 2010. Mallinckrodt is unable to verify the source of the alleged nexus documents and is otherwise without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 1820 of the Third-Party Complaint B and, accordingly, denies those allegations leaving Third-Party Plaintiffs to their proofs.

1821. Mallinckrodt admits that, in 1973, a fire destroyed a portion of the Mallinckrodt Site. Mallinckrodt is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 1821 of the Third-Party Complaint B and, accordingly, denies those allegations leaving Third-Party Plaintiffs to their proofs.

1822. Mallinckrodt admits that the allegations contained on Paragraph 1822 of the Third-Party Complaint B come from the alleged nexus documents that Third-Party Plaintiffs posted on February 15, 2010. Mallinckrodt is unable to verify the source of the alleged nexus documents and is otherwise without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 1822 of the Third-Party Complaint B and, accordingly, denies those allegations leaving Third-Party Plaintiffs to their proofs.

1823. Mallinckrodt is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 1823 of the Third-Party Complaint B and, accordingly, denies those allegations leaving Third-Party Plaintiffs to their proofs.

1824. Mallinckrodt denies the allegations contained in Paragraph 1824 of Third-Party Complaint B as the Mallinckrodt plant ceased operations in 1978 and all tanks containing acetic acid were emptied prior to the alleged fish kill.

1825. Mallinckrodt denies the allegations contained in Paragraph 1825 of Third-Party Complaint B.

1826. Mallinckrodt admits that on or about September 15, 2003, EPA sent a General Notice Letter to Mallinckrodt Inc., a Delaware corporation, which is not the same corporate entity that third-party plaintiffs refer to in the Third-Party Complaint B as Mallinckrodt 2. Mallinckrodt neither admits nor denies the remainder of the allegations in Paragraph 1826 of the Third-Party Complaint B as the General Notice Letter speaks for itself.

1827. Mallinckrodt denies that Mallinckrodt 2 is a party to an Administrative Order on Consent, CERCLA Docket No. 02-2004-2001, but Mallinckrodt admits that Mallinckrodt Inc., a Delaware corporation is a party to an Administrative Order on Consent, CERCLA Docket No. 02-2004-2001. Mallinckrodt neither admits nor denies the remainder of the allegations in Paragraph 1827 of the Third-Party Complaint B as the terms of the Administrative Order on Consent speak for themselves.

1828. Mallinckrodt denies the allegations contained in Paragraph 1828 of Third-Party Complaint B.

FIRST COUNT

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

3446. Mallinckrodt repeats and makes a part hereof its responses to the allegations contained in the preceding paragraphs as if fully set forth at length herein.

3447. The allegations in paragraph 3447 of the Third-Party Complaint B express a legal opinion the accuracy of which Mallinckrodt is not required to admit or deny herein. To the extent a response is required Mallinckrodt denies the allegations that pertain to it in paragraph 3447 of the Third-Party Complaint B. Mallinckrodt is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 3447 pertaining to the other Third-Party Defendants.

3448. The allegations in paragraph 3448 of the Third-Party Complaint B express a legal opinion the accuracy of which Mallinckrodt is not required to admit or deny herein. To the extent a response is required, Mallinckrodt submits that the New Jersey Spill Compensation and Control Act, N.J.S.A. 58:10-23.11.f.a.(2)(a) speaks for itself.

3449. Mallinckrodt denies that Maxus and Tierra are entitled to contribution from Mallinckrodt to recover a proportionate share of any cleanup and removal costs or damages, if any, for which Maxus or Tierra may be found liable under the Spill Act in this lawsuit. Mallinckrodt is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 3449 pertaining to the other Third-Party Defendants.

3450. The allegations in paragraph 3450 of the Third-Party Complaint B express a legal opinion the accuracy of which Mallinckrodt is not required to admit or deny herein. To the extent a response is required, Mallinckrodt is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 3450 and, accordingly, denies those allegations.

3451. Mallinckrodt denies that Maxus and Tierra are entitled to contribution from Mallinckrodt to recover a proportionate share of any cleanup and removal costs that Maxus or Tierra have incurred and will incur in the future. Mallinckrodt is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 3451 pertaining to the other Third-Party Defendants.

WHEREFORE, Mallinckrodt demands dismissal of the Third-Party Complaint "B" with prejudice, costs of litigation, attorney's fees, and for such other costs as the Court deems just.

SECOND COUNT
(Statutory Contribution)

3452. Mallinckrodt repeats and makes a part hereof its responses to the allegations contained in the preceding paragraphs as if fully set forth at length herein.

3453. Mallinckrodt denies that Maxus and Tierra are entitled to contribution from Mallinckrodt, pursuant to the New Jersey statutory provisions for contribution (including N.J.S.A. 2A:53A-1 et seq.), for all or a proportionate share of response costs, cleanup and removal costs, damages, or other loss or harm, if any, for which Maxus or Tierra may be held liable, or which they have incurred or will incur in the future, relating to the Newark Bay Complex. Mallinckrodt is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 3453 pertaining to the other Third-Party Defendants.

WHEREFORE, Mallinckrodt demands dismissal of the Third-Party Complaint "B" with prejudice, costs of litigation, attorney's fees, and for such other costs as the Court deems just.

AFFIRMATIVE DEFENSES

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 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 publicly 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 as necessary and, if required, under the direct oversight of state and/or federal agencies in conformance 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:

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-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-FORTH 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

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.

FIFTY-SIXTH AFFIRMATIVE DEFENSE

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.

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.

DAY PITNEY LLP
Attorneys for Third-Party Defendant
Mallinckrodt Inc.

By:



William S. Hatfield
A Member of the Firm


DATED: March 17, 2010

DESIGNATION OF TRIAL COUNSEL

William S. Hatfield, Esq. and Camille V. Otero, Esq. are hereby designated by Mallinckrodt Inc. as trial counsel.

DAY PITNEY LLP
Attorneys for Third-Party Defendant
Mallinckrodt Inc.

By:



William S. Hatfield
A Member of the Firm

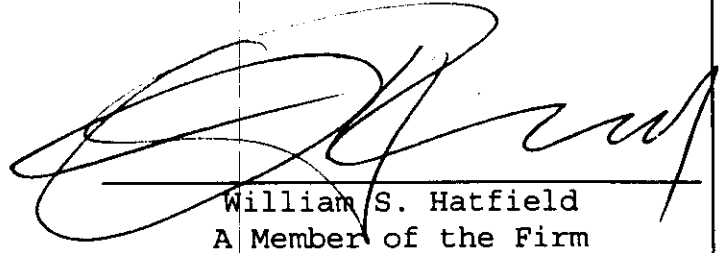
Dated: March 17, 2010

CERTIFICATION

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) Because 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.

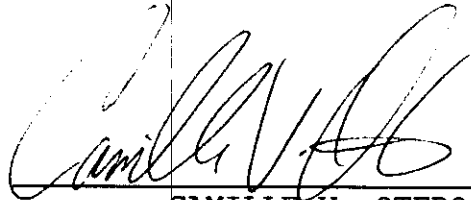


William S. Hatfield
A Member of the Firm

DATED: March 17, 2010

CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of the within Answer, Affirmative Defenses, R. 4:5-1 Certification and Designation of Trial Counsel of Mallinckrodt Inc. was served upon all counsel of record as set forth on the attached service list by timely posting the above-referenced pleadings on the Electronic Case Management Platform NJDEP, et al. v. OCC, et al.; Docket No. ESX-L-9868-05 (PASR) website, or by U.S. mail to those counsel of record who have not consented to electronic service.



CAMILLE V. OTERO

DATED: March 17, 2010

Third-Party Defendants for Regular Service as of February 21, 2010

Defendant Name	Case No.	Attorney Name
Borough of Hasbrouck Heights	A	Richard J. Dewland Coffey & Associates 465 South Street Morristown, NJ 07960 973.539.4500 rjd@coffeylaw.com
City of Orange	A	John P. McGovern Assistant City Attorney City of Orange Township 29 North Day St. Orange, NJ 07050 973.266.4197 973.674.2021 - fax jmcgovern@ci.orange.nj.us
Passaic Pioneers Properties Company	B	John A. Daniels Daniels & Daniels LLC 6812 Park Ave. Guttenberg, NJ 07093 202.868.1868 201.868.2122 - fax jad1903@gmail.com
Township of Hillside	A	Christine M. Burgess Township Attorney Hillside Township Municipal Bldg. 1409 Liberty Ave. Hillside, NJ 07205 973.926.3000 973.926.9232 - fax
Township of Irvington	A	Gustavo Garcia Municipal Attorney Township of Irvington Irvington Municipal Building Civic Square Irvington, NJ 07111 973.399.6637 973.399.6723 - fax