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NEW JERSEY DEPARTMENT OF  
ENVIRONMENTAL PROTECTION, THE  
COMMISSIONER OF THE NEW JERSEY  
ENVIRONMENTAL PROTECTION  
AGENCY, and THE ADMINISTRATOR OF  
THE NEW JERSEY SPILL  
COMPENSATION FUND,

Plaintiffs,

vs.

OCCIDENTAL CHEMICAL  
CORPORATION, TIERRA SOLUTIONS,  
INC., MAXUS ENERGY CORPORATION,  
REPSOL YPF, S.A., YPF, S.A., PF  
HOLDINGS, INC. and CLH HOLDINGS,

Defendants,

MAXUS ENERGY CORPORATION and  
TIERRA SOLUTIONS, INC.,

Third-Party Plaintiffs,

vs.

3M COMPANY, A.C.C., INC., ACH FOOD  
COMPANIES, INC., ACTIVE OIL  
SERVICES, ADCO CHEMICAL COMPANY,  
AGC CHEMICALS AMERICAS, INC.,  
ALDEN-LEEDS, INC., ALLIANCE  
CHEMICAL, INC., ALUMAX MILL  
PRODUCTS, INC., AMCOL REALTY CO.,  
AMERICAN LINKS AND COATINGS

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION: ESSEX COUNTY

DOCKET NO. L-9868-05 (PASR)

CIVIL ACTION

**REVERE SMELTING & REFINING  
CORPORATION'S ANSWER TO THIRD-  
PARTY COMPLAINT "B"**

CORPORATION, APEXICAL, INC.,  
APOLAN INTERNATIONAL, INC.,  
ARKEMA, INC., ASHLAND INC.,  
ASHLAND INTERNATIONAL HOLDINGS,  
INC., ASSOCIATED AUTO BODY &  
TRUCKS, INC., ATLAS REFINERY, INC.,  
AUTOMATIC ELECTRO-PLATING CORP.,  
AKZO NOBEL COATINGS, INC., BASF  
CATALYSTS LLC, BASF CONSTRUCTION  
CHEMICALS INC., BASF CORPORATION,  
BAYER CORPORATION, BEAZER EAST,  
INC., BELLEVILLE INDUSTRIAL  
CENTER, BENJAMIN MOORE &  
COMPANY, BEROL CORPORATION, B-  
LINE TRUCKING, INC., BORDEN &  
REMINGTON CORP., C.S. OSBORNE &  
CO., CAMPBELL FOUNDRY COMPANY,  
CASCHEM, INC., CBS CORPORATION,  
CELANESE LTD., CHEMICAL  
COMPOUNDS INC., CHEMTURA  
CORPORATION, CLEAN EARTH OF  
NORTH JERSEY, INC., COSMOPOLITAN  
GRAPHICS CORPORATION, CIBA  
CORPORATION, COLTEC INDUSTRIES  
INC., COLUMBIA TERMINALS, INC.,  
COMO TEXTILE PRINTS, INC., CONAGRA  
PANAMA, INC.; CONOPCO, INC.,  
CONSOLIDATED RAIL CORPORATION,  
COOK & DUNN PAINT CORPORATION,  
COSAN CHEMICAL CORPORATION,  
COVANTA ESSEX COMPANY, CRODA,  
INC., CRUCIBLE MATERIALS  
CORPORATION, CURTISS-WRIGHT  
CORPORATION, CWC INDUSTRIES, INC.,  
DARLING INTERNATIONAL, INC.,  
DAVANNE REALTY CO., DELEET  
MERCHANDISING CORPORATION,  
DELVAL INK AND COLOR,  
INCORPORATED, DILORENZO  
PROPERTIES COMPANY, L.P., E.I. DU  
PONT DE NEMOURS AND COMPANY,  
EASTMAN KODAK COMPANY, EDEN  
WOOD CORPORATION, ELAN  
CHEMICAL COMPANY, INC., EM  
SERGEANT PULP & CHEMICAL CO.,  
EMERALD HILTON DAVIS, LLC, ESSEX

CHEMICAL CORPORATION, EXXON  
MOBIL F.E.R. PLATING, INC., FINE  
ORGANICS CORPORATION, FISKE  
BROTHERS REFINING COMPANY,  
FLEXON INDUSTRIES CORPORATION,  
FLINT GROUP INCORPORATED, FORT  
JAMES CORPORATION, FOUNDRY  
STREET CORPORATION, FRANKLIN-  
BURLINGTON PLASTICS, INC.,  
GARFIELD MOLDING COMPANY, INC.,  
GENERAL CABLE INDUSTRIES, INC.;  
GENERAL DYNAMICS CORPORATION,  
GENERAL ELECTRIC COMPANY,  
GENTEK HOLDING LLC, GIVAUDAN  
FRAGRANCES CORPORATION, G. J.  
CHEMICAL CO., GOODY PRODUCTS,  
INC., GORDON TERMINAL SERVICE CO.  
OF N.J., INC., HARRISON SUPPLY  
COMPANY, HARTZ MOUNTAIN  
CORPORATION, HAVENICK  
ASSOCIATES L.P., HEXCEL  
CORPORATION, HEXION SPECIALTY  
CHEMICALS, INC., HOFFMANN-LA  
ROCHE INC., HONEYWELL  
INTERNATIONAL INC., HOUGHTON  
INTERNATIONAL INC., HUDSON TOOL &  
DIE COMPANY, INC, HY-GRADE  
ELECTROPLATING CO., ICI AMERICAS  
INC., INNOSPEC ACTIVE CHEMICALS  
LLC, INX INTERNATIONAL INK CO., ISP  
CHEMICALS INC., ITT CORPORATION,  
KEARNY SMELTING & REFINING CORP.,  
KAO BRANDS COMPANY, KOEHLER-  
BRIGITT STAR, INC., LINDE, INC.,  
LUCENT TECHNOLOGIES, INC., MACE  
ADHESIVES & COATINGS COMPANY,  
INC., MALLINCKRODT INC., MERCK &  
CO., INC., METAL MANAGEMENT  
NORTHEAST, INC., MI HOLDINGS, INC.,  
MILLER ENVIRONMENTAL GROUP, INC.,  
MORTON INTERNATIONAL, INC., N L  
INDUSTRIES, INC., NAPPWOOD LAND  
CORPORATION, NATIONAL FUEL OIL,  
INC., NATIONAL-STANDARD, LLC,  
NELL-JOY INDUSTRIES, INC., NESTLE  
U.S.A., INC., NEW JERSEY TRANSIT

CORPORATION, NEWS AMERICA, INC.,  
NEWS PUBLISHING AUSTRALIA  
LIMITED, NORPAK CORPORATION,  
NOVELIS CORPORATION, ORANGE AND  
ROCKLAND UTILITIES, INC., OTIS  
ELEVATOR COMPANY, PRC-DESOTO  
INTERNATIONAL, INC., PASSAIC  
PIONEERS PROPERTIES COMPANY,  
PFIZER INC., PHARMACIA  
CORPORATION, PHELPS DODGE  
INDUSTRIES, INC., PHILBRO, INC., PITT-  
CONSOL CHEMICAL COMPANY,  
PIVOTAL UTILITY HOLDINGS, INC., PPG  
INDUSTRIES, INC., PRC-DESOTO  
INTERNATIONAL, INC., PRAXAIR, INC.,  
PRECISION MANUFACTURING GROUP,  
LLC, PRENTISS INCORPORATED,  
PROCTER & GAMBLE MANUFACTURING  
COMPANY, PRYSMIAN  
COMMUNICATIONS CABLES AND  
SYSTEMS USA LLC, PSEG FOSSIL LLC,  
PUBLIC SERVICE ELECTRIC AND GAS  
COMPANY, PURDUE PHARMA  
TECHNOLOGIES, INC., QUALA  
SYSTEMS, INC., QUALITY CARRIERS,  
INC., RECKITT BENCKISER, INC.,  
REICHHOLD, INC., REVERE SMELTING &  
REFINING CORPORATION, REXAM  
BEVERAGE CAN COMPANY, ROMAN  
ASPHALT CORPORATION, ROYCE  
ASSOCIATES, A LIMITED PARTNERSHIP,  
R.T. VANDERBILT COMPANY, INC.,  
RUTHERFORD CHEMICALS LLC, S&A  
REALTY ASSOCIATES, INC., SCHERING  
CORPORATION, SEQUA CORPORATION,  
SETON COMPANY, SIEMENS WATER  
TECHNOLOGIES CORP. SINGER SEWING  
COMPANY SPECTRASERV, INC., STWB,  
INC., SUN CHEMICAL CORPORATION,  
SVP WORLDWIDE, LLC, TATE & LYLE  
INGREDIENTS AMERICAS, INC., TEVA  
PHARMACEUTICALS USA, INC., TEVAL  
CORP., TEXTRON INC., THE DIAL  
CORPORATION, THE DUNDEE WATER  
POWER AND LAND COMPANY, THE  
NEWARK GROUP, INC., THE OKONITE

COMPANY, INC., THE SHERWIN-WILLIAMS COMPANY, THE STANLEY WORKS, THE VALSPAR CORPORATION, THIRTY-THREE QUEEN REALTY INC., THREE COUNTY VOLKSWAGEN CORPORATION, TIDEWATER BALING CORP., TIFFANY & CO., TIMCO, INC., TRIMAX BUILDING PRODUCTS, INC., TROY CHEMICAL CORPORATION, INC., UNIVERSAL OIL PRODUCTS COMPANY, V. OTTILIO & SONS, INC., VELSICOL CHEMICAL CORPORATION, VEOLIA ES TECHNICAL SOLUTIONS, L.L.C., VERTELLUS SPECIALTIES INC., VITUSA CORP., VULCAN MATERIALS COMPANY, W.A.S. TERMINALS CORPORATION, W.A.S. TERMINALS, INC., W.C. INDUSTRIES, WHITTAKER CORPORATION, WIGGINS PLASTICS, INC., ZENECA INC.,

Third-Party Defendants.

**REVERE SMELTING & REFINING CORPORATION'S ANSWER TO  
THIRD-PARTY COMPLAINT "B"**

Third-Party Defendant Revere Smelting & Refining Corporation ("RSR"), 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. (collectively, "Third-Party Plaintiffs"), as follows:

**GENERALLY**

RSR 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)**

1-15. RSR 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)**

16.-18. No response is required pursuant to CMO V.

**AS TO THE THIRD-PARTY DEFENDANTS**

**(Paragraphs 19 through 210)**

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

163. RSR admits the allegations contained in Paragraph 163.

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

**AS TO DEFINITIONS**

**(Paragraphs 211 through 236)**

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

**AS TO FACTUAL ALLEGATIONS**

**(Paragraphs 237 through 3445)**

237-3445. The referenced pleadings relate to parties other than RSR and speak for themselves. No response is required pursuant to CMO V, except to the extent set forth below.

2544. RSR admits that it operated a secondary lead smelting facility at 387 Avenue P in Newark, Essex County, New Jersey (the “Site”) from April 1970 to December 1972 and, upon information and belief, Revere Smelting and Refining Corporation (of New Jersey)

("Revere NJ"), a different company than RSR, operated a secondary lead smelting facility at the Site from 1965 to April 1970. The remaining allegations in this Paragraph are denied.

2545. Upon information and belief, it is only admitted that Revere NJ, a different company than RSR, operated a secondary lead smelting facility at the Site from 1965 to April 1970. The remaining allegations in this Paragraph are denied.

2546. Admitted.

2547. Upon information and belief, admitted.

2548. RSR is without knowledge or information sufficient to form a belief as to the truth of the matter asserted in Paragraph 2548 and leaves Third-Party Plaintiffs to their proofs with respect to same.

2549. Denied.

2550. Admitted only that, at certain times, batteries were disassembled at the Site. The remaining allegations in this paragraph are denied.

2551. Denied.

2552. RSR is without knowledge or information sufficient to form a belief as to the truth of the matter asserted in Paragraph 2552 and leaves Third-Party Plaintiffs to their proofs with respect to same.

2553. The allegations in Paragraph 2553 refer to a document which speaks for itself and RSR refers to the document for its terms. Any allegations inconsistent with the document are denied.

2554. The allegations in Paragraph 2554 constitute conclusions of law to which no response is required.

**AS TO FIRST COUNT**

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

3446. RSR incorporates by reference as if fully set forth herein its responses as asserted in Paragraphs 1 through 3445 herein.

3447-3448. RSR is without knowledge or information sufficient to form a belief as to the truth of the matters asserted in Paragraphs 3447 through 3448 and leaves Third-Party Plaintiffs to their proofs with respect to same.

3449-3451. RSR denies that it is liable to Third-Party Plaintiffs for contribution. By way of further response, RSR is without knowledge or information sufficient to form a belief as to the truth of the remaining matters asserted in Paragraphs 3449 through 3451 and leaves Third-Party Plaintiffs to their proofs with respect to same.

WHEREFORE, RSR demands that judgment be entered in its favor dismissing the Third-Party Complaint "B" with prejudice, and awarding costs, attorney fees and such other relief the Court deems just and proper.

**AS TO SECOND COUNT**

**Statutory Contribution**

3452. RSR incorporates by reference as if fully set forth herein its responses asserted in Paragraphs 1 through 3451 herein.

3453. RSR denies that it is liable to Third-Party Plaintiffs for contribution. By way of further response, RSR is without knowledge or information sufficient to form a belief as to the truth of the remaining matters asserted in Paragraphs 3453 and leaves Third-Party Plaintiffs.



WHEREFORE, RSR demands that judgment be entered in its favor dismissing the Third-Party Complaint “B” with prejudice, and awarding costs, attorney fees and such other relief the Court deems just and proper.

**FIRST AFFIRMATIVE DEFENSE**

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

**SECOND AFFIRMATIVE DEFENSE**

2. RSR 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**

3. 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**

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

**FIFTH AFFIRMATIVE DEFENSE**

5. Third-Party Plaintiffs have no right of contribution against RSR under the WPCA.

**SIXTH AFFIRMATIVE DEFENSE**

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

#### **SEVENTH AFFIRMATIVE DEFENSE**

7. The Third-Party Complaint is barred, in whole or in part, because Third-Party Plaintiffs have failed to meet the procedural and/or substantive requirements entitling them to sue RSR under New Jersey's Environmental Rights Act, N.J.S.A. 2A:35A-1, et seq.

#### **EIGHTH AFFIRMATIVE DEFENSE**

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

#### **NINTH AFFIRMATIVE DEFENSE**

9. 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**

10. 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**

11. Third-Party Plaintiffs are mere volunteers for remediation of the environmental contamination for which they claim contribution and/or other relief from RSR. Consequently, the claims in the Third-Party Complaint are barred, in whole or in part.

#### **TWELFTH AFFIRMATIVE DEFENSE**

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

#### **THIRTEENTH AFFIRMATIVE DEFENSE**

13. RSR 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**

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

#### **FIFTEENTH AFFIRMATIVE DEFENSE**

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

#### **SIXTEENTH AFFIRMATIVE DEFENSE**

16. 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**

17. Third-Party 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**

18. At all relevant times, RSR 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**

19. The claims asserted against Third-Party Defendant in the Third-Party Complaint are barred because at all relevant times RSR exercised due care with respect to hazardous substances, if any, that may have been handled at the Site, 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 RSR 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**

20. 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**

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

**TWENTY-SECOND AFFIRMATIVE DEFENSE**

22. Third-Party Plaintiffs' claims against RSR 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**

23. Third-Party Plaintiffs' claims are barred in whole or in part by the doctrines of accord and satisfaction, waiver, consent, release and/or assumption of risk.

**TWENTY-FOURTH THIRD AFFIRMATIVE DEFENSE**

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

**TWENTY-FIFTH AFFIRMATIVE DEFENSE**

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

**TWENTY-SIXTH AFFIRMATIVE DEFENSE**

26. 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**

27. Third-Party Plaintiffs' claims are barred, in whole or in part, by the doctrines of collateral estoppel, res judicata, and/or judicial estoppel including in connection with prior findings as to Third-Party Plaintiffs' intentional misconduct.

**TWENTY-EIGHTH AFFIRMATIVE DEFENSE**

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

**TWENTY-NINTH AFFIRMATIVE DEFENSE**

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

**THIRTIETH AFFIRMATIVE DEFENSE**

30. RSR did not own or operate a "Major Facility" as defined by the Spill Act or the WPCA.

**THIRTY-FIRST AFFIRMATIVE DEFENSE**

31. 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**

32. 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" pursuant to the Spill Act.

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

33. 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**

34. 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**

35. RSR denies that Third-Party Plaintiffs have suffered any harm whatsoever, but in the event that they did suffer any form of injury or damages cognizable under applicable Environmental Law, such injury was caused by the intervening acts, omissions, or superseding acts of persons or entities over whom RSR exercised no control and for whose conduct RSR was not responsible including, without limitation, unpermitted and storm event discharges from publically owned treatment works.

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

36. 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 RSR, 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**

37. Although RSR denies that it is liable for the contamination described in Third-Party Complaint, in the event it is found liable, RSR 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 or third-party defendant in this action that would be liable to Third-Party Plaintiffs.

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

38. 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**

39. Third-Party Plaintiffs' claims are barred to the extent that the conduct of RSR that allegedly gave 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**

40. The disposal of waste, if any, which allegedly originated from RSR, 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 RSR cannot be found retroactively liable.

**FORTY-FIRST AFFIRMATIVE DEFENSE**

41. Any discharge that allegedly originated from RSR, 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 RSR cannot be found retroactively liable.

**FORTY-SECOND AFFIRMATIVE DEFENSE**

42. 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**

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

**FORTY-FOURTH AFFIRMATIVE DEFENSE**

44. Third-Party Plaintiffs' claims are barred due to their own conduct in unilaterally, and without notice to RSR, 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**

45. RSR's liability to Third-Party Plaintiffs, if any, is limited to the properly apportioned portion of the divisible harm attributable to RSR pursuant to the Spill Act and

pursuant to legal principles enunciated more generally in Burlington Northern and Santa Fe Railway Co. v. United States, 129 S.Ct. 1870 (2009) and other comparable decisional law.

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

46. Third-Party Plaintiffs cannot assert contribution claims against RSR because the discharges for which the Plaintiffs are seeking relief are different from the alleged discharges asserted against RSR in the Third-Party Complaint.

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

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

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

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

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

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

#### **FIFTIETH AFFIRMATIVE DEFENSE**

50. 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 RSR are barred to the extent of any legal extinguishments of actual or potential claims by the Plaintiffs against RSR 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 RSR. Examples of legal extinguishments that are or may be applicable to RSR include, with respect to each such site:

- a. Any release or covenant not to sue granted by Plaintiffs to RSR;
- b. Any settlement or other compromise between Plaintiffs and RSR;
- c. Any expiration of the statute of limitations or statute of repose governing Plaintiffs' right to maintain a claim against RSR;
- 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 RSR, 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 RSR, directly or indirectly, of any "No Further Action" (a/k/a "NFA") determination, "Negative Declaration," or similar determination.

#### **FIFTY FIRST AFFIRMATIVE DEFENSE**

51. Third-Party Plaintiffs' claims are barred because the relief sought against RSR, were it claimed directly by Plaintiffs, would amount to a "taking" of RSR'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**

52. 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**

53. Without admitting liability, RSR 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 FOURTH AFFIRMATIVE DEFENSE**

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

### **FIFTY FIFTH AFFIRMATIVE DEFENSE**

55. RSR 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.

### **DESIGNATION OF TRIAL COUNSEL**

Pursuant to R. 4:25-4, Nicholas M. Kouletsis is designated as trial counsel on behalf of RSR in this matter.

#### **PEPPER HAMILTON LLP**

A Pennsylvania LLP

Suite 400

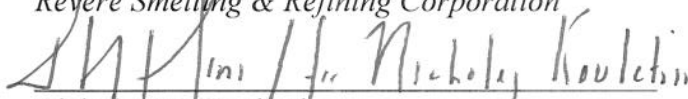
301 Carnegie Center

Princeton, NJ 08543-5276

(609) 452-0808

*Attorneys for Defendant*

*Revere Smelting & Refining Corporation*



Nicholas M. Kouletsis

Anthony J. Destribats

Date: November 20, 2009

**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 said liability is denied by RSR, then all or some of the non-parties listed on the most recent 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.

**PEPPER HAMILTON LLP**

A Pennsylvania LLP

Suite 400

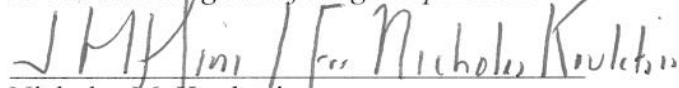
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*Attorneys for Defendant*

*Revere Smelting & Refining Corporation*



Nicholas M. Kouletsis

Anthony J. Destribats

Date: November 20, 2009

**CERTIFICATION OF SERVICE PURSUANT TO RULE 4:6-1 AND RULE 1:5-3**

Anthony J. Destribats, of full age, certifies as follows:

1. I am an attorney-at-law admitted to practice in the State of New Jersey and a member of the firm of Pepper Hamilton LLP, attorneys for Third-Party Defendant Revere Smelting and Refining Corporation (“RSR”).

2. On the date set forth below, which is within the time period allowed for service under CMO V, ¶9(c)(ii) and in accordance with CMO V and CMO VI, I caused to be filed via regular mail with the Clerk of the Superior Court, Essex County Courthouse, 50 West Market Street, Newark, NJ 07102, an original and two copies of Third-Party Defendant RSR’s Answer to Third-Party Complaint “B,” Affirmative Defenses, Designation of Trial Counsel, and Certification, and Case Information Statement.

3. On the date set forth below, in accordance with CMO V and CMO VI, I caused to be electronically served, by posting on [www.sfile.comnjdepvocc](http://www.sfile.comnjdepvocc), a true and accurate copy of Third-Party Defendant RSR’s Answer to Third-Party Complaint “B,” Affirmative Defenses, Designation of Trial Counsel, and Certification, and Case Information Statement upon all parties that have consented to electronic service.

4. On the date set forth below, in accordance with CMO V and CMO VI, I caused to be served via regular mail, a true and accurate copy of Third-Party Defendant RSR’s Answer to Third-Party Complaint “B,” Affirmative Defenses, Designation of Trial Counsel, and Certification, and Case Information Statement upon Counsel of Record for parties that have not

consented to electronic service, listed on the attached "Third-Party Defendants for Regular Service as of November 17, 2009."

**PEPPER HAMILTON LLP**

A Pennsylvania LLP

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301 Carnegie Center

Princeton, NJ 08543-5276


(609) 452-0808

*Attorneys for Defendant*

*Revere Smelting & Refining Corporation*

  
\_\_\_\_\_  
Nicholas M. Kouletsis

Anthony J. Destribats

  
\_\_\_\_\_  
Anthony J. Destribats

Dated: November 20, 2009

**THIRD-PARTY DEFENDANTS FOR REGULAR SERVICE**  
**AS OF NOVEMBER 17, 2009**

<b>NAMED THIRD-PARTY DEFENDANT</b>	<b>THIRD- PARTY COMPLAINT</b>	<b>NOTICE OF APPEARANCE: COUNSEL OF RECORD</b>
Celanese Ltd.	B	Anthony J. Reitano Herold Law, PA 25 Independence Boulevard Warren, NJ 07059-6747 908.647.1022 908.647.7721 – fax <a href="mailto:areitano@heroldlaw.com">areitano@heroldlaw.com</a>
City of Clifton	A	Thomas M. Egan Assistant Municipal Attorney City of Clifton Law Department 900 Clifton Avenue Clifton, NJ 07013 973.470.5817 973.470.5254 – fax <a href="mailto:tegan@cliftonnj.org">tegan@cliftonnj.org</a>
City of Orange	A	John P. McGovern Assistant City Attorney City of Orange Township 29 North Day Street Orange, NJ 07050 973.266.4197 973.674.2021 – fax <a href="mailto:jmcgovern@ci.orange.nj.us">jmcgovern@ci.orange.nj.us</a>
Clean Earth of North Jersey, Inc.	B	Eric S. Aronson Greenberg Traurig, LLP 200 Park Avenue Florham Park, NJ 07932 973.360.7900 973.301.8410 – fax <a href="mailto:aronson@gtlaw.com">aronson@gtlaw.com</a>



NAMED THIRD-PARTY DEFENDANT	THIRD- PARTY COMPLAINT	NOTICE OF APPEARANCE: COUNSEL OF RECORD
DiLorenzo Properties Company, L.P.	B	Steven R. Gray Water McPherson McNeill, P.C. 300 Lighting Way PO Box 1560 Secaucus, NJ 07096 201.863.4400 201.863.2866 – fax <a href="mailto:sgray@lawwmm.com">sgray@lawwmm.com</a>
Passaic Pioneers Properties Company	B	John A. Daniels Daniels & Daniels LLC 6812 Park Avenue Guttenberg, NJ 07093 202.868.1868 201.868.2122 – fax <a href="mailto:jad1903@gmail.com">jad1903@gmail.com</a>
Township of Cranford	A	Carl R. Woodward, III Brian H. Fenlon Carella Byrne Bain Gilfillan Cecchi, Stewart & Olstein 5 Becker Farm Road Roseland, NJ 07068 973.994.1700 973.994.1744 <a href="mailto:cwoodward@carellabyrne.com">cwoodward@carellabyrne.com</a> <a href="mailto:bfenlon@carellabyrne.com">bfenlon@carellabyrne.com</a>
Vitusa Corp.	B	Gerald Poss Gerald Poss, P. A. & Associates 58 Vose Avenue South Orange, NJ 07079-2026 973.762.6400 <a href="mailto:gpossinc@aol.com">gpossinc@aol.com</a>