

08002-00192-LW

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

Plaintiffs,

v.

OCCIDENTAL CHEMICAL CORPORATION; *et*
al.,

Defendants.

And

MAXUS ENERGY CORPORATION; and
TIERRA SOLUTIONS, INC.,

Defendants/Third Party Plaintiffs,

v.

ROYCE ASSOCIATES, LLP; *et al.*,

Third Party Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – ESSEX COUNTY
DOCKET NO.: ESX-L-9868-05 (PASR)

Civil Action

**ROYCE ASSOCIATES, A LIMITED
PARTNERSHIP'S ANSWER TO THIRD
PARTY COMPLAINT "B"**

Third-Party Defendant, Royce Associates, A Limited Partnership, 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".

GENERALLY

Third-Party Defendant denies each and every allegation contained in the 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 the Third-Party Complaint "B".

1-165. Third-Party Defendant denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraphs 1-165.

166. Admitted.

167-2562. Third-Party Defendant denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraphs 167-2562.

2563. Denied.

2564. Denied.

2565. Denied.

2566. Denied.

2567. Denied.

2568. Denied.

2569. Denied as pled.

2570. Denied.

2571. Denied.

2572. Denied.

2573. Denied.

2574. Denied.

2575. Denied.

2576. Denied.

2577. Royce Associates is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 2577 of the Third-Party Complaint "B", and therefore denies the same.

2578. Denied.

2579-3445. The allegations contained in Paragraphs 2579-3445 relate to other Third-Party Defendants, do not specifically relate to Royce Associates and pursuant to Case Management Order V do not require an answer from Royce Associates.

FIRST COUNT

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

3446. Third-Party Defendant repeats and incorporates by reference its responses and denials as asserted in Paragraphs 1 through 3445 of the Third-Party Complaint, as if fully set forth at length herein.

3447. Denied. To the extent the allegations of Paragraph 3447 are directed to Third-Party Defendant, Third-Party Defendant denies that it is a discharger and/or "a person in any way responsible" for the discharge of Hazardous Substances into the Newark Bay Complex, as set forth in the Third-Party Complaint.

3448. Paragraph 3448 quotes from the New Jersey Spill Compensation and Control Act, N.J.S.A. 58:10-22.11f.a.(2)(a) and as such, Royce Associates refers to the Act for specificity as to its terms. Royce Associates denies liability under the Spill Act.

3449. Denied. To the extent the allegations of Paragraph 3449 are directed to Third-Party Defendant, Third-Party Defendant Royce Associates denies that it is liable to the Third-Party Plaintiffs for contribution under the Spill Compensation and Control Act.

3450. Denied. Third-Party Defendant is without knowledge or information sufficient to form a belief as to the truth of the matters stated in Paragraph 3450 of the Third-Party Complaint, and therefore denies the same.

3451. Denied. To the extent the allegations of Paragraph 3451 are directed Third-Party Defendant, Third-Party Defendant denies that it is liable to the Third-Party Plaintiffs for contribution.

WHEREFORE, Third-Party Defendant Royce Associates demands dismissal of the Third-Party Complaint "B" with prejudice, costs of litigation, attorneys' fees, and for such other relief as the court deems equitable and just.

AS TO SECOND COUNT

(STATUTORY CONTRIBUTION)

3452. Third-Party Defendant Royce Associates repeats and incorporates by reference its responses and denials as asserted in the Paragraphs 1 -3451 of the Third-Party Complaint as if fully set forth at length herein.

3453. Denied. To the extent the allegations of Paragraph 3453 are directed to Third-Party Defendant, Third-Party Defendant denies that it is liable to Third-Party Plaintiffs for statutory contribution.

WHEREFORE, Third-Party Defendant Royce Associates demands dismissal of the Third-Party Complaint "B" with prejudice, costs of litigation, attorneys' fees, and for such other relief as the court deems equitable and just.

AFFIRMATIVE DEFENSES

1. Answering Third Party Defendant denies that it is liable as the successor to RII and denies that it is liable as a successor to the environmental liabilities related to the Royce Chemical Site.

2. Third Party Plaintiffs failed to state a claim upon which relief may be granted, and the Answering Third Party Defendant reserves the right to move to dismiss.

3. Third Party Defendant is not a discharger or a person in any way responsible for a discharge of a hazardous substance under the Spill Act.

4. 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.

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

6. 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 cannot be afforded the existing parties pursuant to R. 4:28-1.

7. Third Party Plaintiffs' claims are barred, in whole or in part, by applicable statutes of limitation or by the doctrine of laches.

8. Third Party Plaintiffs' claims are not ripe for adjudication.
9. Third Party Plaintiffs' claims are barred or diminished by the doctrines of release, waiver, accord and satisfaction.
10. 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 at law, such injury was caused by the intervening acts, omissions, or superseding acts of persons or entities over whom Royce Associates exercised no control and for whose conduct Royce Associates is not responsible.
11. Third Party Plaintiffs' claims are barred by the entire controversy doctrine and/or the principles of res judicata and collateral estoppel.
12. Third Party Plaintiffs' claims are barred insofar as the acts and conduct, as alleged in the Third Party Complaint, conformed to and were pursuant to laws, statutes, rules, regulations and industry standards existing at all material times alleged in the Third Party Complaint.
13. Some or all of the Third Party Plaintiffs do not have standing to sue.
14. Third Party Plaintiffs do not have a claim for contribution under the Spill Act for any cleanup and removal costs, damages or other form of monetary relief.
15. Third Party Plaintiffs suffered no losses or injuries that were proximately caused by Royce Associates.
16. The discharges of hazardous substances, if any, from the Royce Chemical Site did not cause any tangible or cognizable injury to the Passaic River or the Newark Bay Complex.
17. Third Party Defendant invokes each and every applicable federal and/or state common law, statutory and constitutional defense available to it as Royce Associates' investigation and defense of this matter continues.

18. Third Party Defendant incorporates by reference any affirmative defense asserted by other parties in this action to the extent such affirmative defenses are defenses to Royce Associates' claims and do not impose liability on Royce Associates.

19. Third Party Defendant reserves the right to assert additional defenses that may be pertinent to Third Party Plaintiffs' claims when the precise nature of such claims are ascertained through discovery and based upon facts developed as this matter progresses.

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

21. 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.

22. 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.

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

24. 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.

25. 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, claims by Third-Party Plaintiffs are barred under the collateral source doctrine or its equitable equivalent.

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

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

28. 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.

29. Although Third-Party Defendant denies that it is liable for the contamination described in the 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.

30. 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.

31. Third-Party Plaintiffs' claims are barred to the extent that the conduct of Third-Party Defendant 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, due 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.

32. 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.

33. 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.

34. 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.

35. Third-Party Plaintiffs' claims are barred to the extent the State of New Jersey would be barred from asserting those claims directly against Royce Associates for the damages sought in its Amended Complaint.

36. 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.

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

38. Third-Party Plaintiffs suffered no losses or injuries that were proximately caused by Royce Associates.

39. 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' failure to incur costs authorized by the Spill Act and Third-Party Plaintiffs' failure to direct cleanup and removal activities in accordance with the National Contingency Plan to the greatest extent possible.

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

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

42. Royce Associates' liability to Third-Party Plaintiffs, if any, is limited to the Spill Act and contribution claims and excludes any such claims which may properly be apportioned to parties pursuant to Burlington Northern and Sante Fe Railway Co., et al. v. United States, et al., 129 S. Ct. 1870 (2009), and other comparable decision of law.

43. Third-Party Plaintiffs cannot seek contribution under the Joint Tortfeasors Contribution Law because Royce Associates 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.

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

WHEREFORE, Third-Party Defendant, Royce Associates respectfully requests that the Court enter an Order dismissing the Third-Party Complaint "B" with prejudice, and awarding costs, attorneys' fees and other relief the court deems equitable and just.

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 Royce Associates respectfully requests that the Court enter an Order dismissing the Third-Party Complaint "B" with prejudice, and awarding costs, attorneys' fees and other relief the court deems equitable and just.

CERTIFICATION PURSUANT TO RULE 4:5-1(b)(2)

Pursuant to R. 4:5-1(b)(2), the undersigned hereby certifies that:

(a) The matter in controversy is not the subject of any other action pending in any court or of a pending arbitration proceeding and no action or arbitration proceeding is contemplated by the undersigned; and

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

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

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

Royce Associates further certifies that confidential personal identifiers have been redacted from documents now submitted to the court, and will be redacted from all documents submitted in the future in accordance with Rule 1:38-7(b).

MARSHALL DENNEHEY, WARNER,
COLEMAN & GOGGIN

By: /s/ LILA WYNNE
LILA WYNNE, ESQUIRE
Attorney for Third Party Defendant,
Royce Associates, A Limited Partnership

Dated: February 15, 2010

CERTIFICATION OF SERVICE

I, LILA WYNNE, an attorney-of-law of the State of New Jersey, do hereby state upon my oath that I have served the Answer of Royce Associates, LLC to Third Party Complaint "B" electronically via posting on Sfile upon all parties which have consented to service by posting, and upon the attached list of counsel of record by depositing the same with the United States Postal Service, and upon the Clerk of Court via overnight 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 willingly false, I am subject to punishment.

MARSHALL DENNEHEY, WARNER,
COLEMAN & GOGGIN

By: /s/ Lila Wynne
LILA WYNNE, ESQUIRE
Attorney for Third Party Defendant,
Royce Associates, A Limited Partnership

Dated: February 15, 2010

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