

Herbert B. Bennett, Esq.  
Sokol, Behot & Fiorenzo  
229 Nassau Street  
Princeton, New Jersey 08542  
609-279-0900  
Attorney for Third-Party Defendant  
The Sherwin-Williams Company

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

Defendants.

MAXUS ENERGY CORPORATION and TIERRA  
SOLUTIONS,  
INC.,

Third-Party Plaintiffs,

vs.

3M COMPANY, *et al.*,

Third-Party Defendants.

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION: ESSEX COUNTY

DOCKET NO. L-9868-05 (PASR)

CIVIL ACTION

**ANSWER AND AFFIRMATIVE  
DEFENSES TO THIRD-PARTY  
COMPLAINT "B"**

Third Party-Defendant The Sherwin-Williams Company, by way  
of Answer to the Third Party Complaint does aver and say:

### **PROCEDURAL BACKGROUND**

1. The Sherwin-Williams Company neither admits nor denies the facts set forth in paragraphs 1 through 15 of the Third-Party Complaint and leaves Third Party Plaintiffs to their proofs.

### **THE PARTIES**

#### **Third-Party Plaintiffs**

2. The Sherwin-Williams Company incorporates by reference herein all answers to paragraphs 1-15 of the Third Party Complaint, inclusive.

3. The Sherwin-Williams Company neither admits nor denies the facts set forth in paragraphs 16 through 18 of the Third-Party Complaint and leaves Third Party Plaintiffs to their proofs.

#### **Third-Party Defendants**

4. Paragraphs 18 through 187, inclusive, do not apply to The Sherwin-Williams Company, and the Company leaves Third-Party Plaintiffs to their proofs.

5. The Sherwin-Williams Company admits the allegations of paragraph 188 of the Third Party Complaint.

6. Paragraphs 189 through 209, inclusive, do not apply to The Sherwin-Williams Company, and the Company leaves Third-Party Plaintiffs to their proofs.

7. The Sherwin-Williams Company neither admits nor denies the facts set forth in paragraph 210 of the Third-Party Complaint and leaves Third Party Plaintiffs to their proofs.

#### **DEFINITIONS**

8. The Sherwin-Williams Company incorporates by reference herein all answers to paragraphs 1-210 of the Third Party Complaint, inclusive.

9. The Sherwin-Williams Company neither admits nor denies the definitions set forth in paragraphs 211 through 236 of the Third-Party Complaint and leaves Third Party Plaintiffs to their proofs.

#### **FACTUAL ALLEGATIONS**

##### Commercial Sites

80 Lister Avenue

10. The Sherwin-Williams Company incorporates by reference herein all answers to paragraphs 1-236 of the Third Party

Complaint, inclusive.

11. The Sherwin-Williams Company neither admits nor denies the definitions set forth in paragraphs 237 through 243 of the Third-Party Complaint and leaves Third Party Plaintiffs to their proofs.

12. Paragraphs 244 through 2642, inclusive, do not apply to The Sherwin-Williams Company, and the Company leaves Third-Party Plaintiffs to their proofs.

13. The Sherwin-Williams Company admits the allegations contained in paragraph 2643 of the Third-Party Complaint.

14. The Sherwin-Williams Company admits its operations on the site began in approximately 1902 and admits it manufactured paint and varnish products at the site, but denies the remaining allegations contained in paragraph 2644 of the Third-Party Complaint.

15. The Sherwin-Williams Company denies the allegations contained in paragraph 2645 of the Third-Party Complaint.

16. The Sherwin-Williams Company admits the allegations contained in paragraph 2646 of the Third-Party Complaint that hazardous substances and other compounds had been detected in the soil at the site, and denies the remaining allegations contained in paragraph 2646 of the Third Party Complaint.

17. The Sherwin-Williams Company denies the allegations of paragraph 2647 of the Third-Party Complaint.

18. Paragraph 2648 sets forth a legal conclusion that requires no response from The Sherwin-Williams Company.

19. The Sherwin-Williams Company denies the allegations of Paragraph 2649 of the Third-Party Complaint.

20. The Sherwin-Williams Company neither admits nor denies the allegations set forth in paragraph 2650 of the Third-Party Complaint and leaves Third Party Plaintiffs to their proofs.

21. Paragraphs 2651 through 3032, inclusive, do not apply to The Sherwin-Williams Company, and the Company leaves Third-Party Plaintiffs to their proofs.

#### **LANDFILL AND DRUM SITES**

##### **Avenue P Landfill and D&J Trucking Sites**

22. The Sherwin-Williams Company neither admits nor denies the definitions set forth in paragraphs 3033 through 3054 of the Third-Party Complaint and leaves Third Party Plaintiffs to their proofs.

23. The Sherwin-Williams Company neither admits nor denies the definitions set forth in paragraphs 3055 through 3070 of the

Third-Party Complaint and leaves Third Party Plaintiffs to their proofs.

24. Paragraphs 3071 through 3082, inclusive, do not apply to The Sherwin-Williams Company, and the Company leaves Third-Party Plaintiffs to their proofs.

25. The Sherwin-Williams Company admits the allegation set forth in paragraph 3083 of the Third-Party Complaint.

26. The Sherwin-Williams Company admits the allegation set forth in paragraph 3084 of the Third-Party Complaint.

27. The Sherwin-Williams Company neither admits nor denies the allegations set forth in paragraph 3085 of the Third-Party Complaint and leaves Third Party Plaintiffs to their proofs.

28. Paragraph 3086 sets forth a legal conclusion that requires no response from The Sherwin-Williams Company.

#### The Bayonne Barrel and Drum Site

29. The Sherwin-Williams Company neither admits nor denies the allegations set forth in paragraphs 3087 through 3110 of the Third-Party Complaint and leaves Third Party Plaintiffs to their proofs.

30. The Sherwin-Williams Company neither admits nor denies the allegations set forth in paragraphs 3111 through 3113 of the Third-Party Complaint and leaves Third Party Plaintiffs to their proofs.

31. The Sherwin-Williams Company admits receipt of a General Notice Letter from EPA, and neither admits nor denies the remaining allegations set forth in paragraph 3114 of the Third-Party Complaint and leaves Third Party Plaintiffs to their proofs.

32. The Sherwin-Williams Company neither admits nor denies the allegations set forth in paragraphs 3115 through 3116 of the Third-Party Complaint and leaves Third Party Plaintiffs to their proofs.

33. The Sherwin-Williams Company admits the entry of an Agreement for Recovery of Past Response Costs with EPA, and neither admits nor denies the remaining allegations set forth in paragraph 3117 of the Third-Party Complaint and leaves Third Party Plaintiffs to their proofs.

34. The Sherwin-Williams Company neither admits nor denies the allegations set forth in paragraphs 3118 through 3209 of the Third-Party Complaint and leaves Third Party Plaintiffs to their proofs.

35. The Sherwin-Williams Company admits the allegation set forth in paragraph 3210 of the Third-Party Complaint.

36. The Sherwin-Williams Company neither admits nor denies the allegations set forth in paragraph 3211 of the Third-Party Complaint and leaves Third Party Plaintiffs to their proofs.

37. The Sherwin-Williams Company admits the allegation set forth in paragraphs 3212 and 3213 of the Third-Party Complaint.

38. Paragraph 3214 sets forth a legal conclusion that requires no response from The Sherwin-Williams Company.

39. The Sherwin-Williams Company neither admits nor denies the allegations set forth in paragraphs 3215 through 3445 of the Third-Party Complaint and leaves Third Party Plaintiffs to their proofs.

#### **FIRST COUNT**

22. The Sherwin-Williams Company incorporates by reference herein all answers to paragraphs 1-3445 of the Third Party Complaint, inclusive.

23. The Sherwin-Williams Company denies the allegations of Paragraph 3447 of the Third-Party Complaint.

24. Paragraph 3448 sets forth a legal conclusion that requires no response from The Sherwin-Williams Company.

25. The Sherwin-Williams Company denies the allegations of



Paragraph 3449 of the Third-Party Complaint.

26. The Sherwin-Williams Company neither admits nor denies the allegations set forth in paragraph 3450 of the Third-Party Complaint and leaves Third Party Plaintiffs to their proofs.

27. The Sherwin-Williams Company denies the allegations of Paragraph 3451 of the Third-Party Complaint.

### **SECOND COUNT**

28. The Sherwin-Williams Company incorporates by reference herein all answers to paragraphs 1-3451 of the Third Party Complaint, inclusive.

29. The Sherwin-Williams Company denies the allegations of Paragraph 3453 of the Third-Party Complaint.

WHEREFORE, Third-Party Defendant, The Sherwin-Williams Company, demands judgment as follows:

1. Dismissing Third Party Plaintiffs' Complaint;
2. Awarding attorneys' fees and costs of suit; and
3. Such other relief as the Court may deem just and equitable.

### **AFFIRMATIVE DEFENSES**

1. 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.

2. 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").

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

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 by the entire controversy doctrine.

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

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

8. Third-Party Defendant cannot be liable for or be required to pay Third-Party Plaintiffs' damages that arise out of conduct lawfully undertaken in compliance with permits or other approvals issued by relevant government agencies, including the State and/or the United States and/or in

compliance with applicable laws, regulations, rules, orders, ordinances, directives and common law, and other requirements of all foreign, federal, state and local government entities ("applicable Environmental Laws").

9. 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.

10. 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.

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

12. The claims asserted against Third-Party Defendant in the Complaint are barred because at all relevant times Third-Party Defendant exercised due care with respect to hazardous substances, if any, that may have been handled at the subject property, took precautions against foreseeable acts or omissions of others and the consequences that could reasonably result from such acts or omissions, and because any release or threat of

release of any hazardous substances, if any, and any costs or damages resulting therefrom, were caused solely by the negligence, acts or omissions of third parties over whom Third-Party Defendant had no control, whether by, in whole or part, contract or otherwise, or any duty to control, including without limitation the State of New Jersey and its agencies and officials, and the United States and its agencies and officials.

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

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

15. 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.

16. 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.

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

18. 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.

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

20. 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.

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

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

23. 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.

24. 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.

25. Third-Party Plaintiffs have failed to join necessary and indispensable parties needed for a just adjudication of the claims asserted in this action, in whose absence complete relief can not be afforded the existing parties pursuant to R. 4:28-1 including, without limit, State of New Jersey agencies and instrumentalities, including without limit Trustees for tidelands, and United States agencies and instrumentalities with liability under the Spill Act.

26. Third-Party Plaintiffs' claims are not ripe for adjudication, inter alia, because Third-Party Plaintiffs have a joint liability to the Plaintiffs and have not paid more than their equitable share of the liability.

27. Third-Party Defendant denies that Third-Party Plaintiffs have suffered any harm whatsoever, but in the event that they did suffer any form of injury or damage cognizable under applicable Environmental Law, such injury was caused by the intervening acts, omissions, or superseding acts of persons or entities over whom Third-Party Defendant exercised no control and for whose conduct Third-Party Defendant was not responsible

including, without limit, unpermitted and storm event discharges from publically owned treatment works.

28. 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.

29. 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.

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 Defendants alleged to

give rise to liability in the Complaint is the subject of a release, covenant not to sue, or otherwise excused by Plaintiffs, including, without limit, through issuance of a no further action letter, consent order, settlement agreement or other applicable document.

32. 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.

33. Any discharge that allegedly originated from Third-Party Defendant, was investigated and remediated by a licensed professional and under the direct oversight of State and/or federal agencies with the then state of the art, the then accepted industrial practice and technology, and the then prevailing requirements.

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

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

36. 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.

37. Third-Party Defendants' liability to Third-Party Plaintiffs, if any, is limited to Spill Act and contribution claims by Third Parties excludes any such claims which may properly be apportioned to parties pursuant to Burlington Northern and Santa Fe Railway Co., et al. v. United States, et al., 556 U.S. \_\_\_\_; 129 S.Ct. 1870 (2009), and other comparable decisional law.

38. 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.

39. 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.

40. 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.

41. 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.

42. 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.

43. 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.

44. Third-Party Plaintiffs claims for contribution, whether under the Spill Act or the New Jersey statutory provisions for contribution (including N.J.S.A. 2A:53A-1 et seq.), are derivative of, and are therefore no greater than, Plaintiffs' claims against Third-Party Plaintiffs. Consequently, Third-Party Plaintiffs' claims against Third-Party Defendant are barred to the extent of any legal extinguishments of actual or potential claims by the Plaintiffs against Third-Party Defendant pertaining to the alleged environmental contamination (including natural resource damage) of any site(s) alleged by Third-Party Plaintiffs to be the subject of their contribution claims against Third-Party Defendant. Examples of

legal extinguishments that are or may be applicable to Third-Party Defendant include, with respect to each such site:

- A. Any release or covenant not to sue granted by Plaintiffs to Third-Party Defendant;
- B. Any settlement or other compromise between Plaintiffs and Third-Party Defendant;
- C. Any expiration of the statute of limitations governing Plaintiffs' right to maintain a claim against Third-Party Defendant;
- D. Any failure to join a claim relating to the "Newark Bay Complex" (as defined in the Third-Party Complaint) in a prior litigation between Plaintiffs and Third-Party Defendant, which would result in relinquishment of such a claim by virtue of New Jersey's Entire Controversy Doctrine; and/or
- E. Any issuance by Plaintiffs to Third-Party Defendant, directly or indirectly, of any "No Further Action" (a/k/a "NFA") determination, "Negative Declaration," or similar determination.

45. 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.

46. 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

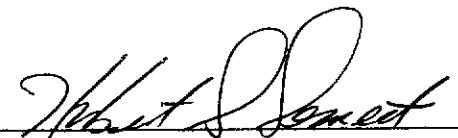
Plaintiffs to be the subject of their contribution claims against Third-Party Defendant, thereby exposing Third-Party Defendant to inconsistent responsibilities, penalties and liabilities, and the possibility of paying twice for the same actions (i.e., double recovery).

47. 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.

48. 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.

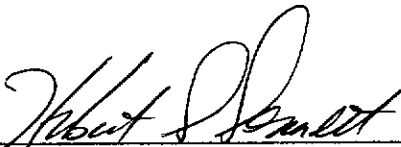
SOKOL, BEHOT & FIORENZO

Date: Dec 3, 2009

By:   
Herbert B. Bennett, Esq.  
229 Nassau Street  
Princeton, NJ 08542  
(609)279-0900  
Attorneys for Third-Party  
Defendant  
The Sherwin-Williams Company

CERTIFICATION

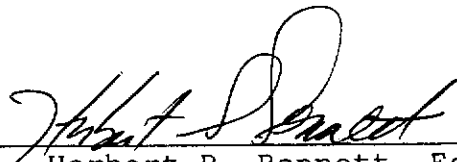
I hereby certify that the original of the within Answer has been filed with the Clerk of the New Jersey Superior Court via overnight delivery, within the time period allowed by CMO V and that a copy of the within Answer has been served upon all counsel of record electronically or by regular mail.

  
\_\_\_\_\_  
Herbert B. Bennett

Dated: Dec 3, 2009

DESIGNATION OF TRIAL COUNSEL

Pursuant to Rule 4:25-4 Herbert B. Bennett, Esq. is hereby designated trial counsel in the above-captioned matter.


  
\_\_\_\_\_  
Herbert B. Bennett, Esq.

Dated: Dec 3, 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 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.

  
Herbert B. Bennett

Dated: Dec 3, 2009