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Attorneys for Third-Party Defendant  
Sun Chemical Corporation

NEW JERSEY DEPARTMENT OF	:	SUPERIOR COURT OF NEW JERSEY
ENVIRONMENTAL PROTECTION, THE	:	LAW DIVISION: ESSEX COUNTY
COMMISSIONER OF THE NEW JERSEY	:	
DEPARTMENT OF ENVIRONMENTAL	:	DOCKET NO. L-9868-05 (PASR)
PROTECTION and THE ADMINISTRATOR OF	:	
THE NEW JERSEY SPILL COMPENSATION	:	
FUND,	:	CIVIL ACTION
	:	
Plaintiffs,	:	<b>SUN CHEMICAL</b>
v.	:	<b>CORPORATION'S ANSWER TO</b>
	:	<b>MAXUS ENERGY</b>
OCCIDENTAL CHEMICAL	:	<b>CORPORATION'S AND TIERRA</b>
CORPORATION, TIERRA SOLUTIONS,	:	<b>SOLUTIONS, INC.'S THIRD-</b>
INC., MAXUS ENERGY CORPORATION,	:	<b>PARTY COMPLAINT "B"</b>
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, <i>et al.</i> ,	:	
	:	
Third-Party Defendants.	:	

Third-party defendant Sun Chemical Corporation ("Sun Chemical"), by and through its undersigned attorneys, and in accordance with this Court's Case Management Order V, Section 9, entered April 16, 2009 ("CMO V"), hereby answers Third-Party Complaint "B" filed by

Maxus Energy Corporation and Tierra Solutions, Inc. (“Third-Party Plaintiffs”), as follows:

**GENERALLY**

Sun Chemical 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. Sun Chemical 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)**

19–176. To the extent that the allegations in Paragraphs 19 through 176 relate to other parties, no response is required pursuant to CMO V.

177. Sun Chemical admits that it is a corporation organized under the laws of the State of Delaware. Sun Chemical denies each and every remaining allegation contained in Paragraph 177 of the Third-Party Complaint “B.”

178–209. To the extent that the allegations in Paragraphs 178 through 209 relate to other parties, no response is required pursuant to CMO V.

210. The allegations in Paragraph 210 of the Third-Party Complaint “B” state a legal conclusion as to which no response is required. To the extent a response is necessary with regard to Sun Chemical, Sun Chemical denies each and every allegation contained in Paragraph

210 of the Third-Party Complaint “B.”

**AS TO THE DEFINITIONS**

**(Paragraphs 211 through 236)**

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

**FACTUAL ALLEGATIONS**

237–2797. No response is required pursuant to CMO V.

**Sun Chemical Site**

Sun Chemical incorporates by reference as if fully set forth herein its responses and denials as asserted in Paragraphs 1 through 2797 herein.

2798. Sun Chemical denies each and every allegation contained in Paragraph 2798 of the Third-Party Complaint “B” and further denies the characterization of the property in question as the “Sun Chemical Site,” except that Sun Chemical admits on information and belief that 185 Foundry Street, Newark, New Jersey, which is comprised of multiple parcels, is located north of Interstate Highway 95, south and west of the Passaic River, and east of certain railroad lines.

2799. Sun Chemical is without knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in Paragraph 2799 of the Third-Party Complaint “B” and therefore denies the same, except that Sun Chemical admits that Sequa Corporation formerly operated as “Sun Chemical Corporation” at one of the parcels located at 185 Foundry Street, Newark, New Jersey, which entity bears no corporate relationship to the current Sun Chemical Corporation.

2800. Sun Chemical admits the allegations contained in Paragraph 2800 of the Third-Party Complaint “B.”

2801. Sun Chemical denies that Sequa Corporation sold certain assets to DIC Americas, Inc. The agreements in connection with the sale by Sequa Corporation of certain assets associated with 185 Foundry Street, Newark, New Jersey speak for themselves. Sun Chemical denies each and every remaining allegation contained in Paragraph 2801 of the Third-Party Complaint "B."

2802. Sun Chemical admits the allegations contained in Paragraph 2802 of the Third-Party Complaint "B."

2803. Sun Chemical admits that in 1990, it acquired a fee interest in a certain parcel located at 185 Foundry Street, Newark, New Jersey. The description of such property is set forth in the operative documents for such purchase and sale, the content of which speaks for itself. Sun Chemical denies each and every remaining allegation contained in Paragraph 2803 of the Third-Party Complaint "B."

2804. Sun Chemical admits that it produced organic pigments at one of the parcels located at 185 Foundry Street, Newark, New Jersey. Sun Chemical is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations to the extent they are asserted against other Third-Party Defendants and therefore denies the same.

2805. The allegation in Paragraph 2805 of the Third-Party Complaint "B" states a legal conclusion to which no response is required. To the extent a response by Sun Chemical is necessary, with regard to its former operations on one of the parcels located at 185 Foundry Street, Newark, New Jersey, Sun Chemical admits the use, at times, of toluene, xylene, acetic acid, sodium hydroxide, methanol, and phosphoric acid and the presence, at times, of trace amounts of ethyl benzene in xylene and trace amounts of cadmium, chromium, and lead in certain laboratory test paint solvent blends. Sun Chemical denies each and every remaining

allegation against it contained in Paragraph 2805 and is without knowledge or information sufficient to form a belief as to the truth of those allegations to the extent that they are asserted against other Third-Party Defendants and therefore denies the same.

2806. Sun Chemical is without knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in Paragraph 2806 of the Third-Party Complaint "B" and therefore denies the same.

2807. Sun Chemical is without knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in Paragraph 2807 of the Third-Party Complaint "B" and therefore denies the same.

2808. Sun Chemical is without knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in Paragraph 2808 of the Third-Party Complaint "B" and therefore denies the same.

2809. Sun Chemical is without knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in Paragraph 2809 of the Third-Party Complaint "B" and therefore denies the same.

2810. Sun Chemical is without knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in Paragraph 2810 of the Third-Party Complaint "B" and therefore denies the same.

2811. Sun Chemical is without knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in Paragraph 2811 of the Third-Party Complaint "B" and therefore denies the same.

2812. Sun Chemical is without knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in Paragraph 2812 of the Third-Party

Complaint "B" and therefore denies the same.

2813. Sun Chemical admits that, on or about September 20, 1995, October 19, 1995, and March 21, 1996, Sun Chemical sent letters to PVSC. The content of such letters speaks for itself. Sun Chemical is without knowledge or information sufficient to form a belief as to the truth of each and every remaining allegation contained in Paragraph 2813 of the Third-Party Complaint "B" and therefore denies the same.

2814. The allegation in Paragraph 2814 of the Third-Party Complaint "B" states a legal conclusion to which no response is required. To the extent a response by Sun Chemical is necessary, Sun Chemical admits that certain substances have been detected in soil at one or more of the parcels located at 185 Foundry Street, Newark, New Jersey, and the documentation regarding these detections speak for themselves. Sun Chemical is without knowledge or information sufficient to form a belief as to the truth of each and every remaining allegation contained in Paragraph 2814 of the Third-Party Complaint "B" and therefore denies the same.

2815. Sun Chemical is without knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in Paragraph 2815 of the Third-Party Complaint "B" and therefore denies the same.

2816. Sun Chemical is without knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in Paragraph 2816 of the Third-Party Complaint "B" and therefore denies the same.

2817. The allegation in Paragraph 2817 of the Third-Party Complaint "B" states a legal conclusion to which no response is required. To the extent a response by Sun Chemical is necessary, Sun Chemical admits that, on or about June 8, 2006, EPA sent a General Notice Letter to Sun Chemical. The content of such General Notice Letter speaks for itself. Sun Chemical is

without knowledge or information sufficient to form a belief as to the truth of each and every remaining allegation contained in Paragraph 2817 of the Third-Party Complaint “B” and therefore denies the same.

2818. The allegation in Paragraph 2818 of the Third-Party Complaint “B” states a legal conclusion to which no response is required. To the extent a response by Sun Chemical is necessary, Sun Chemical is without knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in Paragraph 2818 of the Third-Party Complaint “B” and therefore denies the same.

2819. The allegation in Paragraph 2819 of the Third-Party Complaint “B” states a legal conclusion to which no response is required. To the extent a response by Sun Chemical is necessary, Sun Chemical denies each and every allegation against it contained in Paragraph 2819. Sun Chemical is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations to the extent they are asserted against other Third-Party Defendants and therefore denies the same.

### **FACTUAL ALLEGATIONS**

2820–3078. No response is required pursuant to CMO V.

#### **The Avenue P Landfill Site and D&J Trucking Site Third-Party Defendants**

##### *Sequa Corporation and Sun Chemical Corporation*

Sun Chemical incorporates by reference as if fully set forth herein its responses and denials as asserted in Paragraphs 1 through 3078 herein.

3079. Sun Chemical denies that it was a predecessor to Sequa Corporation. Sun Chemical is without knowledge or information sufficient to form a belief as to the truth of the allegations to the extent they are asserted against other Third-Party Defendants and therefore

denies the same.

3080. The allegation in Paragraph 3080 of the Third-Party Complaint “B” states a legal conclusion to which no response is required. To the extent a response by Sun Chemical is necessary, Sun Chemical denies each and every allegation against it contained in Paragraph 3080. Sun Chemical is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations to the extent they are asserted against other Third-Party Defendants and therefore denies the same.

3081. The allegation in Paragraph 3081 of the Third-Party Complaint “B” states a legal conclusion to which no response is required. To the extent a response by Sun Chemical is necessary, Sun Chemical denies each and every allegation against it contained in Paragraph 3081. Sun Chemical is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations to the extent they are asserted against other Third-Party Defendants and therefore denies the same.

3082. The allegation in Paragraph 3082 of the Third-Party Complaint “B” states a legal conclusion to which no response is required. To the extent a response by Sun Chemical is necessary, Sun Chemical denies each and every allegation against it contained in Paragraph 3082. Sun Chemical is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations to the extent they are asserted against other Third-Party Defendants and therefore denies the same.

#### **FACTUAL ALLEGATIONS**

3083–3391. No response is required pursuant to CMO V.

#### **Central Steel Drum Site PRPs**

*Central Steel Drum Site PRP: Sun Chemical Corporation*



Sun Chemical incorporates by reference as if fully set forth herein its responses and denials as asserted in Paragraphs 1 through 3391 herein.

3392. The allegation in Paragraph 3392 of the Third-Party Complaint "B" states a legal conclusion to which no response is required. To the extent a response by Sun Chemical is necessary, on information and belief, Sun Chemical admits that, during one or more years that the Central Steel Drum Site was operating, Sun Chemical owned properties located at 343 Murray Hill Parkway in East Rutherford, New Jersey, 320 Forbes Boulevard in Mansfield, Massachusetts, and 3301 Hunting Park Avenue in Philadelphia, Pennsylvania. Sun Chemical denies each and every remaining allegation against it contained in Paragraph 3392. Sun Chemical is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations to the extent they are asserted against other Third-Party Defendants and therefore denies the same.

3393. The allegation in Paragraph 3393 of the Third-Party Complaint "B" states a legal conclusion to which no response is required. To the extent a response by Sun Chemical is necessary, Sun Chemical admits that it sent letters to the EPA dated January 21, 1998 and June 9, 1998. The content of such letters speaks for itself. Sun Chemical denies each and every remaining allegation against it contained in Paragraph 3393.

3394. The allegation in Paragraph 3394 of the Third-Party Complaint "B" states a legal conclusion to which no response is required. To the extent a response by Sun Chemical is necessary, Sun Chemical denies each and every allegation against it contained in Paragraph 3394.

#### **FACTUAL ALLEGATIONS**

3395–3446. No response is required pursuant to CMO V.

### **AS TO FIRST COUNT**

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

Sun Chemical incorporates by reference as if fully set forth herein its responses and denials as asserted in Paragraphs 1 through 3446 herein.

3447–3448. Sun Chemical is without knowledge or information sufficient to form a belief as to the truth of the matters alleged in Paragraphs 3447 through 3448 and therefore denies the same.

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

### **AS TO SECOND COUNT**

#### **Statutory Contribution**

Sun Chemical incorporates by reference as if fully set forth herein its responses and denials as asserted in Paragraphs 1 through 3451 herein.

3452–3453. Sun Chemical denies that it is liable to Third-Party Plaintiffs for contribution. Sun Chemical is without knowledge or information sufficient to form a belief as to the truth of the matters in Paragraphs 3452 through 3453 and therefore denies the same.

### **FIRST AFFIRMATIVE DEFENSE**

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

### **SECOND AFFIRMATIVE DEFENSE**

Sun Chemical 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, their agents, employees, successors, and assigns, 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”).

### **FOURTH AFFIRMATIVE DEFENSE**

Third-Party Plaintiffs have no Spill Act claim against Sun Chemical because they have not cleaned up and/or removed a discharge of hazardous substances nor have they incurred cleanup and removal costs within the meaning of the Spill Act.

### **FIFTH AFFIRMATIVE DEFENSE**

Third-Party Plaintiffs have no right of contribution against Sun Chemical under the WPCA.

### **SIXTH AFFIRMATIVE DEFENSE**

Third-Party Plaintiffs’ claims are barred by New Jersey’s Entire Controversy Doctrine.

### **SEVENTH AFFIRMATIVE DEFENSE**

To the extent the Third-Party Complaint “B” 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 Sun Chemical 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 “B,” 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 Sun Chemical. Consequently, the claims in the Third-Party Complaint “B” 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**

Sun Chemical cannot be held liable for or be required to pay Third-Party Plaintiffs’ damages or other claims based on actions or inactions by Sun Chemical 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, Sun Chemical 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. Sun Chemical 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 Sun Chemical directly. As a result, the claims set forth in the Third-Party Complaint "B" are barred, in whole or in part.

#### **FIFTEENTH AFFIRMATIVE DEFENSE**

The Plaintiffs are legally barred from asserting direct claims against Sun Chemical for the damages sought in the Plaintiffs' Second Amended Complaint. Consequently, all claims that are or may be derivative of the Plaintiffs' claims are barred as to Sun Chemical as well, including the claims set forth in the Third-Party Complaint "B."

#### **SIXTEENTH AFFIRMATIVE DEFENSE**

The Third-Party Complaint "B" 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**

The Third-Party Complaint "B" 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, Sun Chemical complied with all applicable Environmental Laws, regulations, industry standards, and ordinances, and Sun Chemical 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 Sun Chemical in the Third-Party Complaint “B” are barred because, at all relevant times, Sun Chemical exercised due care with respect to hazardous substances, if any, that may have been handled at the subject property or properties and 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 Sun Chemical 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 “B” 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 Sun Chemical.

#### **TWENTY-SECOND AFFIRMATIVE DEFENSE**

Third-Party Plaintiffs’ claims against Sun Chemical 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 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 "B" 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 Sun Chemical, were it claimed directly by the New Jersey Department of Environmental Protection, the Commissioner of the New Jersey Department of Environmental Protection, and/or the Administrator of the New Jersey Spill Compensation Fund ("Plaintiffs"), would amount to unlawful taxation.

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

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

### **THIRTIETH AFFIRMATIVE DEFENSE**

Sun Chemical 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, that Third-Party Plaintiffs' have not incurred costs authorized by the Spill Act and 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 cannot 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), 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 because, inter alia, 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**

Sun Chemical 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 Sun Chemical exercised no control and for whose conduct Sun Chemical 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/or fault and/or that of Third-Party Plaintiffs' agents, employees, successors, and assigns. In the event that Third-Party Plaintiffs are found to have sustained any injury and are entitled to damages, Third-Party Plaintiffs' recovery against Sun Chemical, if any, must be reduced by the proportionate damages caused by the acts and conduct of Third-Party Plaintiffs and/or its agents, employees, successors, and assigns.

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

Although Sun Chemical denies that it is liable for the contamination described in the Third-Party Complaint "B", in the event it is found liable, Sun Chemical is entitled to an offset against any such liability on its part for the equitable share of the liability of any person or entity 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 Sun Chemical alleged to give rise to liability in the Third-Party Complaint "B" 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, that allegedly originated from Sun Chemical, 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 Sun Chemical cannot be found retroactively liable.

### **FORTY-FIRST AFFIRMATIVE DEFENSE**

Any discharge that allegedly originated from Sun Chemical 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 Sun Chemical 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 AFFIRMATIVE DEFENSE**

Third-Party Plaintiffs' claims are barred due to Third-Party Plaintiffs' own conduct in unilaterally, and without notice to Sun Chemical, 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**

Sun Chemical's liability to Third-Party Plaintiffs, if any, is subject to apportionment 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 law.

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

Third-Party Plaintiffs cannot assert contribution claims against Sun Chemical because the discharges for which the Plaintiffs are seeking relief are different from Sun Chemical's alleged discharges.

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

Third-Party Plaintiffs cannot seek contribution under the Joint Tortfeasors Contribution Law because Sun Chemical 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**

Third-Party Plaintiffs' claims are barred to the extent they seek to hold Sun Chemical liable, in contribution, for any claims for which it would be a violation of public policy to hold Sun Chemical 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 Sun Chemical 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 Sun Chemical are barred to the extent of any legal extinguishments of actual or potential claims by the Plaintiffs against Sun Chemical 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 Sun Chemical. Examples of legal extinguishments that are or may be applicable to Sun Chemical include, without limitation, with respect to each such site:

- A. Any release or covenant not to sue granted by Plaintiffs to Sun Chemical;
- B. Any settlement or other compromise between Plaintiffs and Sun Chemical;
- C. Any expiration of the statute of limitations or statute of repose governing Plaintiffs' right to maintain a claim against Sun Chemical;
- D. Any failure to join a claim relating to the "Newark Bay Complex" (as defined in the Third-Party Complaint "B") in a prior litigation between Plaintiffs and Sun

Chemical, 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 Sun Chemical, 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 Sun Chemical, were it claimed directly by Plaintiffs, would amount to a "taking" of Sun Chemical'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 Third-Party Complaint "B" is at odds with Sun Chemical'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 Sun Chemical, thereby exposing Sun Chemical 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 Sun Chemical 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 Sun Chemical, the claims for equitable contribution under the Spill Act in the Third-Party Complaint "B" are barred because equity will not compel action that is already being undertaken, has already been undertaken, and/or is unnecessary.

#### **FIFTY-FOURTH AFFIRMATIVE DEFENSE**

Without admitting liability, Sun Chemical alleges that if it is found to have been engaged in any of the activities alleged in the Third-Party Complaint “B”, such activities were *de minimis* and not the cause of any damages or other claims by Third-Party Plaintiffs.

#### **FIFTY-FIFTH 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 an “Act of God” that could not have been prevented by human care, skill, or foresight.

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

Sun Chemical 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 Sun Chemical.

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

Sun Chemical reserves the right to assert and hereby invokes each and every applicable Environmental Law defense 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.

**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 “B” is several only, there are no non-parties that should be joined in the action pursuant to R.4:28; but
- 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 “B” is in any respect joint and several (which is denied), then there are other non-parties, including some or all of the non-parties listed on the October 7, 2009 posting by O’Melveny and Myers, and also including Roanoke, Inc., Chemical Industries, Inc., KEM Realty Company, and H.A. Metz Laboratories, that may constitute parties that may be joined to this action pursuant to Rule 4:28 or are subject to joinder pursuant to Rule 4:29-1.

**DESIGNATION OF TRIAL COUNSEL**

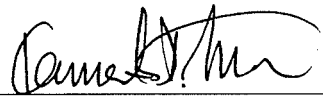
In accordance with Rule 4:25-4, you are hereby notified that Kenneth D. Friedman is assigned to try this case.

**WHEREFORE**, Third-Party Defendant Sun Chemical Corporation demands judgment against Third-Party Plaintiffs:

- A. Dismissing the Third-Party Complaint "B" as against Sun Chemical with prejudice;
- B. Awarding Sun Chemical its attorneys fees;
- C. Awarding Sun Chemical its costs;
- D. Awarding such other and further relief as the Court deems just and proper.

Dated: New York, New York  
November 20, 2009

MANATT, PHELPS & PHILLIPS, LLP

By:   
Kenneth D. Friedman  
7 Times Square  
New York, New York 10036  
Tel.: (212) 790-4500

Attorneys for Third-Party Defendant  
Sun Chemical Corporation



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New York, NY 10036

Tel: (212) 790-4500

Fax: (212) 790-4545

Attorney for Third-Party Defendant(s) SUN CHEMICAL CORPORATION

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NEW JERSEY DEPARTMENT OF	:	SUPERIOR COURT OF NEW JERSEY
ENVIRONMENTAL PROTECTION, THE	:	LAW DIVISION: ESSEX COUNTY
COMMISSIONER OF THE NEW JERSEY	:	
DEPARTMENT OF ENVIRONMENTAL	:	DOCKET NO. L-9868-05 (PASR)
PROTECTION and THE ADMINISTRATOR OF	:	
THE NEW JERSEY SPILL COMPENSATION	:	
FUND,	:	CIVIL ACTION
	:	
Plaintiffs	:	<b>CERTIFICATE OF SERVICE</b>
v.	:	<b>PURSUANT TO RULE 4:6-1 AND</b>
	:	<b>RULE 1:5-3</b>
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, <i>et al.</i> ,	:	
	:	
Third-Party Defendants.	:	

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I, Kenneth Friedman, hereby certify that

1. I am an attorney-at-law admitted to practice in the State of New Jersey and a member of the firm of Manatt, Phelps & Phillips, LLP, attorneys for Third-Party Defendant Sun Chemical Corporation ("Sun Chemical").

2. On the date set forth below, in accordance with CMO V and CMO VI, I caused to be filed, via hand delivery with the Clerk of the Superior Court, Essex County Courthouse, 50 West Market Street, Newark, New Jersey 07102, an original and two copies of Sun Chemical's Answer to Maxus Energy Corporation's and Tierra Solutions, Inc.'s Third-Party Complaint "B" and Case Information Statement ("Answer").

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.com/njdepvocc](http://www.sfile.com/njdepvocc), a true and accurate copy of the Answer 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 by first-class mail, a true and accurate copy of the Answer upon all parties that have not consented to electronic service, as listed on the attached "Third-Party Defendants for Regular Service as of <sup>November 9, 2009.</sup> ~~October 13, 2009.~~"

  
KENNETH D. FRIEDMAN, ESQ.

Date: November 20, 2009

**Third-Party Defendants for Regular Service as of November 9, 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 Blvd. Warren, NJ 07059-6747 908.647.1022 908.647.7721 - fax areitano@heroldlaw.com
City of Clifton	A	Thomas M. Egan, Esq. Assistant Municipal Attorney City of Clifton Law Department 900 Clifton Avenue Clifton, NJ 07013 973.470.5817 973.470.5254 - fax tegan@cliftonnj.org
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
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 aronson@gtlaw.com
DiLorenzo Properties Company, L.P.	B	Steven R. Gray Water, McPherson, McNeill, P.C. 300 Lighting Way P.O. Box 1560 Secaucus, NJ 07096 201.863.4400 201.863.2866 - fax sgray@lawwmm.com
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

**Third-Party Defendants for Regular Service as of November 9, 2009**

Township of Cranford	A	Carl R. Woodward, III, Esq. cwoodward@carellabyrne.com Brian H. Fenlon, Esq. bfenlon@carellabyrne.com Carella, Byrne, Bain, Gilfillan, Cecchi, Stewart & Olstein 5 Becker Farm Road Roseland, NJ 07068 973.994.1700
Vitusa Corp.	B	Gerald Poss Gerald Poss, P.A. & Associates 58 Vose Avenue South Orange, NJ 07079-2026 973.762.6400 gpossinc@aol.com