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Attorneys for Third-Party Defendant Borough of Roselle Park
File No. 3569.2964

NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION, THE
COMMISSIONER OF NEW JERSEY
DEPARTMENT OF ENVIRONMENTAL
PROTECTIONS 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., YPF
HOLDINGS, INC., and CLH HOLDINGS,

Defendants.

MAXUS ENERGY CORPORATION and
TIERRA SOLUTIONS, INC.,

Third-Party Plaintiffs,

BAYONNE MUNICIPAL UTILITIES
AUTHORITY, *et al.*,

Third Party Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – CIVIL PART
ESSEX COUNTY

Docket No. ESX-L-9868-05

Civil Action

**ANSWER TO THIRD PARTY
COMPLAINT "A" OF
DEFENDANTS MAXUS ENERGY
CORPORATION AND TIERRA
SOLUTIONS, INC. AND
AFFIRMATIVE DEFENSES**

Third-Party Defendant, the Borough of Roselle Park, with its principal address at

At 110 E. Westfield Avenue, Roselle Park, New Jersey 07204, by way of Answer to the Third-Party Complaint "A" brought by Defendants Maxus Energy Corporation and Tierra Solutions, Inc., says:

ANSWER

1. The Borough of Roselle Park admits it is a public body and a municipality of the State of New Jersey and a member of the Rahway Valley Sewerage Authority. All other allegations against the Borough of Roselle Park are denied. The Borough of Roselle Park is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraphs 1 through 1147, denies the allegations, and leaves Third-Party Plaintiffs to their proof at the time of trial.

WHEREFORE, the Borough of Roselle Park demands judgment dismissing the Third-Party Complaint, awarding attorney's fees and costs of suit, and such other relief as the Court may deem just and equitable.

FIRST COUNT

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

2. The Borough of Roselle Park repeats and re-alleges its answers contained in paragraph 1 as if set forth at length herein.

3. The Borough of Roselle Park is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraphs 1148-1158, denies the allegations, and leaves Third-Party Plaintiffs to their proofs at time of trial.

WHEREFORE, the Borough of Roselle Park demands judgment dismissing the Third-Party Complaint, awarding of attorney fees and costs of suit, and such other relief as the Court may deem just and equitable.

SECOND COUNT
(Statutory Contribution)

4. The Borough of Roselle Park repeats and re-alleges its answers contained in paragraphs 1-3 as if set forth at length herein.

5. The Borough of Roselle Park is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraphs 1159-1160, denies the allegations, and leaves Third-Party Plaintiffs to their proofs at time of trial.

WHEREFORE, the Borough of Roselle Park demands judgment dismissing the Third-Party Complaint, awarding of attorney fees and costs of suit, and such other relief as the Court may deem just and equitable.

THIRD COUNT
(Enforcement of N.J.S.A.58:14-7 and
N.J.S.A. 58:14-8 and Environmental Rights Act Claim)

6. The Borough of Roselle Park repeats and re-alleges its answers contained in paragraphs 1-5 as if set forth at length herein.

7. The Borough of Roselle Park is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraphs 1161-1186, denies the allegations, and leaves Third-Party Plaintiffs to their proofs at time of trial.

WHEREFORE, the Borough of Roselle Park demands judgment dismissing the Third-Party Complaint, awarding of attorney fees and costs of suit, and such other relief as the Court may deem just and equitable.

FOURTH COUNT
(Nuisance)

8 The Borough of Roselle Park repeats and re-alleges its answers contained in paragraphs 1-7 if set forth at length herein.

9. The Borough of Roselle Park is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraphs 1187-1195, denies the allegations, and leaves Third-Party Plaintiffs to their proofs at time of trial.

WHEREFORE, the Borough of Roselle Park demands judgment dismissing the Third-Party Complaint, awarding of attorney fees and costs of suit, and such other relief as the Court may deem just and equitable.

FIFTH COUNT
(Breach of the Public Trust)

4. The Borough of Roselle Park repeats and re-alleges its answers contained in paragraphs 1-9 as if set forth at length herein.

5. The Borough of Roselle Park is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraphs 1196-1229, denies the allegations, and leaves Third-Party Plaintiffs to their proofs at time of trial.

WHEREFORE, the Borough of Roselle Park demands judgment dismissing the Third-Party Complaint, awarding of attorney fees and costs of suit, and such other relief as the Court may deem just and equitable.

DEFENSES

1. The Third-Party Complaint "A" fails to state a claim upon which relief may be granted.

2. The Third-Party Complaint "A" must be dismissed for failure to join necessary and indispensable parties.

3. The Borough of Roselle Park is not liable pursuant to the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 to 12.3.

4. Third-Party Plaintiffs have failed to provide notice in accordance with N.J.S.A. 59:8-1 et seq.

5. Third-Party Plaintiffs lack standing.

6. Third-Party Plaintiffs have failed to exhaust administrative remedies.

7. Any wrongful conduct alleged in the Third-Party Complaint "A" resulted from and was proximately caused by the conduct of persons other than the Borough of Roselle Park or by the conduct of persons over whom the Borough of Roselle Park had no control, or by the superseding intervention, criminal, illegal or tortuous acts of others outside the control of the Borough of Roselle Park.

8. Without admitting any liability, if it is determined that the Borough of Roselle Park engaged in any of the activities alleged in the Third-Party Complaint "A", such activities were *de minimis*.

9. Any damages were caused by an Act of God.

10. The claims asserted in the Third-Party Complaint "A" are barred, in whole or in part, by the applicable statutes of limitations.

11. Plaintiffs' and Defendants/Third-Party Plaintiffs' costs incurred or to be incurred at the site are unreasonable, duplicative, not cost effective, and not consistent with the National Contingency Plan.

12. To the extent that the Borough of Roselle Park is found liable in this matter, joint and several liability is inappropriate because there are distinct harms or a reasonable basis for apportionment of the harm suffered.

13. At all times relevant, the Borough of Roselle Park complied with all applicable laws, regulations or standards and government approvals.

14. Plaintiffs and Defendants/Third-Party Plaintiffs failed to provide notice to the Borough of Roselle Park that it was considered a potentially responsible party prior to undertaking numerous response actions relating to the site, which has precluded the Borough of Roselle Park from commenting upon or participation in the selection of the remedial action at the site. This has resulted in a deprivation of the Borough of Roselle Park's substantive and procedural due process rights under the Federal and State Constitutions.

15. Plaintiffs' and Defendants/Third-Party Plaintiffs' Complaints include costs not yet expended. The New Jersey Spill Compensation and Control Act ("Spill Act"), N.J.S.A. 58:10-23.11 et seq., does not authorize Plaintiffs and/or Third-Party Plaintiffs to recover future costs. Therefore, any claims are premature and not yet ripe for adjudication.

16. The Third-Party Complaint "A" is an unauthorized retroactive application of the Spill Act and other applicable case law.

17. The Borough of Roselle Park has at all times acted in good faith.

18. To the extent that this action is brought pursuant to the Spill Act, the Borough of Roselle Park is not liable because any release or threat of release of any hazardous substance was an omission of a third party other than an employee or agent of the Borough of Roselle Park. The Borough of Roselle Park exercised due care with respect to any such alleged hazardous substance, in light of all relevant facts and circumstances. The Borough of Roselle Park took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions. Consequently, the Borough of Roselle Park is not liable under the Spill Act.

19. Plaintiffs' and Defendants/Third-Party Plaintiffs' claims for relief are barred by waiver, estoppel and/or laches.

20. In the event Plaintiffs' and Defendants/Third-Party Plaintiffs' claims are not barred by their own conduct, then any recovery by these parties should be reduced in the proportion that such parties' acts or omissions bear to the acts or omissions that caused the alleged injuries or damages.

21. Plaintiffs and Defendants/Third-Party Plaintiffs have failed to comply with the necessary conditions precedent for the maintenance of a claim under the Spill Act.

22. The Borough of Roselle Park is not a "responsible party" under the Spill Act.

23. Certain of the costs incurred or to be incurred by the Plaintiffs and/or Defendants/third-Party Plaintiffs in connection with the site are not "response costs", recoverable from the Borough of Roselle Park, within the meaning of section 101 (23), (24) and (25) of CERCLA, 42 U.S.C. 9601 (23), (24) and (25), as applied to the Spill Act.

24. Certain of the actions taken to date by Plaintiffs and/or Third-Party Plaintiffs for which Third-Party Plaintiffs are making a claim against the Borough of Roselle Park were not consistent with the National Contingency Plan because, among other things, the Borough of Roselle Park was not provided with notice or an opportunity to comment.

25. The Borough of Roselle Park exercised reasonable care under all the circumstances herein. Consequently, it is not liable to Plaintiffs or Defendants/Third-Party Plaintiffs under the common law or any statutory theory of recovery averred herein.

26. The claims for relief are time barred by the terms of the Spill Act.

27. Third-Party Plaintiffs' claims against the Borough of Roselle Park are barred, in whole or in part, by Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3) because any releases, or threats of released of hazardous substances, including those allegedly attributable to the Borough of Roselle Park, an allegation the Borough of Roselle Park denies, were caused by the acts or omissions of third parties other than the Borough of Roselle Park's employees or agent, or other than one with whom the Borough of Roselle Park had direct or indirect contractual relationships, and the Borough of Roselle Park exercised due care with respect to the alleged hazardous substances taking into consideration the characteristics thereof, in light of all the relevant facts and

circumstances, and took precautions against for foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such act or omissions.

28. Third-Party Plaintiffs have not paid more than their fair share of any damages, costs or other relief sought by the Plaintiffs, 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, and are, therefore, not entitled to contribution from the Borough of Roselle Park.

29. Third-Party Plaintiffs' claims for indemnification are barred because any alleged liability of the Borough of Roselle Park, liability of the Borough of Roselle Park denies, would be secondary, indirect, passive, precarious, constructive, technical and/or imputed, and the liability of all or some of the Defendants/Third-Party Plaintiffs are direct, active and primary.

30. Third-Party Plaintiffs are not entitled to recover attorney's fees or costs, or fees of litigation.

31. Third-Party Plaintiffs are not entitled to recovery for any alleged unjust enrichment as there exists an adequate remedy at law to redress Third-Party Plaintiffs' claims.

32. Third-Party Plaintiffs' claims are barred by the statutory defenses to liability provided by the Spill Act.

33. Third-Party Plaintiffs' claims are barred to the extent they seek relief for conduct occurring, or damages incurred, before the effective date of the Spill Act.

34. Third-Party Plaintiffs' claims are barred to the extent they seek recovery for any punitive damages as such claims are barred by public policy and applicable laws.

35. To the extent that Third-Party Plaintiffs' claims against the Borough or Roselle Park are subject to contribution or any reduction of offset from other parties, any damages recovered against the Borough of Roselle Park shall be reduced accordingly.

36. The Borough of Roselle Park hereby asserts and adopts all other defenses which have been or will be asserted at any time by any other party in this action, to the extent said defenses are applicable to the Borough of Roselle Park.

37. The Borough of Roselle Park reserves the right to assert additional defenses that may be uncovered during the course of this action.

COUNTERCLAIMS AND CROSSCLAIMS

In accordance with Case Management Order V, the Borough of Roselle Park is not asserting any counterclaims or crossclaims at this time and reserves its rights to do so as specified by the Court's Order.

DESIGNATION OF TRIAL COUNSEL

In accordance with R. 4:25-4, I, Blakeley Johnstone, III is designated as trial counsel.

CERTIFICATION PURSUANT TO R. 4:5-1

It is hereby certified in accordance with R. 4:5-1 that the specific matter in controversy is not, to my knowledge, the subject of any action pending in any Court, nor of any pending arbitration proceeding. Other than the above referenced actions, there are no other actions or arbitration proceedings in existence or contemplated at this time; and I know of no other party who should be joined in this action. I hereby certify that these statements made by me are true and that I am aware that if any of these statements is willfully false, I am subject to punishment.

**JOHNSTONE, SKOK, LOUGHLIN
& LANE, PC**
Attorneys for Third-Party Defendant
Borough of Roselle Park

By: _____
I, Blakeley Johnstone, III

Dated: October 16, 2009

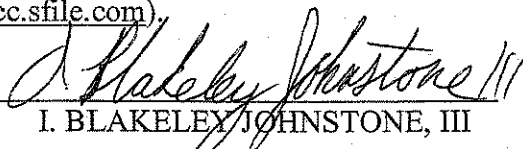
CERTIFICATION OF SERVICE

I certify that the original and copy of the within Answer and Separate Defenses have been sent by hand delivery to the Clerk of the Superior Court of New Jersey, Law Division, Essex County, at the Veterans Courthouse, 50 W. Market Street, Newark, NJ, 07102, and a copy of same has been sent via regular mail this date to Third-Party Plaintiffs' attorneys as follows:

William L. Warren, Esq.
Drinker, Biddle & Reath, LLP
105 College Road East, Suite 300
Princeton, NJ 08542-0627

Thomas E. Starnes, Esq.
Andrews Kurth, LLP
1350 I Street NW – Suite 1100
Washington, DC 20005

I further certify that a copy of said document has been posted on the electronic platform provided by defendants. (<http://njdepvocc.sfile.com>).


I. BLAKELEY JOHNSTONE, III

Dated: October 19, 2009