BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	PCB No. 13-72
v.	)	(Enforcement - Water)
	)	
PETCO PETROLEUM CORPORATION,	)	
	)	
Respondent.	)	

NOTICE OF FILING

To:

Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Ave. East
Springfield, IL 62794
Carol.Webb@Illinois.gov

Andrew Armstrong
Assistant Attorney General
Office of the Attorney General
500 South Second St.
Springfield, IL 62701
Andrew.Armstrong@ilag.gov

Natalie Long
Assistant Attorney General
Office of the Attorney General
500 South Second St
Springfield, IL 62701
natalie.long@ilag.gov

Kevin Barnai
Assistant Attorney General
Office of the Attorney General
500 South Second St.
Springfield, IL 62701
kevin.barnai@ilag.gov

PLEASE TAKE NOTICE that on this 19th day of April, 2023, the attached Motion for Permission to file Reply to Complainant's Response in Opposition to Respondent's Motion to Dismiss Counts 62 Through 73 of the First Amended Complaint; Reply to Complainant's Response in Opposition to Respondent's Motion to Dismiss Counts 62 Through 73 of the First Amended Complaint; and, Response in Opposition to Motion to Strike Respondent's Affirmative and Additional Defenses to the First Amended Complaint and Immaterial Matter were filed with the Illinois Pollution Control Board, which are attached and herewith served upon you on behalf of Respondent Petco Petroleum Corporation.

Respectfully submitted,

/s/ *Paul T. Sonderegger*
Paul T. Sonderegger, #6276829
Tim Briscoe, #6331827
One U.S. Bank Plaza
St. Louis, MO 63101
(314) 552-6000
FAX (314) 552-6154
psonderegger@thompsoncoburn.com
tbriscoe@thompsoncoburn.com

OF COUNSEL:
THOMPSON COBURN LLP

Attorneys for Respondent Petco Petroleum Corporation

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	PCB No. 13-072
v.	)	(Water – Enforcement)
	)	
PETCO PETROLEUM CORPORATION,	)	
	)	
Respondent.	)	

RESPONSE IN OPPOSITION TO MOTION TO STRIKE RESPONDENT'S AFFIRMATIVE AND ADDITIONAL DEFENSES TO THE FIRST AMENDED COMPLAINT AND IMMATERIAL MATTER

COMES NOW Respondent Petco Petroleum Corporation ("Petco"), by and through its undersigned counsel, and for its Response in Opposition to the Motion to Strike Respondent's Affirmative and Additional Defenses to the First Amended Complaint and Immaterial Matter, states as follows:

INTRODUCTION

In its Motion to Strike, Complainant contends that the Board should strike *all* of Petco's pleaded affirmative and additional substantive defenses as well as *unspecified* portions of individual answers to numerous allegations. The Board will recall that this matter has been pending for a decade. Going back that length in time, Petco's 2013 Answer to the original Complaint raised substantially similar affirmative defenses now asserted again in response to the First Amended Complaint in 2023, although compartmentalized a bit differently with certain additions given the amendment. It is noteworthy that Complainant chose not to file a motion to strike the defenses or any other portion of the Answer in 2013. But now, after initiating the need for a further Answer due to its amendment, Complainant is attempting to strike these similar and added defenses that were necessarily pleaded and repackaged by its own doing.

The Motion to Strike does not merely seek an order to clean up the pleading prior to discovery (no discovery has been served, answered, or taken), but instead seeks to gut swaths of responsive information and defenses across Petco's entire Answer, Affirmative and Additional Defenses in lieu of prosecuting this case and proceeding with discovery. Nonetheless, Petco has met the requisite pleading standard. The Answer, Affirmative and Additional Defenses plead salient facts about, for example, the time duration of the alleged violations and the quantum of penalties (if any) to which the alleged violations give rise. In many instances, the Motion to Strike itself paradoxically lacks the clarity necessary to determine what Complainant seeks to strike, which specificity, of course, is what the Motion argues is deficient in Petco's pleading.

Having pled information in accordance with the Board's regulations and after a decade of inaction by Complainant, the Board is required to construe Petco's Answer, Affirmative and Additional Defenses "liberally to do substantial justice between the parties." *Rolf Schilling, et. al. v. Gary D. Hill, et. al.*, PCB 10-100, 2010 WL 4566094, at *8 (Nov. 4, 2010). Accordingly, the Board should deny the Motion to Strike. In the alternative, if the Motion is not denied outright, the Board should grant Petco leave to replead its Answer, Affirmative and Additional Defenses after discovery has been undertaken to cure any issues. Substantial justice requires these results after so much time has gone by and Petco's further Answer was necessitated by Complainant's action in filing the amendment.

LEGAL STANDARD

The Board's regulations provide that "[a]ny facts constituting an affirmative defense must be plainly set forth *before hearing* in the answer or in a supplemental answer, unless the affirmative defense could not have been known before hearing." 35 Ill. Adm. Code 103.204(d) (emphasis added). "The party pleading an affirmative defense need not set out evidence, so long

as the party alleges the ultimate facts." *Elmhurst Mem'l Healthcare v. Chevron U.S.A. Inc.*, PCB 09-066, 2011 WL 2838628, at *26 (June 7, 2011). Respondents also may plead defenses in accordance with 735 ILCS 5/2-613. *See People of the State of Ill. v. Inverse Investments L.L.C.*, PCB 11-79, 2012 WL 2469685, at *5 (June 21, 2012). Section 5/2-613(d) provides: "any ground or defense, whether affirmative or not, which, if not expressly stated in the pleading, would be likely to take the opposite party by surprise, must be plainly set forth in the answer or reply." 735 ILCS 5/2-613. Focused on the principles of disclosure and fair notice, defenses must only "specify the disputed legal issues and inform the Complainant and the Board of the legal theories that will arise." *Inverse Investments, L.L.C.*, PCB 11-79, 2012 WL 2469685, at *5.

ARGUMENT

I. The Board's Pleading Standard Does Not Require the Specificity that Complainant Asserts

Complainant contends that "facts constituting an affirmative defense must be set forth in the answer" immediately, before discovery is taken, and that it is not proper to plead "merely a defense—not an affirmative defense." (Motion to Strike at 5, 7). These points are in error.

First, there is no requirement that a respondent must plead all facts at the outset of an administrative claim or count before any discovery has been undertaken. To the contrary, Section 103.204(d) expressly states that "an affirmative defense must be plainly set forth *before hearing* in the answer or in a supplemental answer, unless the affirmative defense could not have been known before hearing." 35 Ill. Adm. Code 103.204(d) (emphasis added). The language "must be plainly set forth before hearing" is temporal, meaning that facts, whether known at the outset of a claim or gained during discovery, must be pled sometime prior to the hearing based on the principle of fair disclosure and notice. *Id.* That clear language is buttressed by the acknowledgement that facts can be pled "in a supplemental answer." *Id.* Section 103.204(d)

does not require respondent to plead facts immediately in response to a complaint—particularly here, where, for a decade, the case largely has been inactive without discovery having commenced, counsel for each of the parties has changed, and the number of available witnesses has dwindled and/or lack recollection of the events (which is precisely why the General Assembly made the five-year statute of limitations in Section 5/13-205 applicable to this civil enforcement action). Petco is not required to plead additional facts, beyond the facts already laid out, at this stage and before the hearing.

Second, it is incorrect that Petco must plead every fact. A respondent party pleading an "affirmative defense need not set out evidence, so long as the party alleges the ultimate facts." *Elmhurst Mem'l Healthcare.*, PCB 09-066, 2011 WL 2838628, at *26. To determine whether an affirmative defenses has been stated, "the entire pleading must be considered . . . rather than taking a myopic view of a disconnected part." *Rolf Schilling, et. al.*, PCB 10-100, 2010 WL 4566094, at *7. "Moreover, pleadings are not intended to create technical obstacles to reaching the merits of a case at trial; rather, their purpose is to facilitate the resolution of real and substantial controversies." *Id.* at *8. In this case, Petco has pled the requisite ultimate facts. By way of examples, Petco asserts that: 1) Complainant improperly bypassed the Illinois Environmental Protection Act by not providing and allowing for opportunities to reach compliance through Compliance Commitment Agreements (CCAs) that are mandatory; 2) the IEPA has not permitted Petco's oil fields and cannot enforce the Oil and Gas Act, which is occurring here; 3) Petco already has paid many of the civil penalties sought in this action by Complainant, as such payments are bond for contesting violations under the Oil and Gas Act; and 4) prior judicial orders cover the subject matter that Complainant improperly seeks to

enforce again here again. (*See* Answer, Affirmative and Additional Defenses at C, D, E & F; *see also* Argument § III, *infra* for information as to each defense).

Third, Complainant is incorrect that only affirmative defenses can be pled and mere defenses cannot be pled. (Motion to Strike at 7). Defenses are allowed to be pled in matters before the Board in accordance with 735 ILCS 5/2-613. *Inverse Investments L.L.C.*, PCB 11-79, 2012 WL 2469685, at *5. Section 5/2-613(d) specifically states: "any ground or defense, *whether affirmative or not*, which, if not expressly stated in the pleading, would be likely to take the opposite party by surprise, must be plainly set forth in the answer or reply." 735 ILCS 5/2-613. As such, the principles of disclosure and fair notice dictate that Petco, as opposed to a bar, plead its defenses to avoid unfair surprise. To that end, defenses only need "specify the disputed legal issues and inform the Complainant and the Board of the legal theories that will arise." *Inverse Investments, L.L.C.*, PCB 11-79, 2012 WL 2469685, at *5. That is what Petco's Affirmative and Additional Defenses do in this case. Complainant's contentions otherwise are without any merit. The Motion to Strike should be denied.

II. The Motion to Strike "Immaterial Matter" Does Not Identify the Objectionable Material with Specificity and Fails on the Merits

In addition, the Board should deny Complainant's request to strike the claimed "immaterial matter" from the Answer, Affirmative and Additional Defenses because Complainant does not make any effort to identify the specific items that it wishes to be stricken. Complainant provides only this wide-ranging and vague description: "[i]n its Answer, Respondent has pled immaterial matter in response to certain of Complainant's allegations that includes information apparently intended to show either subsequent compliance with the Act or to cast doubt on Respondent's own water sampling." (Motion to Strike at 25-26). Complainant follows that sentence with a string cite to fifty-seven paragraphs of Petco's Answer, Affirmative

and Additional Defenses, which does not identify the language and terms from each answer paragraph sough to be stricken. Complainant's failure to specifically identify and designate the matters challenged runs afoul of 735 ILCS 5/2-615(a), which provides:

> All objections to pleadings shall be raised by motion. The motion shall point out *specifically* the defects complained of, and shall ask for appropriate relief, such as: that a pleading or portion thereof be stricken because substantially insufficient in law, or that the action be dismissed, or that a pleading be made more definite and certain in a specified particular, or that *designated* immaterial matter be stricken out . . . .

(emphasis added). The Motion to Strike's vague language and corresponding string cite to a list of numbered paragraphs is insufficient to inform the Board of the challenged matter.

Moreover, even if Complainant's one-sentence description suffices to identify the challenged matters (it does not), the information pleaded by Petco satisfies the requisite pleading standards. First, Petco is permitted to provide specificity in its admissions and denials concerning the First Amended Complaint's allegations that allege Petco "tested" certain waters on certain dates by identifying the testing as on-site and preliminary. The testing to which Complainant refers was expressly preliminary a decade ago, and Complainant makes no mention and may not be aware of the follow-up and final testing. And, due to the passage of time since the filing of the original Complaint and Complainant's election to file the First Amended Complaint and the present Motion to Strike, pertinent facts necessary to prove the accuracy and underlying circumstances of preliminary test results, especially compared to any subsequent testing that was performed, may be needed in this action.

Second, Petco's pleading of included factual information detailing repairs and enhancements to equipment related to the alleged violations[1] is not, as Complainant claims,

[1] *See* Answer, Affirmative and Additional Defenses at: Ct. I, ¶ 18; Ct. III, ¶ 18; Ct. VI, ¶ 18; Ct. VII, ¶ 18; Ct. VIII, ¶ 18; Ct. IX, ¶ 18; Ct. X, ¶ 18; Ct. XI, ¶¶ 18; Ct. XII, ¶ 18; Ct. XIII, ¶ 18; Ct. XIV, ¶ 18; Ct. XV, ¶¶ 18; Ct. XVI, ¶ 18; Ct. XVII, ¶ 18; Ct. XVIII, ¶ 18; Ct. XIX, ¶ 18; Ct. XX, ¶ 18; Ct. XXI, ¶ 18; Ct. XXII,

"intended to show [Petco's] subsequent compliance with the Act." (Motion to Strike at 25-26). Rather, these facts bear on the time duration of the alleged violations, the severity or scope of them, and the quantum of penalties Complainant may seek for them. Indeed, Petco pleaded many of these same facts in its Answer to the original Complaint in 2013. Accordingly, Petco requests that the Board deny Complainant's request to strike the claimed "immaterial material" as requested in the Motion to Strike.

III. Each Affirmative and Additional Defense Meets the Requisite Pleading Standard

Finally, each of Petco's eleven Affirmative and Additional Defenses satisfy the standard for pleading the requisite ultimate facts and disputed legal issues to inform the Complainant and the Board of the legal theories that will arise. *Elmhurst Mem'l Healthcare*, PCB 09-066, 2011 WL 2838628, at *26; *Inverse Investments, L.L.C.*, PCB 11-79, 2012 WL 2469685, at *5.

A. Affirmative and Additional Defense A for Failure to State a Claim

Petco's Affirmative and Additional Defense A is viable because several of the factual contentions in the First Amended Complaint, even if assumed true, do not state a claim for civil penalties and an injunction against Petco. For example, Petco already has filed a Motion to Dismiss Counts 62 through 73 for failure to state a claim based on the applicable statute of limitations (which constitutes another affirmative defense). That matter is currently pending before the Board, and there should be no surprise or lack of knowledge or facts surrounding it. Petco has pled the ultimate fact and need not regurgitate points that have been filed and are pending in this case. In other instances, the First Amended Complaint claims that the releases are "attributable to human error, corrosion, old equipment or other circumstances that could have been prevented," yet many of its allegations belie this contention. (First Am. Compl. at ¶17). In

¶ 18; Ct. XXX, ¶ 18; Ct. XXXIV, ¶ 18; Ct. XXXVIII, ¶ 18; Ct. XXXIX, ¶ 18; Ct. XLV, ¶ 18; Ct. LI, ¶ 18; Ct. LII, ¶ 18; Ct. LIII, ¶ 18; Ct. LVI, ¶ 18, 19; Ct. LVII, ¶ 18; Ct. LVIII, ¶ 18; Ct. LIX, ¶ 18; Ct. LX, ¶ 18.

Count XXIV pertaining to the Edith Durbin Pit, Complainant acknowledges that the release was "potentially due to pressure caused by tree roots." (*Id.* at Count XXIV, ¶18). In Count XLII regarding the M.E. Hogan #11 Production Well, Complainant concedes that the release may have been "due to vandalism, and the pump jack continued to operate." (*Id.* at Count LII, ¶18). And, in Count LVII at the Birdie Kimbrell #3 Flowline, Complainant agrees that the release was caused "when high surface waters tore a tree free of the creek bank [and it later] dropped onto and broke the flow line at the creek crossing." (*Id.* at Count LVII, ¶18).

These allegations stand in contrast to the standards for imposing liability under the Act, which require a showing of causation and control attributable to the Respondent. Section 12(a) imposes liability where the respondent's actions:

> Cause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources, or so as to violate regulations or standards adopted by the Pollution Control Board under this Act.

415 ILCS 5/12(a). "Liability is found when [the State] shows the alleged polluter had the capability of controlling the pollution or at least had control of the premises where the pollution occurred." *People of the State of Ill. v. Lincoln, Ltd.*, 410 Ill. Dec. 534, 543, 70 N.E.3d 661, 671 (1st Dist. 2016). On the issue of control, in *Phillips Petroleum Co. v. Ill. Env't Prot. Agency*, 72 Ill. App. 3d 217, 220, 390 N.E.2d 620, 623 (2nd Dist. 1979), the court held that there was insufficient evidence to hold the owner of a tank car of anhydrous ammonia that punctured open violated the Act. There, Phillips Petroleum Company's train containing anhydrous ammonia punctured open while under the control of a transporting railroad organization and released poisonous gas into the air. *Id.* The court found that, despite Phillips' ownership of the tank car, "[t]he record in the present cause does not show any admissible evidence which indicates that

Phillips exercised sufficient control over the source of the pollution in such a way as to have caused, threatened, or allowed the pollution." *Id.*

Complainant quotes *People of the State of Ill. v. A.J. Davinroy Contractors*, 249 Ill. App. 3d 788, 795, 618 N.E.2d 1282, 1287-88 (5th Dist. 1993) for the rule that "it is no defense that another party may have been partially responsible for the pollution" (Motion to Strike at 25), but this principle would only apply where the respondent *itself* were proven liable under the Act due to exercising sufficient control over the source of the pollution. The court in *Davinroy* also made clear that alleged polluters are not strictly liable for violations of the Act. *Id.* Complainant has the burden of proving causation and control.

Applying the liability principles articulated in *Phillips* necessary to show liability under the Act, in many circumstances as alleged in the First Amended Complaint and which are to be discovered here, Petco did not have control over the "source that caused, threatened, or allowed the pollution." As such, Petco should not be liable as it did not exert the "control" required for finding a violation of the Act. Petco has adequately pled and should have the opportunity to demonstrate that Complainant fails to state a claim upon which relief can be granted.

B. Affirmative and Additional Defense B for Failure to Satisfy Prerequisites

The intent of Affirmative and Additional Defense B is to plead and avoid unfair surprise surrounding Complainant's noncompliance with the statutory and regulatory prerequisites under the Act including the notice, complaint, and hearing provisions under 415 ILCS 5/31. This affirmative and additional defense, in fact, is the same as a portion of the first affirmative defense that Petco asserted in its Answer to the original Complaint in 2013 upon which Complainant opted not to file a motion. Due to the passage of a decade since the filing of the original Complaint and Complainant's election to file the First Amended Complaint and the present

Motion to Strike, pertinent facts necessary to prove this defense may need to be discovered during the pendency of this action. Petco has adequately pled the ultimate facts and should have the opportunity to demonstrate that Complainant failed to comply with the notice, complaint, and hearing provisions of Illinois law in this matter.

C. Affirmative and Additional Defense C for Failure to Comply with Section 31 of the Act

The intent of Affirmative and Additional Defense C is to apprise Complainant that it did not comply with the requirements under Section 31 of the Act, 415 ILCS 5/31. This affirmative and additional defense is the same as another portion of the first affirmative defense that Petco asserted in its Answer to the original Complaint in 2013 upon which Complainant likewise opted not to file a motion. Again, due to the passage of a decade since the filing of the original Complaint and Complainant's election to file the First Amended Complaint and the present Motion to Strike, pertinent facts necessary to prove this defense may need to be discovered during the pendency of this action. Petco has adequately pled the ultimate facts and should have the opportunity to demonstrate that Complainant failed to comply with Section 31 of the Act.

D. Affirmative and Additional Defense D that IEPA Lacks Enforcement Authority

The intent of Affirmative and Additional Defense D is to plead and avoid unfair surprise Complainant's noncompliance with requirements under the Oil and Gas Act, 225 ILCS 725 *et. seq*. IDNR, not IEPA, is vested with the authority to enforce the Oil and Gas Act. *See id.* This affirmative and additional defense is the same as a portion of the second affirmative defense that Petco asserted in its Answer to the original Complaint in 2013 upon which Complainant opted not to file a motion Due to the passage of a decade since the filing of the original Complaint and Complainant's election to file the First Amended Complaint and the present Motion to Strike,

pertinent facts necessary to prove this defense may need to be discovered during the pendency of this action. Petco has adequately pled the ultimate facts and should have the opportunity to demonstrate that IEPA does not have enforcement authority under the Oil and Gas Act here.

E. Affirmative and Additional Defense E that IDNR Has Not Adjudicated these Claims to Finality

The intent of Affirmative and Additional Defense E is to apprise Complainant that IDNR, within its own enforcement authority pursuant to the Oil and Gas Act, 225 ILCS 725 *et. seq.*, failed to adjudicate those claims to finality as required in its own administrative procedures. This affirmative and additional defense is the same as a portion of its second affirmative defense that Petco asserted in its Answer to the original Complaint in 2013 upon which Complainant likewise opted not to file a motion. Again, due to the passage of a decade since the filing of the original Complaint and Complainant's election to file the First Amended Complaint and the present Motion to Strike, pertinent facts necessary to prove this defense may need to be discovered during the pendency of this action. Petco has adequately pled the ultimate facts and should have the opportunity to demonstrate that IDNR did not follow the requirements of the Oil and Gas Act here to administratively adjudicate its claims to finality.

F. Affirmative and Additional Defense F Regarding Prior Orders and Associated Efforts of Compliance

The intent of Affirmative and Additional Defense F is to avoid unfair surprise regarding prior adjudications resulting in judicial orders requiring Petco to take certain actions, including the development of a written oil and gas facilities operation maintenance plan that covers some of the wells relevant to the First Amended Complaint. This affirmative and additional defense is substantially similar to the third affirmative defense that Petco asserted in its Answer to the original Complaint in 2013 upon which Complainant opted not to file a motion Due to the

passage of a decade since the filing of the original Complaint and Complainant's election to file the First Amended Complaint and the present Motion to Strike, pertinent facts necessary to prove this defense may need to be discovered during the pendency of this action. Petco has adequately pled the ultimate facts and should have the opportunity to demonstrate that Complainant cannot relitigate matters covered and governed by prior judicial orders and Petco's related efforts of compliance.

G. Affirmative and Additional Defense G Concerning a Bar to Equitable Relief

Complainant takes issue with Affirmative and Additional Defense G, claiming that "Petco does not set forth what equitable relief being sought is objectionable" (Motion to Strike at 13). The referenced equitable relief should not be a bone of contention. There is only one form of equitable relief sought in the First Amended Complaint: "[o]rdering Respondent to cease and desist from any further violations of the Act and associated regulations." (*See* First Amended Complaint at 111, Prayer for Relief, subpart C). Yet, nowhere in the First Amended Complaint does the State allege that the releases of the crude oil and/or salt water did not cease, lasted for any express length of time, or that any environmental impacts are unresolved and/or are ongoing. To the contrary, all seventy-three counts alleged occurred between 2010 and 2014 and involve the discharge of produced fluids that were reported to the IEMA. The First Amended Complaint does not plead any facts showing a need for equitable relief and instead focuses on obtaining penalties under the Act. Petco's Affirmative and Additional Defense G, therefore, is appropriate to counter potential equitable remedies Complainant may seek in this proceeding because civil penalties are the available remedies under the circumstances. Petco has adequately pled the ultimate facts and should have the opportunity to demonstrate that Complainant does not have a right to equitable relief in this action.

H. Affirmative and Additional Defense H on the Statute of Limitations

Affirmative and Additional Defense H concerns the requisite statute of limitations passed by the General Assembly that Petco asserts is applicable to certain counts. As set forth in the pending Motion to Dismiss Counts 62 through 73 of the First Amended Complaint and Motion for Permission to file Petco's Reply to Complainant's Response in Opposition to Respondent's Motion to Dismiss Counts 62 through 73 of the First Amended Complaint,[2] the twelve new Counts 62 through 73 occurred multiple years prior to October 20, 2017, which is five years prior to the filing of the First Amended Complaint. The violations in those new counts occurred and were known to Complainant for over eight to nine years before the filing of the First Amended Complaint, in 2013 and 2014. All of them have been designated with IEMA incident numbers. All of them were corrected more than five years before the First Amended Complaint was filed. Only now, after so many years have passed, does Complainant seek to introduce this new slate of alleged violations to increase the amount of its requested civil penalties. As pleaded in Petco's Affirmative and Additional Defense H and detailed in Petco's Motion to Dismiss and pending Reply, the five-year statute of limitations applies and prevents Complainant from doing so. *See* 735 ILCS 5/13-205. This matter has now been fully briefed.

In sum, the State does have limits to bringing civil enforcement actions. Complainant cannot wait nearly a decade to seek civil penalties for alleged violations of the Act that were known and were reported more than five years ago. Taken to its logical extreme, Complainant could wait a century to bring a claim for civil penalties in the absence of limits. Thankfully, the General Assembly provided reasonable limits. Pursuant to Section 5/13-205, Complainant must have filed the new civil penalty claims within five years after they occurred. It did not. With

[2] Petco's Motion for Permission and corresponding Reply are filed contemporaneously herewith.

Petco having pled the ultimate facts and developed those facts and arguments through motion practice, there is no requirement for Petco to regurgitate each of those arguments and points in its Answer and Affirmative and Additional Defenses, which already stands at a robust 154 pages long. Petco should be afforded the opportunity to plead and preserve the statute of limitations defense.

I. Affirmative and Additional Defense I on Equitable and Legal Doctrines

The intent of Affirmative and Additional Defense I is to apprise Complainant of the applicability of the equitable and legal doctrines set forth therein based on the facts and passage of time expressly at issue in the First Amended Complaint: estoppel, collateral estoppel, waiver, release, res judicata, and/or laches. Due to the passage of a decade since the filing of the original Complaint and Complainant's election to file the First Amended Complaint and the present Motion to Strike, pertinent facts necessary to prove this defense may need to be discovered during the pendency of this action. Petco has adequately pled the ultimate facts and should have the opportunity to demonstrate that, given the passage of time, multiple legal actions and court orders on matters alleged again here, and payment of civil penalties claimed as bond, these equitable and legal doctrines and defenses apply to this case.

J. Affirmative and Additional Defense J on Prior Payments of Civil Penalties

The intent of Affirmative and Additional Defense J is to avoid unfair surprise to Complainant that previous payments Petco made to the State, which are required as bond to challenge related administrative orders, should be credited to the penalties that Complainant seeks to recover through the First Amended Complaint. Due to the passage of a decade since the filing of the original Complaint and Complainant's election to file the First Amended Complaint and the present Motion to Strike, pertinent facts necessary to prove this defense may need to be

discovered during the pendency of this action. Petco has adequately pled the ultimate facts and should have the opportunity to demonstrate that the civil penalties have been paid and/or should be credited against the amounts sought in this matter.

K. Affirmative and Additional Defense K on Causation and Control

Petco's Affirmative and Additional Defense K apprises Complainant of causation and control issues presented by the allegations in the First Amended Complaint and which may otherwise arise during discovery in this case. Again, imposing liability under the Act requires a showing of causation and control. Section 12(a) imposes liability where the respondent's actions:

> Cause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources, or so as to violate regulations or standards adopted by the Pollution Control Board under this Act.

As set forth above, "[l]iability is found when [the State] shows the alleged polluter had the capability of controlling the pollution or at least had control of the premises where the pollution occurred." *Lincoln, Ltd.*, 410 Ill.Dec. at 543, 70 N.E.3d at 671. Likewise in *Phillips Petroleum Co.*, 72 Ill. App. 3d at 220, 390 N.E.2d at 623, the court again held that there was insufficient evidence to hold the owner of a tank car of anhydrous ammonia that punctured open violated the Act. Petco should have the opportunity to show that it did not have control over the "source that caused, threatened, or allowed the pollution." As such, Petco should not be liable as it did not exert the required "control" Petco requests deny the request to strike this Affirmative and Additional Defense K. *See also* Argument, Section III.A, *supra*.

L. Affirmative Defense L on the Right to Amend and Supplement Defenses

Complainant did not move to strike Petco's Affirmative and Additional Defense L despite it being pled in similar fashion to many of Petco's affirmative defenses discussed above. That defense asserts and preserves the procedural ultimate fact, given the stage of this case

without having had discovery and with new claims asserted, of the ability under Section 103.204(d) to allege additional affirmative and additional defenses in a supplemental answer prior to the hearing. *See* 35 Ill. Adm. Code 103.204(d). Consistent with Complainant's silence on this Affirmative Defense L, there is nothing objectionable about citing ultimate facts and authority to supplement as provided by the Board's regulations. The Motion to Strike should be denied.

IV. In the Alternative, the Board Should Grant Leave to Replead Its Answer, Affirmative and Additional Defenses if It Finds any Deficiencies Exist

If the Board finds that Petco did not plead ultimate facts and adequately apprise Complainant of its positions in its Answer, Affirmative and Additional Defenses (as set forth above, the pleading standard has been met), Petco alternatively requests that the Board grant leave to Petco to replead to cure any deficiencies. Illinois law provides for liberal amendment of pleadings "[a]t any time before final judgment . . . on just and reasonable terms" including amendments to change or add "causes of action or defenses." 735 ILCS 5/2-616(a); *see also Grove v. Carle Found. Hosp.*, 364 Ill. App. 3d 412, 417, 846 N.E.2d 153, 157 (4th Dist. 2006) ("Illinois law supports a liberal policy of allowing amendments to the pleadings so as to enable parties to fully present their alleged cause or causes of action."); *People of the State of Ill. v. Sheridan Sand & Gravel Co.*, PCB 06-177, 2007 WL 555656, at *1 (Jan. 26, 2007) (granting leave to amend answer and affirmative defenses while allowing complainant to renew motion to strike based on amended answer and affirmative defenses). At this stage of this case, even though the Motion to Strike should be denied, leave to amend alternatively would be warranted.

CONCLUSION

For the reasons addressed herein, Respondent Petco Petroleum Corporation has met the requisite pleading standards and therefore respectfully requests that the Board deny the Motion

to Strike Respondent's Affirmative and Additional Defenses to the First Amended Complaint and Immaterial Matter. Petco alternatively requests that the Board grant leave to Petco to replead its Answer, Affirmative and Additional Defenses to cure any deficiencies that the Board should find.

Respectfully submitted,

/s/ *Paul T. Sonderegger*
Paul T. Sonderegger, #6276829
Tim Briscoe, #6331827
One U.S. Bank Plaza
St. Louis, MO 63101
(314) 552-6000
FAX (314) 552-6154
psonderegger@thompsoncoburn.com
tbriscoe@thompsoncoburn.com

OF COUNSEL:
THOMPSON COBURN LLP

Attorneys for Respondent Petco Petroleum Corporation

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 19, 2023, the foregoing was filed via the Board's electronic filing system providing notice of the same to all the clerk and all counsel of record.

/s/ Paul T. Sonderegger

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	PCB No. 13-072
v.	)	(Water – Enforcement)
	)	
PETCO PETROLEUM CORPORATION,	)	
	)	
Respondent.	)	

MOTION FOR PERMISSION TO FILE REPLY TO COMPLAINANT'S RESPONSE IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS COUNTS 62 THROUGH 73 OF THE FIRST AMENDED COMPLAINT

COMES NOW Respondent Petco Petroleum Corporation ("Petco"), by and through its undersigned counsel, and, pursuant to 35 Ill. Adm. Code 101.500(d), moves the Board for permission and leave to file a Reply to Complainant's Response in Opposition to Respondent's Motion to Dismiss Counts 62 Through 72 of the First Amended Complaint.

1. On October 20, 2022, the Board adopted for filing the People's First Amended Complaint in this civil enforcement action.

2. On January 18, 2023, Petco filed its Motion to Dismiss Counts 62 Through 73 of the First Amended Complaint and Answer, Affirmative and Additional Defenses to the First Amended Complaint.

3. On March 10, 2023, Complainant filed: 1) Response in Opposition to Respondent's Motion to Dismiss Counts 62 Through 72 of the First Amended Complaint ("Response"); 2) Motion to Strike Respondent's Affirmative and Additional Defenses to the First Amended Complaint and Immaterial Matter; and, 3) Reply to Respondent's Answer to the First Amended Complaint.

4. On March 20, 2023, the Hearing Officer and parties participated in a telephone status conference during which the parties reported consent and agreement to a unified deadline of April 19, 2023 for Petco to respond to Complainant's March 10, 2023 filings, including expressly Petco's intent to file this Motion for Permission and the attached Reply to Complainant's Response in Opposition to Respondent's Motion to Dismiss Counts 62 Through 72 of the First Amended Complaint. The Hearing Officer's March 20, 2023 Order enacts that April 19, 2023 deadline and accordingly sets the next status conference for May 1, 2023.

5. Pursuant to 35 Ill. Adm. Code 101.500(e), "[t]he moving person will not have the right to reply, except as the Board or the hearing officer permits to prevent material prejudice."

6. The Response raises new and additional issues that are not germane to the Motion to Dismiss, such that Petco should be afforded the opportunity to address and dispel them.

7. Despite the single legal issue raised by Petco in its Motion to Dismiss—the applicability of the statute of limitations at 735 ILCS 5/13-205 to the twelve new counts in the First Amended Complaint—the Response opens with four pages of exposition about the "larger ongoing saga involving" Petco on other court cases and a mischaracterization of settlement efforts in this matter. (See Response at 1-4).

8. When the Response eventually reaches the statute of limitations issue, it sidesteps the dispositive points raised by Petco and contorts Illinois caselaw to claim that the three-factor public interest test takes precedence over the plain and ordinary meaning of the statute of limitations.

9. Similarly, the Response raises points about the application of common law government immunity from statutes of limitations without recognizing that the General

Assembly's 1982 passage of Section 5/13-205 unambiguously supplied a limitations period applicable to the State's twelve new counts.

10. As such, the Response raises new and additional issues that merit a reply, which would assist the Board in rendering a ruling on this matter and prevent material prejudice.

11. Finally, since the Motion to Dismiss was filed, the Illinois Supreme Court has handed down a new decision on the scope and application of the five-year limitations period set forth in Section 5/13-205. *See Tims v. Black Horse Carriers, Inc.*, --- N.E.3d ----, ¶ 34, 2023 WL 1458046, *7 (opinion filed Feb. 2, 2023). This opinion should be briefed, noted, and taken into account.

12. Accordingly, Petco move the Board to grant permission to file the Reply, which Petco has attached to this Motion for Permission.

WHEREFORE, Respondent Petco Petroleum Corporation respectfully requests that the Board grant this motion and accept for filing Petco's Reply to Complainant's Response in Opposition to Respondent's Motion to Dismiss Counts 62 Through 72 of the First Amended Complaint.

Respectfully submitted,

/s/ *Paul T. Sonderegger*

Paul T. Sonderegger, #6276829
Tim Briscoe, #6331827
One U.S. Bank Plaza
St. Louis, MO 63101
(314) 552-6000
FAX (314) 552-6154
psonderegger@thompsoncoburn.com
tbriscoe@thompsoncoburn.com

OF COUNSEL:
THOMPSON COBURN LLP

Attorneys for Respondent Petco Petroleum Corporation

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 19, 2023, the foregoing was filed via the Board's electronic filing system providing notice of the same to all the clerk and all counsel of record.

/s/ Paul T. Sonderegger

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	PCB No. 13-072
v.	)	(Water – Enforcement)
	)	
PETCO PETROLEUM CORPORATION,	)	
	)	
Respondent.	)	

REPLY TO COMPLAINANT'S RESPONSE IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS COUNTS 62 THROUGH 73 OF THE FIRST AMENDED COMPLAINT

COMES NOW Respondent Petco Petroleum Corporation ("Petco"), by and through its undersigned counsel, and for its Reply to Complainant's Response in Opposition to Respondent's Motion to Dismiss Counts 62 Through 72 of the First Amended Complaint ("Reply"), states as follows:

INTRODUCTION

There is a single legal issue raised in the Motion to Dismiss—the applicability of the five-year statute of limitations at 735 ILCS 5/13-205 to the twelve new counts in the First Amended Complaint. However, Complainant's Response in Opposition opens with four pages of unrelated and objectionable exposition about the "larger ongoing saga involving" Petco and a mischaracterization of settlement efforts in this matter. (Response at 1-4). This is a tacit admission to the Board, despite Complainant's express representations to the Hearing Officer that it needed time to uncover the facts and rationale from personnel, that Complainant has no reason or excuse for waiting a decade to bring new claims. It goes without saying that, regardless of other court cases or ongoing settlement negotiations (which Petco has repeatedly advised and affirmed to the Board, but the Complainant curiously has walked back and now

declines to acknowledge with the exception of its points raised in Response to the Motion to Dismiss), Complainant could and should have filed new Counts 62 through 73 five years ago to preserve them. It then could have asked the Board for a stay. But, Complainant neither did so nor asked Petco for its position or consent. Late 2022 was the first time Complainant raised the desire and need to file new claims that arose in 2013 and 2014 to either the Board or Petco.

Aside from the irrelevant sojourn into other cases and the parties' settlement discussions, when the Response does eventually reach the statute of limitations, it sidesteps the dispositive points on the express and operative language of Section 5/13-205. Complainant instead leaps to the three-factor public interest test and declares that it takes precedent over the plain and ordinary meaning of the provisions of the terms of the statute of limitations. Similarly, the Response raises irrelevant points about the application of common law government immunity in this statutory case brought pursuant to the Environmental Protection Act, 415 ILCS 5/1 (the "Act"). The bottom line is that the General Assembly's 1982 passage of Section 5/13-205 unambiguously supplied a limitations period applicable to Complainant's twelve new counts because they are "civil actions." Complainant chooses to ignore the dispositive language because it does not have a substantive response. Accordingly, Petco requests that Counts 62 (LXII) through 73 (LXXIII) of the First Amended Complaint be dismissed.

ARGUMENT

I. Section 5/13-205 Bars Counts 62 Through 73 Because Complainant's Civil Enforcement Under the Act Are Indisputably "Civil Actions"

Complainant sidesteps Petco's central argument that new Counts 62 through 73 are "civil actions" within the plain and ordinary meaning of 735 ILCS 5/13-205, and, therefore are subject

the five-year limitations period.[1] In each limited instance where Complainant addresses the operative language, the Response offers only hyperbole. As an initial matter, Petco neither "dissect[s] and reconstruct[s]" nor "infus[es] fresh meaning" (Response at 4-5) into the term "civil action" in Section 5/13-205. Complainant does not and cannot dispute that this case indeed is a *civil action* brought pursuant to the Act. The Motion to Dismiss identifies the accepted definition of "civil action" in Black's Law Dictionary[2] and the Illinois Supreme Court's acknowledgment that actions brought by Complainant to enforce provisions of the Act are "civil enforcement actions." *People of the State of Ill. v. Stateline Recycling, LLC,* 2020 IL 124417, ¶ 1, 181 N.E.3d 887, 888–89 (Ill. 2020); *see also* Motion to Dismiss at 7-9.

Again, without exception, the General Assembly has provided that "all *civil actions* not otherwise provided for, shall be commenced within 5 years next after the cause of action accrued." 735 ILCS 5/13-205 (emphasis added). Complainant does not offer any explanation or theories as to how the General Assembly could have more clearly and broadly written Section 5/13-205 so as to capture civil enforcement actions filed pursuant to the Act. One iteration of hypothetical text could be: 'all civil actions not otherwise provided for, *including civil actions brought by the State*.' But, this hypothetical additional clause would be superfluous, unnecessary, and confusing due to the plain and ordinary meanings of the terms "all" and "civil

[1] *See, e.g.*, Response at 4 ("Petco expends considerable energy dissecting and reconstructing the phrase 'civil action,' in an effort to reach a conclusion about the effect of Section 13-205 [] that simply is not supported by the case law."); 5 ("Infusing fresh meaning into the phrase 'civil action' does not give rise to the ability of a party to apply a statute of limitations defense to a governmental entity, acting in the public interest, particularly when the State brings an enforcement action pursuant to Section 31 of the Act."); 10 ("Whether or not an action is a "civil action" is beside the point. The key question to consider is whether an action brought by a governmental entity involves a public right or a private right.").

[2] Complainant endorses utilizing Black's Law Dictionary based on the two parenthetical references to the dictionary on page 3 of Complainant's Motion to Strike Respondent's Affirmative and Additional Defenses to the First Amended Complaint and Immaterial Material filed contemporaneously with Complainant's Response.

action." *See Garimella v. Bd. of Trustees of Univ. of Ill.*, 50 Ill. Ct. Cl. 350, 366 (1996) (Epstein, J., concurring) ("I agree with Judge Raucci that this statutory 'all claims' language must be given its plain and ordinary meaning: that 'all' means all and does not mean some and that, in the absence of legislative history to the contrary, we must conclude that the General Assembly did not utilize the expression 'all claims' to mean 'all claims except equitable claims.'"). Here, "all" must mean *all* civil actions irrespective of whether they are brought by a private party or the government. Civil enforcement actions under the Act are "civil actions" to which Section 5/13-205 applies.

In addition, whether or not the plain and ordinary meaning of Section 5/13-205 is "supported by the case law" (Response at 4) has been expressly addressed and is immaterial because the dispositive statutory language, until this action, has not been presented to the Board. Rather, other parties have leaped past a review of the text of the statute of limitations altogether. They instead went straight to briefing the three-factor analysis of the public interest exception, which was created by courts in *common law* actions, and arguing that public interest issue in those *statutory* enforcement actions without apparent aforethought. *See, e.g.*, *People of the State of Ill. v. Amsted Rail Co., Inc.*, PCB No. 16-61, 2016 WL 4400840, at *2 (Mar. 3, 2016); *Pielet Bros. Trading v. Ill. Pollution Control Bd.*, 110 Ill. App. 3d 752, 758, 442 N.E.2d 1374, 1379 (5th Dist. 1982); *City of Shelbyville v. Shelbyville Restorium, Inc.*, 96 Ill.2d 457, 459-63, 451 N.E.2d 874, 875-78 (Ill. 1983). Complainant makes the same leap in the Response,[3] as confronting the text of the statute of limitations issue directly leads to an adverse outcome—

[3] *See* Response at 4 ("the case law has long held that when a government entity brings a lawsuit, a statute of limitations does not apply if the government entity acts in the public interest."); 6 ("Governmental immunity to the application of statutes of limitations when a government entity is working in the public interest is well-established in the case law."); 10 ("Whether or not an action is a 'civil action' is beside the point. The key question to consider is whether an action brought by a governmental entity involves a public right or a private right.");

reasonable time limits on Complainant's ability to bring civil enforcement actions many years, decades, or a century after the actions accrued in the absence of ongoing violations.

Further absurd outcomes would result if the three-factor public interest analysis superseded analysis of the statutory text. For instance, consider how Complainant's purported rule may have changed the outcome of *Du Page County v. Graham, Anderson, Probst & White, Inc.*, 109 Ill. 2d 143, 485 N.E.2d 1076 (Ill. 1985). In *Du Page County*, the county filed suit against the architect and general contractor of a county administration building alleging defective design and construction. *Id.* at 109 Ill. 2d 146; 485 N.E.2d 1077. The Illinois Supreme Court found that the two-year statute of limitations at 735 ILCS 5/13-214 applied because the term "person" in the statute was expressly defined to include "any body politic." *Id*. at 109 Ill. 2d 151, 485 N.E.2d 1079. The Court concluded the analysis by applying the text of the statute of limitations and did not consider whether public interests were implicated. *Id.* at 109 Ill. 2d 153, 485 N.E.2d 1088 ("Because we find that the language of section 13-214 abrogates governmental limitations immunity, it is unnecessary to reach the issue of whether the instant action involves public rights. That becomes an appropriate inquiry only where a statute of limitation does not expressly state that it applies to a governmental entity.").

If Complainant's position here were applied in *Du Page County*, then the Court would have simply ignored the statute of limitations and considered only whether the county was pursuing a public interest. Under this reasoning, the statute of limitations would not have applied in that case despite the express inclusion of "any body politic" in the statute so long as obtaining relief due to an architect or contractor's negligent design of the government building was in the public interest. That is not the law as articulated by *Du Page County* or any other

case. Rather, if a statute expressly includes actions by the government, as Section 5/13-205 does here, then the limitations period applies.

Differences in the text of Section 5/13-214 at issue in *Du Page County* and Section 5/13-205 at issue here do not impact the analysis. Section 5/13-214 uses the term "person" (defined to include "any body politic") to identify the entity bringing an action, while Section 5/13-205 does not identify the entity bringing an action. Instead, the General Assembly made the scope of Section 5/13-205 clear by specifying the actions to which the limitations period would apply. Those actions include, in relevant part, "all civil actions not otherwise provided for." 735 ILCS 5/13-205. This catch-all limitations period squarely captures Complainant's action in this case, which is a "civil action" for which a statute of limitations is not "otherwise provided for."

Subsequent to filing the Motion to Dismiss, the Illinois Supreme Court emphasized the scope of Section 5/13-205 in *Tims v. Black Horse Carriers, Inc.*, --- N.E.3d ----, ¶ 34, 2023 WL 1458046, *6-7 (opinion filed Feb. 2, 2023). Noting that "Illinois courts have routinely applied this five-year catchall limitations period to other statutes lacking a specific limitations period," the Court in *Tims* held that claims under the Biometric Information Privacy Act, 740 ILCS 14/1 were subject to the five-year limitations period of Section 5/13-205. *Id.* (collecting cases). The Court explained that applying Section 5/13-205 was also required in order to "ensure certainty, predictability, and uniformity as to when the limitations period expires in each subsection [of the act]." The reasoning of the Illinois Supreme Court in *Tims* applies equally here. The Board should dismiss Counts 62 through 73.

II. Governmental Immunity Does Not Apply Based on the 1982 Passage of Section 5/13-205

Complainant also leans heavily on the common law principle of governmental immunity to argue actions under the Act are not subject to the statute of limitations if they are brought in

the "public interest." Yet many of Complainant's cited cases on this point are inapposite because they predate the General Assembly's 1982 passage of Section 5/13-205. *See Governor use of Thomas v. Woodworth*, 63 Ill. 254 (Ill. 1872), *Brown v. Trs. of Schools*, 224 Ill. 184, 79 N.E. 579 (Ill. 1906); *People, For Use of Town of New Trier v. Hale*, 320 Ill. App. 645, 52 N.E.2d 308 (1st Dist. 1943).

The General Assembly has the express power to alter or abrogate common law precepts so long as the legislature's intent is "clearly and plainly expressed." *Maksimovic v. Tsogalis*, 177 Ill.2d 511, 518, 687 N.E.2d 21, 24 (Ill. 1997). The intent "will not be presumed from ambiguous or doubtful language." *Id.*; *see also McIntosh v. Walgreens Boots All., Inc.*, 2019 IL 123626, ¶ 30, 135 N.E.3d 73, 82 (Ill. 2019) ("Common-law rights and remedies remain in full force in this state unless expressly repealed by the legislature or modified by court decision."); *accord Du Page Cnty*, 109 Ill. 2d at 153, 485 N.E.2d at 1088.

Again, the text of Section 5/13-205 is plain and clear. "[A]ll civil actions not otherwise provided for, shall be commenced within 5 years next after the cause of action accrued." 735 ILCS 5/13-205. Complainant seeks to enforce the Act against Petco for new violations set forth in Counts 62 through 73 that occurred more than eight to nine years before the First Amended Complaint was filed. Any cause of action which accrued prior to October 20, 2017 is time-barred. Counts 62 through 73 accrued from May 27, 2018 through September 1, 2019. The five-year statute of limitations applies to those twelve counts, as the First Amended Complaint was filed on October 20, 2022. Therefore, Section 5/13-205 time-bars Counts 62 through 73.

III. Petco Has Sought and Continues to Seek a Lasting Resolution of Complainant's Claims in this Case and Other Actions

Finally, Complainant attempts to place Petco in a bad light by claiming that it is litigiousness and intransigent by relating a history of pending, completed, or settled actions filed

against Petco in various jurisdictions stretching as far back as 1999. (*See* Response at 1-4). These other cases, and the separate circumstances presented by each of them, are not relevant to the statute of limitations issue raised by Petco's Motion to Dismiss and do not bear on any claimed wrongdoing by Petco here. *See* Ill. R. Evid. 404(b) and 403; *see also KCBX Terminals Co. v. Illinois Environmental Protection Agenc*y, PCB 14-110, 2014 WL 1757982, at *4 (Apr. 28, 2014) (applying Illinois Rules of Evidence).[4]

One of Complainant's purposes for citing the other cases seems to be to set the stage for characterizing settlement negotiations in this matter. Yet, the Response gives away the catch by informing the Board that it was Complainant who unilaterally "determined in 2021 that settlement negotiations had reached an impasse." (Response at 3). Petco has repeatedly requested a meeting and response from the State to several resolution alternatives, provided information to the State, and made offers to the State including, but not limited to, on December 3, 2021, December 7, 2021, and April 19, 2022. Petco and Complainant also discussed the matter and updates at various times during Summer 2022, which begs the question of when exactly the purported impasse occurred and why Petco had not been informed of its existence. At least eight months after the claimed 2021 impasse, Complainant belatedly filed its Motion for Leave to File the First Amended Complaint, adding the twelve new counts subject to Petco's Motion to Dismiss.[5] Petco again reached out to Complainant seeking a dialogue on March 29,

[4] Complainant's citations to these cases are also notably inconsistent with its statements later in the Response that "[e]ach case that comes before the Board presents a unique set of facts" and "the Board considers each case individually." (Response at 17-18).

[5] Complainant is attempting to have it both ways. On one hand, it contends that there was no agreement with Petco to refrain from sending notices of violation and filing new claims while negotiations proceeded. On the other hand, Complainant asserts that it held off on filing claims while settlement negotiations occurred so a "global settlement" potentially could be reached. This latter position, of course, evidences an agreement between the parties during negotiations for Complainant to refrain from taking action on new alleged violations—which, as set forth above, Complainant denies the existence of such an

2023 and April 12, 2023. Petco believes and has expressed to Complainant that the most productive path forward is to have a meeting with the principals involved, revisit where things stand, and discuss potential resolution alternatives. Accordingly, this matter remains on the Board's docket as the of Complainant's unilateral conduct and declarations.

Similarly, Complainant's repeated references to "continued violations" in the Response[6] are not relevant either to this case or the statute of limitations issue raised in the Motion to Dismiss. Complainant does not dispute that the new violations subject to the Motion to Dismiss (Counts 62 through 73) were corrected long ago and occurred more than five years before the filing of the First Amended Complaint. (*See* Motion to Dismiss at 1-2; 13; 16-17). There is no present harm requiring injunctive relief or a need for the expenditure of public funds for any kind of remediation at issue in this proceeding. Complainant brings forth the irrelevant other court cases and the parties' settlement discussions to distract all from the central and dispositive point. The stale claims presented in Counts 62 through 73 should be dismissed.

CONCLUSION

Based on the foregoing arguments and those set forth in its Motion to Dismiss Counts 62 Through 73 of the First Amended Complaint, Respondent Petco Petroleum Corporation requests

agreement at the same time. Complainant's lack of positional consistency is shown throughout the Response. Complainant in some instances filed claims while settlement negotiations occurred, including in Fayette County Circuit Court and Jefferson County Circuit Court, which Complainant again acknowledges it refrained doing before the Board in the same period. *Compare* Response at 2 ("Following the filing of the original Complaint, and as reflected by the docket for this case, the parties engaged in protracted settlement negotiations in an effort to achieve a 'global settlement' to resolve all Petco-related violations—including both violations on file in multiple jurisdictions, and unfiled violations—with an eye toward developing and implementing a long-term compliance plan for Petco's operations.") *with* Response at 3, fn.3. What is clear and is dispositive, however, is that the parties did *not* enter into a tolling agreement that would affect the application of the statute of limitations.

[6] *See, e.g.*, Response at 2 ("Yet despite the previous orders in place against Petco, Respondent's operations continued—and continue to date—to produce violations of the Act."); 3 ("Violations continued to accrue during this period of negotiations . . .").

that the Board dismiss with prejudice Counts 62 (LXII) through 73 (LXXIII) of the First Amended Complaint, that judgment be entered in its favor and against Complainant, and that Petco Petroleum Corporation be granted any other any further relief as the Board deems proper under the circumstances.

Respectfully submitted,

/s/ *Paul T. Sonderegger*
Paul T. Sonderegger, #6276829
Tim Briscoe, #6331827
One U.S. Bank Plaza
St. Louis, MO 63101
(314) 552-6000
FAX (314) 552-6154
psonderegger@thompsoncoburn.com
tbriscoe@thompsoncoburn.com

OF COUNSEL:
THOMPSON COBURN LLP

Attorneys for Respondent Petco Petroleum Corporation

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 19, 2023, the foregoing was filed via the Board's electronic filing system providing notice of the same to all the clerk and all counsel of record.

/s/ Paul T. Sonderegger