



2. In pertinent part for purposes of this motion, the Board granted Kerr-McGee's motion to dismiss Grand Pier's eighth affirmative defense, which provides: "Any injuries, damages or condition complained of by Kerr-McGee were caused by the acts or omissions of third parties not under the control of Grand Pier." *See* Jan. 5, 2006, Order p.8.

3. The Board held that Grand Pier's eighth affirmative defense was a denial of the allegations in Kerr-McGee's counter complaint rather than affirmative defense. *See id.* at 9.

4. Despite the fact that the Board dismissed Grand Pier's eighth affirmative defense, the Board allowed Kerr-McGee's sixth affirmative defense to stand, which is substantively equivalent to Grand Pier's eighth affirmative defense. Kerr-McGee's sixth affirmative defense alleges: "Grand Pier's claims are barred because of preceding, intervening, and/or superceding acts of third parties or because of events which Kerr McGee had no control." *See id.* at 4.

5. Clearly, both Grand Pier's eighth affirmative defense and Kerr-McGee's sixth affirmative defense assert that claims are barred due to acts of third parties over which Grand Pier or Kerr-McGee, respectively, had no control. Grand Pier respectfully argues that the Board's ruling on this limited issue is inequitable and should be reconsidered and Grand Pier's eighth affirmative defense reinstated.<sup>1</sup>

6. Grand Pier's eighth affirmative defense is properly pled because it asserts a new matter by which Kerr-McGee's counter complaint is defeated. *See Ferris Elevator*

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<sup>1</sup> In order for the Board to rule equitably, either both affirmative defenses must be allowed to stand or they must both be stricken, but it is judicially inconsistent to allow Kerr-McGee's sixth affirmative defense to stand while striking Grand Pier's eighth affirmative defense.

*Co., Inc. v. Neffco, Inc.*, 285 Ill.App.3d 350, 354, 674 N.E.2d 449, 452 (3d Dist. 1996); *Condon v. American Telephone and Telegraph Co., Inc.*, 210 Ill.App.3d 701, 709, 569 N.E.2d 518, 523 (2d Dist. 1991); *see also* Jan. 5, 2006, Order p. 2 citing *People v. Community Landfill Co.*, PCB 97-193, slip op. at 3 (Aug. 6, 1998). The eighth affirmative defense asserts that, after giving color to Kerr-McGee's claims within its counter complaint, all injuries asserted by Kerr-McGee were the result of the actions taken by third parties over which Grand Pier lacked control.

7. As the Board concluded vis-à-vis Kerr-McGee's sixth affirmative defense, if the facts compassed by Grand Pier's eighth affirmative defense are proven, there is the possibility that Grand Pier could prevail. *See* Jan. 5, Order p. 7 citing *International Ins. Co. v. Sargent & Lundy*, 242 Ill.App.3d 614, 609 N.E.2d 842, 854 (1<sup>st</sup> Dist. 1993).

WHEREFORE, Complainants Grand Pier LLC and American International Specialty Lines Insurance Co. pray this Board reconsider its January 5, 2006, Order and reinstate Complainants' eighth affirmative defense. In the alternative, Complainants pray this Board reconsider its January 5, 2006, Order and strike Kerr-McGee's sixth affirmative defense.

January 30, 2006

Respectfully submitted

GRAND PIER CENTER LLC and  
AMERICAN INTERNATIONAL  
SPECIALITY LINES INSURANCE CO.

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**Certificate of Service**

The undersigned certifies he caused to be served the foregoing **COMPLAINANTS' MOTION TO RECONSIDER THE BOARD'S JANUARY 5, 2006, ORDER** by U.S. Mail on the 30th day of January, 2006, to:

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