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June 5, 2009

VIA ELECTRONIC FILING

Illinois Pollution Control Board
Clerk's Office
James R. Thompson Center, Suite 11-500
100 West Randolph Street
Chicago, Illinois 60601
http://www.ipcb.state.il.us/

Re: ***Elmhurst Memorial Healthcare, et al. v. Chevron U.S.A. Inc.*** **(PCB 2009-066)**

This law firm represents Elmhurst Memorial Healthcare and Elmhurst Memorial Hospital in the above-referenced case. Please find enclosed a dispositive motion directed to the Board titled "Complainants' Response to Affirmative Defense Number I and Motion to Strike Affirmative Defenses II Through IX." A Notice of Filing and Certificate of Service are enclosed as well.

Very truly yours,

Andrew J. Marks

Encl.

cc: Via Regular Mail

Joseph A. Girardi
Robert B. Christie
Henderson & Lyman
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175 W. Jackson Blvd., Suite 240
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ELMHURST MEMORIAL HEALTHCARE and ELMHURST MEMORIAL HOSPITAL	)	
Complainants,	)	
v.	)	PCB 09-66
	)	(Citizen's Enforcement – Land)
CHEVRON U.S.A. INC.,	)	
Respondent.	)	

NOTICE OF FILING

To: Joseph A. Girardi
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PLEASE TAKE NOTICE that I have on June 5, 2009 electronically filed with the Office of the Clerk of the Pollution Control Board COMPLAINANTS' RESPONSE TO AFFIRMATIVE DEFENSE NUMBER I AND MOTION TO STRIKE AFFIRMATIVE DEFENSES II THROUGH IX, a copy of which is hereby served upon you.

Elmhurst Memorial Healthcare
Elmhurst Memorial Hospital

By: _____
One of their attorneys

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ELMHURST MEMORIAL HEALTHCARE and ELMHURST MEMORIAL HOSPITAL	)	
Complainants,	)	
v.	)	PCB 09-66 (Citizen's Enforcement – Land)
CHEVRON U.S.A. INC.,	)	
Respondent.	)	

COMPLAINANTS' RESPONSE TO AFFIRMATIVE DEFENSE NUMBER I AND MOTION TO STRIKE AFFIRMATIVE DEFENSES II THROUGH IX

Complainants, Elmhurst Memorial Healthcare and Elmhurst Memorial Hospital (collectively referred to as "EMH"), by and through their attorney, the Law Offices of Carey S. Rosemarin, P.C., responds to Respondent's Affirmative Defense Number I and moves this Board for an order striking Respondent's Affirmative Defenses II through IX.

INTRODUCTION

EMH's Complaint seeks to recover remediation costs from Respondent Chevron U.S.A. Inc. ("Chevron"). Texaco Inc. ("Texaco") operated a gasoline filling station at 701 South Main Street, Lombard, Illinois (the "Property") from approximately 1958 to 1977. (EMH purchased the Property in 2005.) Texaco's liabilities have devolved upon Respondent as a result of various corporate transactions.

Respondent asserted nine (9) affirmative defenses. EMH responds to Affirmative Defense Number I, and moves to strike Affirmative Defenses II through IX because they do not satisfy the legal standard the Board has applied to affirmative defenses.

RESPONSE TO AFFIRMATIVE DEFENSE NUMBER I

Aff.Def.I. ¶1. Paragraph 3 of the Complaint alleges that Chevron Corporation (not the Respondent) merged with Texaco Inc.

Response: EMH admits that paragraph 3 of the Complaint alleges: "In October 2001, Chevron Corporation merged with Texaco." EMH denies any and all other allegations contained in Aff.Def.I ¶1.

Aff.Def.I. ¶2. Paragraph 4 of the Complaint alleges that by virtue of the alleged merger, any liabilities arising from Texaco Inc.'s pre-2001 actions relevant to this Complaint became the liabilities of Chevron Corporation.

Response: EMH admits that Paragraph 4 of the Complaint alleges: "By virtue of the merger, any liabilities arising from Texaco's pre-2001 actions relevant to this Complaint became the liabilities of Chevron Corporation. On information and belief, following the 2001 merger, Chevron Corporation effectively transferred such liabilities to its subsidiary, Respondent Chevron." EMH denies any and all other allegations contained in Aff.Def.I ¶2.

Aff.Def.I. ¶3. Paragraph 4 of the Complaint further alleges, on information and belief only, that following the alleged merger, Chevron Corporation effectively transferred the liabilities of Texaco Inc. to Respondent. Paragraph 4 does not allege any facts upon which Complainants formed their information and belief to make the allegations.

Response: EMH admits that Paragraph 4 of the Complaint alleges: "By virtue of the merger, any liabilities arising from Texaco's pre-2001 actions relevant to this Complaint became the liabilities of Chevron Corporation. On information and belief, following the 2001 merger, Chevron Corporation effectively transferred such liabilities to its subsidiary, Respondent Chevron." EMH denies any and all other allegations contained in Aff.Def.I ¶3.

Aff.Def.I. ¶4. In fact, on October 9, 2001 a transaction took place in which:

(a) The common stock of Texaco Inc. was acquired by a subsidiary of Chevron Corporation; and

(b) As a result Texaco Inc. became and remains a wholly-owned, indirect, subsidiary of Chevron Corporation.

Response: EMH does not have sufficient knowledge to form a belief as to the truth of the allegations of Aff.Def.I ¶4 and, as such, denies same.

Aff.Def.I. ¶5. Texaco Inc. did not merge into or with Chevron Corporation.

Response: EMH denies the allegations of Aff.Def.I ¶5.

Aff.Def.I. ¶6. No liabilities of Texaco Inc. were transferred to or assumed by Respondent in this transaction.

Response: EMH denies the allegations of Aff.Def.I ¶6.

Aff.Def.I. ¶7. As a result, any liability of Texaco Inc. for the actions alleged in the Complaint is not the liability of Respondent.

Response: EMH denies the allegations of Aff.Def.I ¶7.

Wherefore, Respondent respectfully requests that the Illinois Pollution Control Board enter an order finding in favor of Respondent and against the Complainants on each and every claim for relief requested by Complainants, and for such other and further relief as the Board may deem appropriate.

Response: EMH adopts and relies on its responses to Aff.Def.I ¶¶ 1 through 7 and denies that Respondent's requested relief is appropriate.

MOTION TO STRIKE AFFIRMATIVE DEFENSES II THROUGH IX

LEGAL STANDARD

To assert a valid affirmative defense Respondent must assert new facts or legitimate legal arguments that, if true, will defeat EMH's claims even if all of the allegations in the complaint are true. *People v. Community Landfill Co.*, PCB 97-193, slip op. at 3 (Aug. 6, 1998). "Any 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).

A valid affirmative defense admits the allegations in the complaint and asserts a new matter which precludes complainant's recovery. *People v. Wood River Refining Co.*, PCB 99-120, slip op. at 4 (Aug. 8, 2002); *People v. Community Landfill Co.*, PCB 97-193, slip op. at 3 (Aug. 6, 1998). Also, an affirmative defense is defined as a "response to a plaintiff's claim which attacks the plaintiff's legal right to bring an action, as opposed to attacking the truth of claim." *Farmer's State Bank v. Phillips Petroleum Co.*, PCB 97-100, slip op. at 2 n. 1 (Jan. 23, 1997) (quoting *Black's Law Dictionary*).

On the other hand, "if the pleading does not admit the opposing party's claim, but instead attacks the sufficiency of that claim, it is not an affirmative defense." *Grand Pier v. Kerr-McGee*, PCB 05-157, 2006 WL 159467, at *1 (Jan. 5, 2006). In other words, an affirmative defense "must do more than merely refute well-pleaded facts in the complaint." *Prywelle r v. Cohen,* 668 N.E.2d 1144, 1149, 282 Ill. App. 3d 899 (1st Dist. 1996), *appeal denied* 675 N.E.2d 640, 169 Ill.2d 588 (1996).

ARGUMENT

As discussed below, Respondent's Affirmative Defenses II through IX must be stricken because they either fail to assert facts which would preclude Complainant's recovery, or because they merely attempt to refute well-pleaded facts in EMH's Complaint.

A. Bankruptcy. Respondent's Affirmative Defense Number II Contains No Facts to Show EMH'S Present Cause of Action Was Affected by the Discharge.

Respondent's position rests on the implicit and irrefutably wrong assumption that all entities that enter and emerge from bankruptcy are absolved of all pre-bankruptcy sins. *E.g., In re Pettibone Corp.*, 90 B.R. 918, 923 (Bankr. N.D. Ill. 1988) (Where tort claimant is only exposed to defective product post-bankruptcy, court held that claim arose post- bankruptcy and was not dischargeable even where Chapter 11 debtor sold defective product to tort claimant's employer pre- bankruptcy). The crux of Affirmative Defense Number II is Respondent's allegation that EMH's claims are barred because EMH did not file a claim in Texaco's 1988 Chapter 11 bankruptcy proceeding. It states: "No claims arising out or relating to any acts, omissions or liabilities of Texaco Inc. arising out of or relating to the Property, including but not limited to the claims alleged in the Complaint, were filed in the Texaco Bankruptcy by Complainants or any other person or entity." (Aff. Def. No. II, ¶ 6) (emphasis added).

But the affirmative defense alleges no facts to show that Complainant had a claim that was required to be filed in the Texaco bankruptcy proceeding or that was otherwise dischargeable in bankruptcy. *People v. Highlands*, PCB 00-104, 2005 WL 2985591, at *3 (Oct. 20, 2005) (Under Illinois' fact-pleading standard and Board rules, an affirmative defense must "at a minimum set out ultimate facts that support" the defense or it will be stricken.) (citing 35 Ill. Adm. Code 103.204(d)).

As Respondent asserted, Texaco filed its bankruptcy petition in 1987, and March 15, 1988 was set as the date by which proofs of claim had to be filed ("Bar Date"). (Aff. Def. No. II, ¶¶ 2, 3.) Thus, the pivotal issue is whether EMH's present action could qualify as such a claim (i.e., whether it had to be filed before the Bar Date).

> The starting place for any analysis of whether a claim is discharged is the definition of "claim." The Bankruptcy Code defines "claim" broadly, and includes "any right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unse[cured]."

In re Conseco, 330 B.R. 673, 685-86 (Bankr. N.D. Ill. 2005) (emphasis added) (citing 11 U.S.C. § 101(5)(A)).

The right to payment must exist before the Bar Date. *In re Chicago, Milwaukee, St. Paul & Pacific R.R.*, 3 F.3d 200, 202, 207 (7th Cir. 1993) (The claim bar only applies to claims arising prior to the bankruptcy). While some claims may qualify as a contingent right to payment and subject to the bar, at some point the possibility becomes so remote that no right to payment exists.

> As one court aptly noted, a contingent right to payment might be said to exist somewhere on a continuum between being and nonbeing. At some point on that continuum, a right to payment becomes so contingent that it cannot fairly be deemed a right to payment at all. The constitutional right to due process must guide courts in determining whether a potential right constitutes a contingent claim that is discharged in bankruptcy.

In re Conseco, 330 B.R. 685 (internal quotations and citations omitted).

Respondent's affirmative defense must be stricken because it alleges absolutely no facts that even remotely suggest that EMH had a right to payment on the "*Conseco* continuum." Therefore, even if all of the allegations in Affirmative Defense Number II are assumed to be true, EMH's right to assert its present cause of action would not be defeated. *Highlands*, PCB 00-104, 2005 WL 2985591, at *3; *Community Landfill Co.*, PCB 97-193, slip op. at 3.

The Seventh Circuit has addressed the issue of what constitutes a "claim" in the environmental context. In some cases the right to payment turns on whether the claimant had knowledge of releases pre-bankruptcy that will lead to claims. *In re Chicago, Milwaukee, St. Paul & Pacific Railroad*, 974 F.2d 775, 786 (7th Cir.1992). Where no such knowledge is possessed, the claims are not discharged. *AM Int'l, Inc. v. Datacard Corp.*, 106 F.3d 1342 (7th Cir. 1997); *see also In re Conseco*, 330 B.R. at 685-86 (The test is "whether the claimant could have fairly contemplated a claim based on pre-discharge conditions or conduct.") (emphasis added).

In *Datacard*, clean-up costs were recoverable where, as in the present case, the purchase of the contaminated property occurred after the conclusion of the bankruptcy proceeding. AMI caused solvent spills at its site from 1959 to 1981, when the site was sold to DBS. *Datacard*, 106 F.3d 1344. In 1982, AMI filed for Chapter 11 reorganization and its plan was confirmed in 1984. Two years later, Datacard purchased the site from DBS. *Id.* at 1344. Because Datacard did not know of the contamination until after the bankruptcy, Datacard had no right to payment pre-bankruptcy so its claim was not discharged. *Id.* at 1349.

Respondent has alleged no facts by which one could possibly conclude EMH had any right to payment, or even a contingent right to payment, prior to the Bar Date. To survive this Motion to Strike, Respondent must allege, for example, that EMH not only knew of the contamination before the Bar Date (March 15, 1988), but also knew at that time the contamination would someday give EMH a right to payment. Of course, it is not possible for Respondent to validly assert such facts because EMH did not purchase the Property until some seventeen years later, in 2005. In short, EMH had no dischargeable claim, and Respondent has asserted no facts to the contrary. Affirmative Defense Number II must be stricken.

B. Jurisdiction/Retroactive Application of Illinois Environmental Protection Act. Respondent's Affirmative Defense Number III Disregards the Board's Clear Holdings that the Act Applies Retroactively.

Respondent asserts the Illinois Environmental Protection Act ("Act") is not applicable because: (1) the Act became effective twelve years after Texaco began operation of the gas station at the Property; and (2) Sections 21(a) and 21(e) of the Act (415 ILCS 5/21(a) and 21(e)) were not "in effect earlier than January 1, 1985." (Aff. Def. No. III, ¶ 2, 3.) Respondent is simply incorrect. In fact, Sections 21(a) and (e) were part of the original 1970 Act (P.A. 76-2429, eff. July 1, 1970).[1] Further, Respondent admitted that Texaco operated the gas station for seven years beyond 1970. (Answer to Compl. ¶ 6, operating from 1958-77). Respondent has alleged no facts that would preclude application of the Act to Texaco and this deficiency is fatal. *Highlands*, PCB 00-104, 2005 WL 2985591, at *3; *Wood River Refining Co.*, PCB 99-120, slip op. at 4.

EMH alleged that Texaco caused or allowed releases in violation of the Act and such contamination remained on the Property. Compl. ¶¶ 33-34, 40-41. Whether the contamination occurred before 1970, after 1970, or partly before and after 1970 is of no consequence. The Board has repeatedly and unequivocally held that the Act applies retroactively. *Grand Pier v. Kerr-McGee*, PCB 05-157, 2005 WL 1255254, at *4 (May 19, 2005) (citing *State Oil Co. v. People*, 822 N.E.2d 876, 882, 352 Ill. App. 3d 813, 819 (2nd Dist. 2004).

In *Grand Pier*, the respondent argued the complainant had no cause of action because the contamination occurred decades before the Act was adopted. *Grand Pier*, PCB 05-157, 2005 WL 1255254, at *2. In response, the complainant argued that the wrongful acts occurred before 1970, but they caused complainant to incur clean-up costs in 2000 and beyond. Id. at *3. The

[1] Since 1970, various amendments were made to Section 21. 415 ILCS 5/21. However, these amendments do not affect the validity of EMH's claims.

Board agreed with the complainant and, relying on *State Oil*, stated "that the legislature intended the Act to "address ongoing problems, which by definition existed at the time the Act was enacted." *Id.* at *4. To find otherwise would strip the Act of its authority over persistent contamination due to actions prior to 1970. Id. at *3.

Under a plain reading of the Act and the holding of *Grand Pier*, Respondent's Affirmative Defense Number III is legally insufficient and should be stricken.

C. <u>Jurisdiction/Authority to Award Cleanup Costs.</u> Respondent's Affirmative Defense Number IV Disregards the Board's Clear Holdings that It Possesses the Authority to Award Cost Recovery to Private Parties.

Respondent asserts that the Board lacks statutory authority to award clean-up costs. (Aff. Def. No. IV, ¶¶ 4-6.) Even a casual look at the Board's cases show that Respondent is wrong. "Since 1994, the Board has consistently held that pursuant to the broad language of Section 33 of the Act (415 ILCS 5/33 (2002)), the Board has the authority to award cleanup costs to private parties for a violation of the Act." *See e.g., Grand Pier*, PCB 05-157, 2005 WL 1255254, at *4 (citing *Lake County Forest Preserve District v. Ostro*, PCB 92-80 (Mar. 31, 1994)). In *Ostro*, the Board stated that Section 33(a) of the Act specifically allows the Board "to enter such final orders as it deems appropriate." *Ostro*, PCB 92-80, slip op. at 13. Respondent has provided no factual or legal basis to conclude that the Board's clear rulings should not obtain in the present case. Respondent's Affirmative Defense Number IV must be stricken.

D. <u>No Cognizable Legal Principle.</u> Respondent's Affirmative Defense Numbers V, VI, and VII, Present No Cognizable Legal Principle that Would Preclude Recovery by EMH.

Respondent's Affirmative Defense Numbers V, VI and VII are essentially the same. Each asserts that because EMH did not allege that it performed due diligence prior to purchasing the Property, EMH "incurred the risk," "assumed the risk," and "could have avoided the

consequence" of the releases of contaminants on the Property. (Aff. Def. Nos. V, ¶¶ 4-8; VI, ¶¶ 4-8; and VII, ¶¶ 4 – 8.)

Respondent has articulated no legal theory by which a third party's investigation (or lack of investigation) prior to entering into a contract for the purchase of property could possibly relieve Respondent of responsibility for violations of Sections 21(a) or 21(e) some thirty years earlier. Respondent's assertions do not comprise affirmative defenses because they do not assert new facts or arguments that, if true, could defeat EMH's claims. *Wood River Refining Co.*, PCB 99-120, slip op. at 4 (An affirmative defense admits the allegations in the complaint and asserts a new matter which precludes complainant's recovery.) *Community Landfill Co.*, PCB 97-193, slip op. at 3. Whether EMH conducted exhaustive due diligence or no due diligence is utterly irrelevant to the validity or strength of its claim, and Respondent's Affirmative Defenses V, VI, and VII do not say how the contrary could possibly be true. Those affirmative defenses are preposterous and should be stricken.

E. Mere Attempted Refutation of Allegations. Respondent's Affirmative Defense Number VIII is Termed "Causation" But Offers No Facts Refuting EMH's Allegations.

An affirmative defense "must do more than merely refute well-pleaded facts in the complaint." *Pryweller*, 668 N.E.2d at 1149. In Affirmative Defense Number VIII, Respondent asserts, "Complainants cannot demonstrate that the release of gasoline or other petroleum alleged [sic] occurred during the time that Texaco Inc. operated any USTs on the Property; thus, Texaco Inc.'s operation of the USTs could not have directly resulted in the releases alleged." (Aff. Def. No. VIII, ¶ 7.) Aside from Respondent's leap of logic, its affirmative defense fails because it offers no facts whatsoever to support its position. Respondent also nakedly muses that others could be the cause of any release of gasoline on the Property. (Aff. Def. No. VIII, ¶ 6, emphasis

added.) Respondent cites no facts to support this mere speculation. Further, even if that were true, Respondent suggests no principle of law as to how that fact would relieve it of responsibility for violations of Sections 21(a) and 21(e). *Wood River*, PCB 99-120, slip op. at 4 (A valid affirmative defense admits the allegations in the complaint and asserts a new matter which precludes complainant's recovery). Thus, Respondent's Affirmative Defense Number VIII is insufficient and should be stricken.

F. Laches. Respondent's Affirmative Defense Number IX Sets Forth No Facts to Support a Defense of Laches.

"Laches is an equitable doctrine that bars relief where a defendant has been misled or prejudiced because of a plaintiff's delay in asserting a right." *People v. Skokie Valley Asphalt Co.*, PCB 96-98, 2004 WL 2008898, at *7 (Sept. 2, 2004) (emphasis added) (citing *City of Rochelle v. Suski*, 206 Ill. App. 3d 497, 501, 564 N.E.2d 933, 936 (2nd Dist. 1990). Under this well established equitable principle, the inquiry looks to actions by the complainant. Respondent's Affirmative Defense Number IX, purporting to be premised on laches, contains no facts relating to any delay by Complainant EMH. Rather, it merely refers to facts relating to the age and/or existence of witnesses and other evidence. Assuming *arguendo* those facts are true, they are simply not relevant (even if it is assumed that laches could otherwise defeat EMH's cause of action, which EMH does not admit). Accordingly, this affirmative defense is insufficient and should be stricken.

CONCLUSION

Affirmative Defense Number I is denied. The Board should strike Affirmative Defenses II through and including IX because they are legally and/or factually deficient for the reasons stated above.

Dated: June 5, 2009

Respectfully submitted,

Elmhurst Memorial Healthcare
Elmhurst Memorial Hospital

By: _____
One of their attorneys

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Respondent.	)	

CERTIFICATE OF SERVICE

I, the undersigned, on June 5, 2009, caused the foregoing "Complainants' Response to Affirmative Defense Number I and Motion to Strike Affirmative Defenses II Through IX" and Notice of Filing to be electronically filed with the Office of the Clerk, and caused a true and correct copy of said documents to be served upon:

Joseph A. Girardi
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by placing same in an envelope bearing sufficient postage with the United States Postal Service located at 2460 North Dundee Road, Northbrook, Illinois 60062-2620.

One of the Attorneys for
Elmhurst Memorial Healthcare
Elmhurst Memorial Hospital

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