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July 10, 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' Motion for Leave to File Reply Instanter in Support of its Motion to Strike Affirmative Defenses." 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
Attorneys for Chevron U.S.A. Inc.
175 W. Jackson Blvd., Suite 240
Chicago, Illinois 60604

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:

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Hearing Officer
Illinois Pollution Control Board
James R. Thomson Center, Suite 11-500
100 W. Randolph Street
Chicago, Illinois 60601

PLEASE TAKE NOTICE that I have on July 10, 2009 electronically filed with the Office of the Clerk of the Pollution Control Board COMPLAINANTS' MOTION FOR LEAVE TO FILE REPLY INSTANTER IN SUPPORT OF ITS MOTION TO STRIKE AFFIRMATIVE DEFENSES, 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.	)	

COMPLAINTS' MOTION FOR LEAVE TO FILE REPLY INSTANTER IN SUPPORT OF ITS MOTION TO STRIKE AFFIRMATIVE DEFENSES

Complainants, Elmhurst Memorial Healthcare and Elmhurst Memorial Hospital (collectively, "EMH"), by and through their attorney, the Law Offices of Carey S. Rosemarin, P.C., and pursuant to 35 Ill. Adm. Code § 101.500(e), request leave to file this reply instanter in support of EMH's motion to strike Respondent Chevron's affirmative defenses. EMH's reply is limited to Chevron's Affirmative Defense Number II, addressing the bankruptcy of Texaco Inc. ("Bankruptcy Defense"). In support of this motion, EMH states as follows:

Legal Standard for Leave to Reply – Material Prejudice

The Board should grant movants leave to reply to prevent material prejudice. 35 Ill. Adm. Code § 101.500(e). As Board cases show, such prejudice can result from non-movants' misstatements of law and mischaracterizations of fact, as is the case here. *Indian Creek Development Co. v. Burlington Northern RR*, PCB 07-44, 2007 WL 928718, at *4-5 (March 15, 2007) (leave to reply granted to prevent material prejudice arising from alleged misrepresentation of facts regarding pace and extent of diesel spill remediation); *In re Ensign-*

Bickford, AS 00-5, 2003 WL 1785066, at *4 (March 20, 2003) (leave to reply granted to prevent material prejudice arising from misstatements of law.); *People v. Chiquita Processed Foods, L.L.C.*, PCB 02-56, 2002 WL 745635, at *3-4 (April 18, 2002) (leave to reply granted to prevent material prejudice arising from allegedly misleading statements regarding party's authority to control pollution and precautions taken to prevent pollution.)

The "Response of Chevron U.S.A. Inc. to Motion to Strike Affirmative Defenses" ("Response") materially prejudices EMH because it would improperly have the Board believe that the Bankruptcy Court actually dealt with and discharged EMH's cause of action. For example, referring to its own Bankruptcy Defense, Chevron stated:

> In this affirmative defense, Respondent has asserted that . . . the claims alleged in the Complaint were discharged in the Texaco Inc. bankruptcy ("Texaco Bankruptcy") that took place in the late 1980s. (Response at p. 4.)

In fact, EMH first came to and purchased the property in 2005 and thus had no claim until many years after the Texaco Bankruptcy. Therefore, it was *impossible* for the claims alleged in the Complaint to have been discharged.

Chevron also asserted:

> In the instant matter, there is no question that any releases that occurred under Texaco's operation of the Property were prior to the Texaco Bankruptcy. Therefore, any response costs, no matter when incurred, including those which Complainants allege were recently incurred, are "claims" and have been discharged. Thus, the fact that these Complainants did [not][1] own the Property [701 S. Main] at the time of the Texaco Bankruptcy, and, therefore, could not have filed a claim, does not change the rule that the debt for which they now seek recompense was discharged, and no one can now bring a claim for it. (Response at p. 9, emphasis added.)

[1] Chevron omitted the word "not." Based on the remainder of the sentence, EMH assumes this omission was merely a typographical error and Chevron intended to include the word "not."

Chevron's assertion that the 1987 Texaco Bankruptcy discharged all future claims dealing with pre-bankruptcy contamination by Texaco, including that on the Lombard Property, is highly misleading, and indeed, false. The 1988 confirmation order stated that "each of the Debtors [are] discharged of and free [from] any and all debts and claims that arose against it before the date of the entry of this order." (Response at Ex.1, p. 8, dated March 23, 1988; emphasis added.)

EMH's current cause of action could not have arisen prior to the purchase of the Property in 2005 and thus could not have been discharged. Texaco has emerged from bankruptcy and EMH's cause of action is viable and valid. EMH will be materially prejudiced if it is not permitted to rectify Chevron's misstatements of law and fact. As demonstrated below, EMH had no pre-bankruptcy claim against Texaco for the simple reason that it had no pre-bankruptcy relationship with Texaco. That fundamental fact clearly distinguishes the present matter from the cases cited in the Response. Indeed, Chevron's own cases solidly support EMH's position.

Black Letter Bankruptcy Law – No Discharge Absent a Pre-Bankruptcy Relationship

A claim cannot be discharged in bankruptcy if no pre-bankruptcy claim exists, and there can be no such claim where, as here, there was no pre-bankruptcy relationship between the claimant and the debtor. A claim is defined in bankruptcy as a "right to payment." 11 U.S.C. § 101(5)(A); *Avellino & Bienes v. M. Frenville Co., Inc.* 744 F.2d 332, 334 (3rd Cir. 1984). And, as EMH has clearly explained, that right must exist *before* the bankruptcy. *In re Chicago, Milwaukee, St. Paul & Pacific R.R.*, 3 F.3d 200, 202, 207 (7th Cir. 1993), *discussed in* EMH's Motion to Strike at pp. 7-8 (June 5, 2009).

Chevron does not dispute these fundamental principles of bankruptcy; it simply ignores them. Rather than confronting or attempting to distinguish the controlling cases cited in EMH's Motion to Strike, Chevron relies on cases in which a critical pre-bankruptcy relationship – clearly absent in the present case – existed.

In re Chateaugay, 944 F.2d 997 (2nd Cir. 1991), cited by Chevron, is particularly instructive. In *Chateaugay*, the U.S. Environmental Protection Agency ("EPA") filed claims in the bankruptcy proceeding of LTV Steel. EPA's claims were premised on the federal Superfund statute, which allows recovery of costs incurred as a result of the release of hazardous substances, known as "response costs." EPA argued that its claims for future response costs could not be discharged because no "right to payment" existed, and thus no claim existed until EPA incurred response costs. The Court analyzed this position by examining the components necessary to determine whether EPA had a right to payment.

Logically, the *Chateaugay* court commenced the analysis by noting Congress' intent that "right to payment" be interpreted broadly to fulfill the policy of the bankruptcy statute.[2] But the court immediately realized that such a blind policy could lead to unacceptable results. The Court stated:

> To expect "claims" to be filed by those who have not yet had any contact whatever with the tort-feasor has been characterized as " 'absurd.' " *See Schweitzer v. Consolidated Rail Corp. (Conrail) (In re Central R. Co. of New Jersey)*, 758 F.2d 936, 943 (3d Cir.) (quoting *Gladding Corp. v. Forrer (In re Gladding Corp.)*, 20 B.R. 566, 568 (Bankr.D.Mass.1982)), *cert. denied*, 474 U.S. 864, 106 S.Ct. 183, 88 L.Ed.2d 152 (1985); *see also Mooney Aircraft Corp. v. Foster (In re Mooney Aircraft, Inc.)*, 730 F.2d 367, 375 & n. 6 (5th Cir.1984)

[2] It was in this context that the *Chateaugay* court acknowledged the language quoted by Chevron, to the effect that the definition of "claim" was intended "to have wide scope." Response at p. 7, apparently quoting from *Texaco Inc. v. Fred Sanders*, 182 B.R. 937, 951 (Bankr. S.D.NY. 1995), in turn, quoting from *Chateaugay*, 944 F.2d at 1003. But unlike Chevron, the *Chateaugay* Court recognized, "That language surely points us in a direction, but provides little indication of how far we should travel." Chevron's analysis ran out of gas at that point, but as discussed in the text and as *Chateaugay* instructs, a proper analysis requires the journey to continue.

> (victims of post-bankruptcy accident resulting from pre-bankruptcy faulty design had no "claims" under former Bankruptcy Act, and court need not consider whether "claims" would exist under Bankruptcy Code).

Chateaugay, 944 F.2d at 1003-1004.

Yet, this "absurd" position is precisely what Chevron seeks to foist upon on the Board. Chevron has cited absolutely no pre-bankruptcy contact between EMH and Texaco but it unabashedly argues that EMH's claim was discharged in the Texaco Bankruptcy. *Chateaugay* went on to examine the pre-bankruptcy relationship between EPA and LTV and found it sufficient to qualify as a "claim," albeit a contingent one.

> Though there does not yet exist between EPA and LTV the degree of relationship between claimant and debtor typical of an existing though unmatured contract claim, the relationship is far closer than that existing between future tort claimants totally unaware of injury and a tort-feasor. EPA is acutely aware of LTV and vice versa. The relationship between environmental regulating agencies and those subject to regulation provides sufficient "contemplation" of contingencies to bring most ultimately maturing payment obligations based on pre-petition conduct within the definition of "claims." True, EPA does not yet know the full extent of the hazardous waste removal costs that it may one day incur and seek to impose upon LTV, and it does not yet even know the location of all the sites at which such wastes may yet be found. But the location of these sites, the determination of their coverage by CERCLA, and the incurring of response costs by EPA are all steps that may fairly be viewed, in the regulatory context, as rendering EPA's claim "contingent," rather than as placing it outside the Code's definition of "claim."

Chateaugay, 944 F.2d at 1005 (emphasis added).

No pre-bankruptcy relationship between EMH and Texaco existed, not even the attenuated relationship that could rise to the level of a "contingent" claim. And not even one close to that which existed in *Texaco Inc. v. Fred Sanders*, 182 B.R. 937 (Bankr. S.D.NY. 1995), upon which Chevron relies so heavily. Response at 5-8. The pre-bankruptcy relationship in *Sanders* consisted of long-standing contractual relationships relating to oil and gas wells with certain claimants and salt water storage pits located on one of the claimant's property. *Sanders*,

182 B.R. at 941-42. The relationship was further cemented through Texaco's multi-year pre-bankruptcy operation of a gas plant near the claimants' properties, during which time Texaco piped chromate effluent into the storage pits. *Id.* at 951.

Unlike in *Sanders*, EMH had no pre-bankruptcy relationship with Texaco; it had no right to payment from Texaco before the Texaco Bankruptcy and thus it had no claim that could have been discharged. Courts have disagreed upon, and even struggled with the issue of how close the pre-bankruptcy relationship must be to give rise to a claim.[3] But the Board is spared that task. All courts agree that when a party has no pre-bankruptcy relationship with the debtor it has no claim. Indisputably, no relationship equals no discharge.[4]

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[3] *Compare Chateaugay*, 944 F.2d at 1005 (future costs, including unknown future costs, that were within the contemplation of the parties were claims because claimant and debtor were "acutely aware" of each other pre-bankruptcy) *with In re National Gypsum Co.*, 139 B.R. 397, 407-408 (N.D. Tex. 1992) (requiring more than just contemplation, but "fair" contemplation pre-bankruptcy, which excludes unknown claims) *and United States v. Union Scrap Iron & Metal*, 123 B.R. 831, 836 (D. Minn. 1990) (despite the fact that the release of hazardous substances had occurred pre-bankruptcy, the Government's CERCLA claim was not a "claim" that had been discharged because the dispute arose years after the debtor had emerged from a Chapter 11 reorganization); *see also AM Int'l v. Datacard Corp.*, 106 F.3d 1342, 1348 (7th Cir. 1997) (Motion to Strike at 9) (claims not discharged where claimant did not have sufficient knowledge of debtor's pre-bankruptcy releases prior to confirmation of the bankruptcy, despite relationship between claimant's predecessor and debtor).

[4] Any other finding would be fundamentally unfair and would deprive EMH of its constitutional right to due process. *See In re Conseco*, 330 B.R. 673, 685 (Bankr. N.D. Ill. 2005), Motion to Strike at p. 8 (discussing the *Conseco* continuum). *See also Sanders*, 182 B.R. at 950 ("[I]t is important to acknowledge that in some circumstances it may indeed be unfair, and impermissible, to apply the discharge provisions of the Bankruptcy Code where a claimant would thereby be barred from asserting otherwise valid claims which, as a practical matter, through no fault of the claimant, could not be asserted prior to confirmation."); *Chateaugay*, 944 F.2d at 1003 (If the test for determining whether a claim is discharged ignores the pre-petition relationship between a debtor and claimant, "enormous practical and perhaps constitutional problems would arise."); *see also Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936, 944 ("If contingent claims were held to include possible future tort claims, then every hypothetical chain of future events leading to liability, regardless of how likely or unlikely, might be the basis for a contingent claim." Such a result "would raise constitutional questions.")

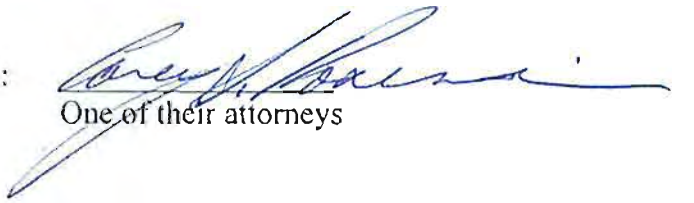
CONCLUSION

Chevron misstates the law and mischaracterizes the facts. Its assertion that EMH's cause of action was discharged in the Texaco Bankruptcy is simply wrong and could materially prejudice EMH. The Board should grant EMH's Motion for Leave to Reply Instanter and grant EMH's Motion to Strike Chevron's Affirmative Defense Number II. As for the remaining affirmative defenses, EMH rests on its Motion to Strike.

Dated: July 10, 2009

Respectfully submitted,

Elmhurst Memorial Healthcare
Elmhurst Memorial Hospital

By: 
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CHEVRON U.S.A. INC.,	)	
Respondent.	)	

CERTIFICATE OF SERVICE

I, the undersigned, on July 10, 2009, caused the foregoing "COMPLAINANTS' MOTION FOR LEAVE TO FILE REPLY INSTANTER IN SUPPORT OF ITS MOTION TO STRIKE AFFIRMATIVE DEFENSES" 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:

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by placing same in U.S. Mail at 500 Skokie Boulevard, Northbrook, Illinois 60062-2620.

One of the Attorneys for
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Elmhurst Memorial Hospital

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