BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

BNSF RAILWAY COMPANY, f/k/a The Burlington Northern and Santa Fe Railway Company, Complainant, v. INDIAN CREEK DEVELOPMENT COMPANY, an Illinois Partnership, individually and as beneficiary under trust 3291 of the Chicago Title and Trust Company dated December 15, 1981 and the Chicago Title & Trust Company, as trustee under trust 3291, dated December 15, 1981, and JB INDUSTRIES, INC., Respondents.	)	PCB 2014-081

ORIGINAL

NOTICE OF FILING

To: Pamela Nehring
Sean Sullivan
Jennifer Schuch
Daley Mohan Groble, P.C.
55 West Monroe Street
Suite 1600
Chicago, IL 60606

PLEASE TAKE NOTICE that on April 10, 2014, we caused to be filed with the Clerk of the Illinois Pollution Control Board located at the James R. Thompson Center, 100 Randolph, Suite 11-500, Chicago, Illinois, **RESPONDENTS' MOTION FOR RECONSIDERATION,** a copy of which is attached hereto and is hereby served upon you.

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Respectfully submitted,

Indian Creek Development Company, JB Industries, Inc., and Chicago Title and Trust Company, as Land Trustee under Trust No. 3291 dated December 15, 1981

By: _____
One of Its Attorneys

CERTIFICATE OF SERVICE

Matthew E. Cohn, an attorney, certifies that a true and correct copy of the foregoing **RESPONDENTS' MOTION FOR RECONSIDERATION** was served upon the following counsel of record:

Pamela Nehring
Sean Sullivan
Jennifer Schuch
Daley Mohan Groble, P.C.
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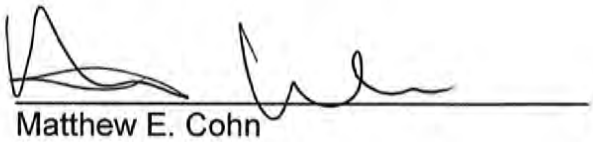
by depositing a copy thereof, enclosed in an envelope, in the United States Mail at 120 South Riverside Plaza, Chicago, Illinois, proper postage prepaid, prior to the final pickup on April 10, 2014.



Matthew E. Cohn

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

BNSF RAILWAY COMPANY, f/k/a The Burlington Northern and Santa Fe Railway Company, Complainant, v. INDIAN CREEK DEVELOPMENT COMPANY, an Illinois Partnership, individually and as beneficiary under trust 3291 of the Chicago Title and Trust Company dated December 15, 1981 and the Chicago Title & Trust Company, as trustee under trust 3291, dated December 15, 1981, and JB INDUSTRIES, INC., Respondents.	)	PCB 2014-081

ORIGINAL

RESPONDENTS' MOTION FOR RECONSIDERATION

The Illinois Environmental Protection Act (the "Act") was never intended to allow, and indeed does not allow, those who caused transportation accidents and environmental disasters to sue the victims of the releases of fuels and hazardous materials resulting from those transportation accidents and environmental disasters. Such absurd and cynical actions – polluters suing the polluted – do not stand as common law actions in Illinois' circuit courts, and should likewise not stand as statutory actions before the Illinois Pollution Control Board (the "Board"). By permitting BNSF Railway Company ("BNSF") to bring its Complaint for Allocation of Proportionate Share Responsibility against Respondents, the Board is allowing BNSF to turn the Illinois Environmental Protection Act inside out and transform it into something unrecognizable. It is BNSF that caused a train accident that released thousands of gallons of locomotive

diesel fuel, and BNSF therefore is not a proper Complainant against those who were merely victims of that accident.

Respondents move the Board, pursuant to 35 Ill. Admin. Code § 101.520, for the reconsideration of its March 20, 2014 Order (Exhibit A), and Respondents ask once again that this Board grant their Motion to Dismiss BNSF's Complaint for Allocation of Proportionate Share Responsibility. In support, Respondents ask the Board to fully consider the language, context, intent and purpose of Section 58.9 of the Act, 415 ILCS 5/58.9, the statutory provision that the Board relied upon in its March 20, 2014 Order, and to further consider, by analogy, the outcome of a similar contribution-type claim brought by BNSF under Illinois' common law in related litigation pending before the Circuit Court of Kane County.

Background

Respondents own property and a manufacturing business adjacent to railroad tracks in Aurora, Illinois. BNSF owns and controls the railroad tracks. On January 20, 1993, with no fault to Respondents, and with fault to BNSF, a train collision on BNSF's railroad tracks resulted in the release of thousands of gallons of locomotive diesel fuel, some of which migrated from the tracks onto and under Respondents' property. Over twenty years later, BNSF has still not fully investigated or cleaned up its contamination on Respondents' property. BNSF has unconvincingly argued to the Illinois Environmental Protection Agency ("IEPA"), the Circuit Court of Kane County, and the Board that the contamination on Respondents' property was not caused by BNSF or the train crash at all, but rather by Respondents. BNSF has alleged that Respondents caused their own property to become contaminated through their own violations of

Sections 12(a), 12(d), and 21(e) of the Act. Respondents certainly dispute BNSF's allegations, noting that BNSF has identified no pollution events caused by Respondents that could explain the free product and contamination on Respondents' property. However, regardless of BNSF's incorrect factual assertions, the law simply does not allow BNSF to bring a contribution action against Respondents.

In making its claim against Respondents, BNSF is seeking to change its posture from defense to offense. BNSF is suing Respondents, the accident victim, for contribution costs. Importantly, and critically, it should be recognized that ***the environmental work that BNSF has been required to perform on Respondents' property has been dictated to BNSF not by Respondents but by the State of Illinois***, through an action brought by the Illinois Office of the Attorney General, and through a process controlled by the IEPA. Thus BNSF is suing Respondents for the costs it has incurred performing response work that it has been legally obligated to perform for others on Respondents' property.

BNSF May Not Be Awarded Any Contribution, As Section 58.9 of the Act and the Claims Made Against BNSF Already Limit BNSF's Liability To the Train Accident Contamination and Nothing More

The Board's March 20, 2014 Order applies Section 58.9 of Act in a way that was never intended and is not allowed – the perpetrator of an environmental release suing the victim of that release. Even if BNSF can show that there is some non-BNSF contamination on Respondents' property that was investigated and remediated by BNSF, Section 58.9 of the Act and Illinois law still does not allow BNSF's contribution action. The State's enforcement action directed at BNSF for its train accident and

environmental release does not grant BNSF the right to bring an action against others who had nothing to do with that train accident and environmental release.

The Board wrote in its March 20, 2014 Order, "under Section 58.9 a person may seek contribution for remediation costs of a site where other persons have proximately contributed to contamination and, under Part 741, the Board is authorized to order a party to pay its proportionate share of liability for remediation costs." (Exhibit A at 11) While the Board absolutely has the ability to allocate proportionate shares of liability between or among responsible parties, the Board does not have that ability under the facts and circumstances of this case – there is only one responsible party. It is only BNSF that is responsible for the contamination released after its January 20, 1993 train accident. Respondents did not cause the accident. BNSF has only been asked and demanded to investigate and clean up the contamination caused by that train accident – nothing else. The fact that BNSF's train accident polluted an industrial property, which BNSF asserts may have otherwise been contaminated by Respondents, does not give BNSF a cause of action for contribution against Respondents. Section 58.9 of the Act does not give BNSF the ability to make Respondents reimburse BNSF for the investigation and remediation of non-BNSF contamination, if even present, that Respondents and the State of Illinois never asked BNSF to address.

Importantly, the Act does not allow BNSF to be held responsible for anything more than the contamination that BNSF caused, and in fact no such claims for the

cleanup of non-BNSF contamination have been made against BNSF by anyone.[1] Section 58.9(a)(1) of the Act provides:

> ... in no event may the Agency, the State of Illinois, or any person bring an action pursuant to this Act ... to require any person to conduct remedial action or to seek recovery of costs for remedial activity conducted by the State of Illinois or any person beyond the remediation of releases of regulated substances that may be attributed to being proximately caused by such person's act or omission ...."

No claims for remediation of the contamination beyond that proximately caused by BNSF have been made against BNSF, and thus BNSF may not seek contribution.

The Board's Order correctly cites three separate and related enforcement and litigation matters involving the site. In examining these three related actions, it is readily apparent that no one, not the State of Illinois, not the Illinois Environmental Protection Agency, and not Respondents, has asked BNSF to clean up anything other than its own contamination caused by the train accident.

1. Under the Consent Order between the State of Illinois and BNSF in People of the State of Illinois v. BNSF, Case No. CH KA 95 0527, in the Circuit Court of Kane County, BNSF only has an obligation to investigate and remediate contamination caused by the release associated with its January 20, 1993 train accident (*see* Exhibit B - Consent Order, dated February 5, 1996; Exhibit C - Consent Order Amended, dated November 18, 2009).

2. In Indian Creek Development Company, et al. v. BNSF, PCB 07-44, BNSF has only been asked to investigate and clean up its own contamination associated with its January 20, 1993 train accident (*see* Exhibit D – Complaint, dated December 4, 2006)

3. In Indian Creek Development Company, et al., v. BNSF, Case No. 07 LK 604, in the Circuit Court of Kane County, BNSF has likewise only been asked to investigate and clean up its own contamination

[1] BNSF will likely argue that Respondents' demand for a cleanup to "residential" or "background" standards in the PCB 07-44 case is significant. It is not. Respondents are only demanding that BNSF clean up its own contamination and return their property to pre-accident conditions.

associated with its January 20, 1993 train accident (*see* Exhibit E – Second Amended Complaint, dated December 4, 2013).

The investigation and remediation of non-BNSF contamination, if even present, has never been sought. BNSF's assertion that the contamination on Respondent's property did not originate from the 1993 train crash, an assertion that is just plain wrong, is actually BNSF's defense to claims brought against it. It is not a legitimate basis for an independent cause of action for contribution. There can be no contribution claim made by BNSF under these circumstances, in which BNSF is only required to investigate and remediate its own contamination caused by the train crash.

Just as an Illinois Court Did Not Allow BNSF's Unjust Enrichment and Restitution Claim, So Too Should the Board Dismiss BNSF's Contribution Claim

In related circuit court litigation, Case No. 07 LK 604 identified above, BNSF has in fact made this same type of contribution claim, styled there as a counterclaim for unjust enrichment and restitution. BNSF's counterclaim was dismissed. The circuit court would not allow BNSF, the polluter, to sue the victims, the owners of adjacent property (*see* Exhibit F – Counterclaim; Exhibit G- Plaintiffs' Motion to Dismiss; Exhibit H – BNSF's Response; Exhibit I – Plaintiffs' Reply; Exhibit J – Transcript from 3/19/2014 Hearing, 12:2 to 24:5, 37:21 to 39:1; Exhibit K – Order Dismissing BNSF's Counterclaim).[2] For similar reasons, BNSF's Complaint for Allocation of Proportionate Share Responsibility should be dismissed by the Board.

[2] Respondents strongly urge the Board to review the substance of the debate in the circuit court contained in the attached court documents (Exhibits F, G, H, I, J, and K) in order to fully appreciate the absurdity of allowing these types of "polluter v. polluted" claims to be brought at the Illinois Pollution Control Board.

The law in Illinois is clear. Illinois courts have adopted Section 106 of the Restatement of Restitution (1937) which states:

> A person who, incidentally to the performance of his own duty or to the protection or the improvement of his own things, has conferred a benefit upon another, is not thereby entitled to contribution.

See Griffith Wrecking Co., Inc. v. Greminger, 65 Ill.App.3d 962 (1978). Section 58.9 of the Act does not change this rule.

BNSF has a pre-existing legal duty to the State of Illinois to clean up its contamination, irrespective of any other contamination on the Respondents' property, if even present. Any investigation or remediation of non-BNSF contamination that may exist on Respondents' property is incidental to BNSF's existing legal duty. There is no contribution claim allowed for the recovery of costs associated with incidental benefits provided by one with an existing legal duty. The presence of any non-BNSF contamination (which has not been proven to exist, and which if existent has not been proven to have increased BNSF's response efforts) does not give rise to a contribution cause of action by BNSF against Respondents.

Allowing Section 58.9 of the Act to Be Used Offensively by Those Who Cause Environmental Disasters and Transportation Accidents Against the Victims Would Create Absurd Results

Allowing contribution actions such as the one brought by BNSF would create a system of statutory environmental law in Illinois in which those who caused environmental disasters and transportation accidents would be allowed to sue the victims of their disasters and accidents. Some hypothetical questions illustrate the absurdity of allowing such contribution lawsuits:

- If a refinery explodes causing petroleum contamination to soil and groundwater on surrounding properties, and the State of Illinois in turn orders the refinery operator to investigate and clean up its contamination resulting from the explosion, should the refinery operator be allowed to sue the owners and operators of all proximal gas stations (LUST sites) and auto garages (spilled oils) for contribution costs associated with its investigation and remediation work?

- If a ship runs aground, and the State of Illinois orders the ship operator to clean up oil released in the water, should the ship operator be allowed to sue the operators of other boats in the same body of water if those other boats released small amounts of fuel in that same water?

- If there is a train wreck adjacent to an industrial park and the State of Illinois orders the train company to investigate and clean up fuel and hazardous materials released from the train in the industrial park, should the train company be allowed to sue the owners and operators of the various industrial properties who may have used and released some quantities of petroleum or hazardous materials on their own properties in that industrial park?

The answers to these hypothetical questions are all no, all for the same reason. The Illinois Environmental Protection Act does not give those who caused environmental disasters and transportation accidents causes of action against their victims. Polluters do not sue their victims, even if the victims are the owners of properties that are not free and clear of all contamination.

The 100% Is the Contamination Caused by the Train Accident

Perhaps another way to look at this case is to fully consider and recognize the proper subject of allocation following a transportation accident. The 100% to be allocated following a transportation accident is the contamination that the State of Illinois demands be cleaned up following a transportation accident. In this case, all that is at issue is BNSF's contamination released after the 1993 accident, which amounts to 100% of the liability at stake. A polluter cannot increase the subject of the allocation beyond the 100% identified by the enforcer of the transportation accident cleanup.

BNSF is seeking to "add to the 100%" non-BNSF contamination that no one asked to be cleaned up (and that may not even be present, and that if present may not even measurably change the scope of the investigation and cleanup). There is nothing to allocate between BNSF and Respondents, as there is only one responsible party for the 1993 train accident contamination.

Industrial Property Owners Could be Charged for Unsolicited Brownfields Cleanups

What BNSF is essentially proposing, and the Board is momentarily allowing, is for Section 58.9 of the Act to be used in a very cynical way. BNSF is effectively recasting a portion of its environmental response work related to the 1993 train accident into an unsolicited brownfields remediation project on the victims' property, and then seeking to charge the victims for the costs of BNSF's unsolicited brownfields remediation work. If Respondents wanted to investigate and remediate any non-BNSF contamination on their property, obtaining a brownfields type of cleanup, they would enroll their property in the Site Remediation Program, as allowed under Title XVII of Act, on a voluntary basis. The costs of a brownfields investigation and cleanup should not be imposed upon Respondents on an accelerated schedule, via a Section 58.9 contribution action, simply because Respondents had the misfortune of being located next to the site of BNSF's 1993 train accident.

The General Assembly's expression of the intent of Title XVII could not be clearer:

> (1) To establish a risk-based system of remediation based on protection of human health and the environment relative to present and future uses of the site.

(2) To assure that the land use for which remedial action was undertaken will not be modified without consideration of the adequacy of such remedial action for the new land use.
(3) To provide incentives to the private sector to undertake remedial action.
(4) To establish expeditious alternatives for the review of site investigation and remedial activities, including a privatized review process.
(5) To assure that the resources of the Hazardous Waste Fund are used in a manner that is protective of human health and the environment relative to present and future uses of the site and surrounding area.
(6) To provide assistance to units of local government for remediation of properties contaminated or potentially contaminated by commercial, industrial, or other uses, to provide loans for the redevelopment of brownfields, and to establish and provide for the administration of the Brownfields Redevelopment Fund.

415 ILCS 5/58. Title XVII of the Act is named "Site Remediation Program." Title XVII was added to the Act to incentivize environmental remediation at brownfield sites and other contaminated properties. It was not designed to give a party responsible for an environmental disaster or a transportation accident the means to complicate, confuse, and disrupt the investigation and cleanup of such a well-defined source of contamination attributable to such an obvious responsible party for that contamination. BNSF is using a provision of Title XVII (i.e., Section 58.9) in a way never contemplated by the General Assembly, and certainly never intended. In actuality, it is apparent that Title XVII of the Act is just not applicable to this dispute. "[One] is not entitled to invoke the provisions of Title XVII unless Title XVII is applicable to it in the first place." State Oil Co. v. People of the State of Illinois, et al. 352 Ill.App.3d 813, 817 (2004).

Industrial Property Owners Adjacent to Transportation Routes Beware

Section 58.9 of the Act should not be used by those responsible for transportation accidents to make contribution claims against the victims of those

transportation accidents, when the victims merely own or operate non-pristine industrial property near a transportation route. Railroad and transportation routes of all kinds traverse industrial areas all over the State of Illinois. Each time there is a transportation accident in such an industrial area, where released fuel or hazardous material may contaminate industrial property that may contain other contamination, the owners and operators of such industrial properties should not be forced to defend a contribution lawsuit being brought against them by the party responsible for the transportation accident. Section 58.9 of the Act was intended to allocate responsibility between or among parties responsible for a common source of contamination, not to allow the one who caused a transportation accident to seek contribution from the victim of the accident who had nothing to do with causing the accident.

Conclusion

BNSF, and those who cause transportation accidents, may not use Section 58.9 of the Act to seek contribution from their victims. BNSF, and those who cause transportation accidents or environmental disasters, must simply investigate and clean up the contamination that their accidents or environmental disasters caused, as directed by the State of Illinois. Any pre-existing contamination at a transportation accident or environmental disaster site is a factual issue that the party that caused a transportation accident or environmental disaster can use in defense to a claim brought by the victim, but it is not a legitimate basis for a polluter such as BNSF, who is solely responsible for causing a train accident and an environmental release, to seek contribution.

WHEREFORE, Respondents respectfully ask that the Board reconsider its March 20, 2014 Order and dismiss BNSF's Complaint for Allocation of Proportionate Share Responsibility.

Dated: April 10, 2014

Respectfully submitted,

Indian Creek Development Company, JB Industries, Inc., and Chicago Title and Trust Company, as Land Trustee under Trust No. 3291 dated December 15, 1981

By: _____
One of Its Attorneys

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EXHIBIT A

ILLINOIS POLLUTION CONTROL BOARD
March 20, 2014

BNSF RAILWAY COMPANY, f/k/a The Burlington Northern and Santa Fe Railway Company, Complainant, v. INDIAN CREEK DEVELOPMENT COMPANY, an Illinois Partnership, individual and as beneficiary under trust 3291 of the Chicago Title and Trust Company dated December 15, 1981 and the Chicago Title & Trust Company, as trustee under trust 3291, dated December 15, 1981, and JB INDUSTRIES, INC., Respondents.	)	PCB 14-81 (Citizen's Enforcement - Water, Land)

ORDER OF THE BOARD (by D. Glosser):

On December 10, 2013, BNSF Railway Company (BNSF) filed a complaint against Indian Creek Development Company (ICDC) and JB Industries, Inc. (JB Industries) (collectively, respondents). The complaint (Comp.) alleges that respondents violated Sections 12(a), 12(d), and 21(e) of the Illinois Environmental Protection Act (Act) (415 ILCS 5/12(a), 12(d), and 21(e) (2012)). The complaint also alleges that BNSF incurred costs for its environmental response work on ICDC's property regarding petroleum constituents not related to a 1993 collision and diesel fuel spill on BNSF's property. BNSF seeks "judgment in its favor and against respondents in an amount commensurate with respondents' comparative responsibility for the presence of contaminants on the ICDC site." The ICDC site is located at 1500 Dearborn Avenue, Aurora, Kane County.

On January 9, 2014, respondents timely filed a motion to dismiss the complaint (Mot.). On February 10, 2014, BNSF filed a response to the motion to dismiss (Resp.). On February 24, 2014, respondents filed a motion for leave to file a reply to BNSF's response to the motion to dismiss, accompanied by a reply (Reply). For the reasons discussed below, the Board denies the motion to dismiss and directs the parties to proceed to hearing.

In this order, the Board first sets out the procedural history of this case. The Board then summarizes the complaint, motion to dismiss the complaint, response to the motion to dismiss, and reply. Next, the Board provides the applicable legal framework, including a discussion of citizen's enforcement actions and the standards that apply in determining whether a complaint is duplicative or frivolous. Finally, the Board rules on respondents' motion to dismiss.

BACKGROUND

This complaint stems from a train collision involving BNSF that occurred on January 20, 1993, which resulted in locomotive diesel fuel leaking into the environment. Comp. at 2. On February 9, 1996, BNSF entered into a Consent Decree with the People of the State of Illinois, the Illinois Attorney General, and the Illinois Environmental Protection Agency (Agency) to provide for investigation and remediation of the fuel that spilled on BNSF's property as a result of the train collision. Comp. at 2. BNSF entered into an Amendment to the Consent Order on November 18, 2006, after ICDC discovered diesel fuel on its property, alleged to be fuel resulting from the 1993 collision and spill. Comp. at 3.

On December 4, 2006, ICDC filed a complaint before the Board, alleging that, as a result of the 1993 collision and spill, BNSF violated Sections 12(a), 12(d), and 12(e) of the Act. Comp. at 3; *see* Indian Creek Development Company, et al. v. Burlington Northern Santa Fe Railway Co., PCB 07-44, slip op. at 1 (March 15, 2007). In the complaint, ICDC requests that BNSF be required to remediate the ICDC site, that ICDC and its consultants be permitted to monitor the remediation, and that BNSF be required to reimburse ICDC for all costs and expenses relating to the investigation and remediation. Comp. at 3-4. The Board complaint remains pending. *Id.* at 4.

On November 9, 2007, ICDC filed a complaint against BNSF in the Circuit Court for the Sixteenth Judicial Circuit in Kane County. Comp. at 4. Through the complaint, ICDC sought damages and injunctive relief relating to the 1993 collision and spill. *Id.* The lawsuit remains pending. *Id.*

On December 10, 2013, BNSF filed the complaint at issue here alleging various violations of the Act. On January 9, 2014, respondents filed a motion to dismiss the complaint. On February 10, 2014, BNSF filed a response to the motion to dismiss. On February 24, 2014, respondents filed a motion for leave to file a reply to BNSF's response to the motion to dismiss, accompanied by a reply. On March 4, 2014, BNSF filed a response objecting to the motion for leave to file the reply (Resp.Reply)

MOTION TO FILE REPLY

Respondents seek leave to file a reply with the Board. BNSF argues that the reply offers no additional support or information that would assist the Board in making its determination. Resp.Reply at 1-2. BNSF asks that the Board deny the motion for leave to file a reply. Section 101.500(e) provides that "the moving person will not have the right to reply, except as permitted by the Board or the hearing officer to prevent material prejudice." 35 Ill. Adm. Code 101.500(e). The Board grants the motion for leave to file the reply to prevent material prejudice. The Board will consider the reply.

COMPLAINT

The complaint alleges that pursuant to the Consent Order and the Amendment to the Consent Order, BNSF has spent large sums of money in order to investigate and remediate the presence of locomotive diesel fuel resulting from the 1993 collision and spill. Comp. at ¶ 13. BNSF states that it has spent large sums of money on obtaining access to the ICDC site, on consultants retained by ICDC, and on reimbursement to the Agency for investigation and remediation costs. *Id.* JB Industries is an affiliate and principal tenant of the ICDC site. *Id.* at ¶12.

BNSF alleges that the petroleum constituents found or that will be found on the ICDC site are likely to be from sources other than the 1993 collision and spill, "including sources for which Respondents are responsible." Comp. at ¶ 14. BNSF alleges that the ICDC site has a history of engaging in and continues to engage in "heavy industrial activity" and investigations have concluded that oil and gas tanks, as well as oil reservoirs, have been present on the property over the years. *Id.* at ¶¶ 17-18. The complaint alleges that a variety of petroleum products are also presently located on the property and there is a history of numerous environmental releases at the ICDC site. *Id.* at ¶¶ 19, 21.

BNSF states that its investigation, pursuant to the Consent Orders, concluded that the petroleum and other contaminants on the ICDC property did not come from the 1993 collision and spill. Comp. at ¶ 23. The complaint alleges that the polynuclear aromatic hydrocarbons (PAHs) found on the ICDC site could not have migrated to the ICDC site from the 1993 spill. *Id.* at ¶ 25. Further, the petroleum constituents found on the site are heavy fuel oil, not diesel fuel, which was the type of fuel involved in the 1993 spill. *Id.* at ¶ 26.

The complaint then alleges that respondents violated Sections 12(a), 12(d), and 21(e) of the Act (415 ILCS 5/12(a), 12(d), and 21(e) (2012)). Comp. at ¶¶ 28-34. BNSF alleges that respondents "caused or allowed contaminants" on the ICDC property in violation of the Act. *Id.* at ¶ 33. Further, the complaint alleges that respondents have caused or allowed contaminants into the ground and soil, as well as the groundwater on the property. *Id.* at ¶ 34.

Lastly, BNSF alleges that because of the expense that it incurred and continues to incur investigating and remediating the ICDC site, BNSF is entitled to reimbursement of those amounts. *Id.* at ¶¶ 37-38. The complaint states that pursuant to Section 22.2d(f) of the Act (415 ILCS 5/22.2d(f) (2012), BNSF is entitled to judgment "in an amount commensurate with Respondents' comparative responsibility for the presence of contaminants on the ICDC Site." *Id.* at ¶ 38.

With respect to the allegations set forth in its complaint, BNSF requests judgment be entered in its favor in an amount equal to the costs BNSF incurred in investigating and remediating the ICDC site. Comp. at 10-11. BNSF further seeks an amount equal to respondents' "comparative responsibility" for the presence of contaminants on the property. *Id.* at 11.

STATUTORY AND REGULATORY BACKGROUND

Section 31(d)(1) of the Act provides in pertinent part:

> Any person[1] may file with the Board a complaint, meeting the requirements of subsection (c) of this Section, against any person allegedly violating this Act or any rule or regulation thereunder. 415 ILCS 5/31(d)(1) (2012).

Section 22.2d of the Act provides in pertinent part:

> [T]he Director may issue to any person who is potentially liable under this Act for the release or substantial threat of release any order that may be necessary to protect the public health and welfare and the environment.
>
> ***
>
> [A]ny person may seek contribution from any other person who is liable for the costs of response actions under this Section. In resolving contribution claims, the Board or court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.
>
> ***
>
> The provisions of Section 58.9 of this Act do not apply to any action taken under this Section. 415 ILCS 5/22.2d(b), (f), (h) (2012).

Section 58.9 of the Act provides:

> [I]n no event may the Agency, State of Illinois, or any person bring an action pursuant to this Act or the Groundwater Protection Act to require any person to conduct remedial action or to seek recovery of costs for remedial activity conducted by the State of Illinois or any person beyond the remediation of release of regulated substances that may be attributed to being proximately caused by such person's acts or omissions or beyond such person's proportionate degree of responsibility for costs of the remedial action of release of regulated substances that were proximately caused or contributed to by 2 or more persons. 415 ILCS 5/58.9(a)(1) (2012).

The Board's "Proportionate Share Liability" rules implement Section 58.9 of the Act. *See* 35 Ill. Adm. Code 741. Section 741.100 sets out the purpose of the Part:

> The purpose of this Part is to establish procedures under which the Board will allocate proportionate shares of the performance or costs of a response resulting

[1] The Act defines "person" as "any individual, partnership, co-partnership, firm, company, limited liability company, corporation, association, joint stock company, trust, estate, political subdivision, state agency, or any other legal entity, or their legal representative, agent, or assigns." 415 ILCS 5/3.315 (2012).

from the release or substantial threat of a release of regulated substances or pesticides on, in, under or from a site. 35 Ill. Adm. Code 741.100.

Section 741.105, which addresses the applicability of the proportionate share liability rules, states in relevant part:

a) This Part applies to proceedings before the Board in which:

1) Any person seeks, under the Environmental Protection Act [415 ILCS 5] or the Groundwater Protection Act [415 ILCS 55], to require another person to perform, or to recover the costs of, a response that results from a release or substantial threat of a release of regulated substances or pesticides on, in, under or from a site; *** 35 Ill. Adm. Code 745.105(a)(1); *but see* 35 Ill. Adm. Code 741.105(f) (matters to which Part 741 is inapplicable).

Section 741.125 requires the complainant to serve the Agency with a copy of the complaint seeking cost recovery:

A person seeking allocation of proportionate shares must serve a copy of the complaint . . . on the Agency within 30 days after the filing of the complaint or petition. *** 35 Ill. Adm. Code 741.125.

Additionally, Section 741.205 of the Board's proportionate share rules provides:

a) To establish a respondent's proportionate share, the complainant must prove the following by a preponderance of the evidence:

1) That the respondent proximately caused or contributed to a release or substantial threat of a release of regulated substances or pesticides on, in, under or from a site; and

2) The degree to which the performance or costs of a response result from the respondent's proximate causation of or contribution to the release or substantial threat of a release as established under subsection (a)(1) of this Section.

***

c) A complainant is not required to plead a specific alleged percentage of liability for the performance or costs of a response in a complaint that seeks to require a respondent to perform or pay for a response that results from a release or substantial threat of a release of regulated substances or pesticides. 35 Ill. Adm. Code 741.205(a), (c).

MOTION TO DISMISS

Respondents move to dismiss the complaint on the ground that the complaint is frivolous. First, respondents argue that the complaint is frivolous because the Board does not have the authority to grant the relief requested. Mot. at ¶ 23. BNSF requests relief under Section 22.2d(f) of the Act (415 ILCS 5/22.2d(f) (2012)). *Id.* at ¶ 17. Respondents allege that Section 22.2d(f) does not apply in this situation because a contribution action under Section 22.2d is only appropriate when seeking contribution from recipients of an order from the Director. *Id.* at ¶ 20. Section 22.2d(f) of the Act authorizes a person to bring an allocation complaint against another person who is liable for response costs "under this Section." 415 ILCS 5/22.2d(f) (2012). The Consent Order under which BNSF has been investigating and remediating the ICDC site, in connection with the 1993 spill, was entered in state court and not pursuant to Section 22.2d of the Act. *Id.* at ¶ 22. Thus, respondents argue that the Board does not have the authority to grant BNSF relief under Section 22.2d(f). *Id.* at ¶ 23.

Second, respondents argue that the complaint is frivolous because there is no basis for the relief sought by BNSF, and thus BNSF failed to state a cause of action upon which the Board can grant relief. Mot. at ¶ 24. Respondents state that the Consent Order requires BNSF to investigate and remediate only contamination that BNSF caused. *Id.* Respondents allege that because respondents are not responsible for the contamination on the ICDC site resulting from the 1993 spill, and because respondents are not obligated to remediate any other possible contamination present on the site, there is no basis for the relief sought by BNSF from respondents because the Consent Order only pertains to BNSF-caused contamination. *Id.*

Lastly, respondents argue that the relief sought in the complaint is not available because the Agency did not follow the procedural requirements under Section 22.2d(b) of the Act (415 ILCS 5/22.2d(b) (2012)). Mot. at ¶ 25. Respondents state that the Agency specifically never required BNSF to follow certain United States Environmental Protection Agency (USEPA) regulations relating to Section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as well as never issued BNSF a Special Notice Letter as required by that Section. *Id.* Therefore, respondents argue that the complaint should be dismissed. *Id.*

RESPONSE TO MOTION TO DISMISS

In its response, BNSF asserts that the Board has express authority to grant the relief that BNSF requests. Resp. at 2. BNSF argues that under Section 31(d)(1) of the Act (415 ILCS 5/31(d)(1) (2012), anyone may file a complaint with the Board for an alleged violation of the Act. *Id.* BNSF alleges that Part 741 of the Board's rules (35 Ill Adm. Code 741) sets out procedures for the Board to follow when allocating proportionate shares of performance or costs of a response. *Id.*, citing 35 Ill. Adm. Code 741.100. BNSF argues that Part 741 "applies to proceedings before the Board in which any person seeks, under the Act, to require another person to perform, or to recover the costs of, a response that results from a release or substantial threat of a release of regulated substances." Resp. at 2, citing 35 Ill. Adm. Code 741.105(a)(1).

BNSF argues that respondents' focus on the applicability of Section 22.2d(f) of the Act (415 ILCS 5/22.2d(f) (2012)) in its motion to dismiss "misses the point." Resp. at 3; *see* Mot. at 5. BNSF argues that Section 22.2d(f) is only one avenue for obtaining an allocation of proportionate shares. Resp. at 3. BNSF also argues that regardless of whether Section 22.2d(f) applies here, Part 741 of the Board's rules allows an allocation complaint. Resp. at 3. BNSF argues that Section 22.2(d)(f) applies here because ICDC filed a complaint seeking to have the Agency require BNSF to remediate the site according to ICDC's proposed standards. Resp. at 3, n. 1. Therefore, BNSF argues that the Board is authorized to allocate responsibility and costs in the manner in which BNSF seeks, and the motion to dismiss should be denied. Resp. at 2.

Further, BNSF opines that its complaint for allocation is "particularly warranted" because ICDC "has filed a complaint with the Board in which it seeks to mandate remediation of the site under terms separate and apart from the terms of the Consent Order between BNSF and the State . . . ." Resp. at 2-3. BNSF filed a separate complaint because the Board's procedures do not provide for a counterclaim for allocation. Resp. at 3. Therefore, BNSF suggests that the two proceedings should be consolidated after the Board receives respondents' answer to the complaint. *Id.*

REPLY TO THE RESPONSE TO MOTION TO DISMISS

In their reply, respondents argue that because the Board lacks the authority to grant the requested relief under Section 22.2d of the Act (415 ILCS 5/22.2d (2012)), the complaint is defective and should be dismissed. Reply at 1-2. Respondents again argue that the relief requested by BNSF cannot be granted under Section 22.2d of the Act because the Consent Order was not granted pursuant to Section 22.2d and was not issued by the Director of the Agency. *Id.* at 2. Additionally, respondents state that BNSF first mentioned Part 741 of the Board's rules (35 Ill. Adm. Code 741) as a basis for relief in its response to the motion to dismiss. *Id.* Because Section 22.2d of the Act (415 ILCS 5/22.2d (2012)) was the only basis for BNSF's requested relief in its complaint, the complaint is defective. *Id.*

Because the complaint is defective, respondents argue that BNSF can only seek relief under Part 741 of the Board's rules (35 Ill. Adm. Code 741) by filing an amended complaint, which it has not done here. Reply at 2. Furthermore, respondents argue that Part 741 (35 Ill. Adm. Code 741) does not provide a cause of action against respondents. *Id.* Respondents argue that pursuant to Section 58.9 of the Act (415 ILCS 5/58.9 (2012)), from which Part 741 is derived, parties must be jointly responsible for the alleged contamination in order to bring a valid allocation complaint. *Id.* Respondents argue that because BNSF and respondents are not jointly responsible for the contamination on the ICDC site, Part 741 of the Board's rules (35 Ill. Adm. Code 741) is not a proper basis for relief. *Id.*

Lastly, respondents argue that the complaint should be dismissed because it is duplicative. Reply at 2-3. Respondents state that in their "complaint filed with the Board in a separate action (PCB 07-44), which prompted [BNSF] to file this action, Respondents only requested relief for environmental contamination attributed to BNSF." *Id.* Respondents argue that the only "proper procedural course of action" in PCB 2007-044 would be for BNSF to deny liability on respondents' complaint. *Id.* at 3. Because BNSF has already denied liability for the

contamination alleged in the prior complaint (PCB 2007-044), respondents argue that BNSF filing a separate complaint here is both procedurally improper and duplicative. *Id.*

DISCUSSION

The Board first provides the legal framework for today's decision. The Board then analyzes and resolves respondents' motion to dismiss.

Legal Framework

Section 31(d)(1) of the Act authorizes any person to file a complaint with the Board against any person in violation of the Act or Board rules. 415 ILCS 5/31(d)(1) (2012); *see also* 35 Ill. Adm. Code 103.212(a). Under this Section, the Board shall schedule a hearing unless it finds the complaint to be "duplicative or frivolous." *Id.*

This type of enforcement action is referred to as a "citizen's enforcement proceeding," which the Board defines as "an enforcement action brought before the Board pursuant to Section 31(d) of the Act by any person who is not authorized to bring the action on behalf of the People of the State of Illinois." 35 Ill. Adm. Code 101.202. BNSF's complaint against ICDC initiated a citizen's enforcement proceeding.

Section 31(c) states that the complaint "shall specify the provision of the Act or the rule or regulation . . . under which such person is said to be in violation, and a statement of the manner in, and the extent to which such person is said to violate the Act or such rule or regulation . . . ." 415 ILCS 5/31(c) (2012). Even though "[c]harges in an administrative proceeding need not be drawn with the same refinements as pleadings in the court of law," (Lloyd A. Fry Roofing Co. v. PCB, 20 Ill. App. 3d 301, 305, 314 N.E.2d 350, 354 (1st Dist. 1974)), the Act and the Board's procedural rules "provide for specificity in pleadings" (Rocke v. PCB, 78 Ill. App. 3d 476, 481, 397 N.E.2d 51, 55 (1st Dist. 1979)), and "the charges must be sufficiently clear and specific to allow preparation of a defense" (Lloyd A. Fry Roofing, 20 Ill. App. 3d at 305, 314 N.E.2d at 354).

The Board's procedural rules codify the requirements for the contents of a complaint, including:

1) A reference to the provision of the Act and regulations that the respondents are alleged to be violating.

2) The dates, location, events, nature, extent, duration, and strength of discharges or emissions and consequences alleged to constitute violations of the Act and regulations. The complaint must advise respondents of the extent and nature of the alleged violations to reasonably allow preparation of a defense.

3) A concise statement of the relief that the complainant seeks. 35 Ill. Adm. Code 103.204(c).

Within 30 days after being served with a complaint, a respondent may file a motion to strike or dismiss a complaint, which may include a challenge that the complaint is "duplicative" or "frivolous." 35 Ill. Adm. Code 101.506, 103.212(b). A complaint is "duplicative" if it is "identical or substantially similar to one brought before the Board or another forum." 35 Ill. Adm. Code 101.202. A complaint is "frivolous" if it requests "relief that the Board does not have the authority to grant" or "fails to state a cause of action upon which the Board can grant relief." *Id.*

Motion to Dismiss

In deciding a motion to dismiss, the Board considers all well-pled facts contained in the pleading as true, and draws all inferences from the facts in favor of the non-movant. People v. Stein Steel Mills Services, Inc., PCB 02-1 (Nov. 15, 2001); Shelton v. Crown, PCB 96-53 (May 2, 1996); Krautsak v. Patel, PCB 95-143 (June 15, 1995). Dismissal of the complaint is proper only if it is clear that no set of facts could be proven that would entitle complainant to relief. *See* Stein Steel, PCB 02-1; Shelton, PCB 96-53; Krautsack, PCB 95-143.

The complaint sets forth allegations that respondents violated Section 12(a), 12(d), and 21(e) of the Act (415 ILCS 5/12(a), (f), and 21(e) (2012)). Comp. at ¶¶ 28-34. BNSF alleges that respondents "caused or allowed contaminants" on the ICDC property in violation of the Act. *Id.* at 33. Further, the complaint alleges that respondents have caused or allowed contaminants into the ground and soil, as well as the groundwater on the property. *Id.* at ¶ 34. Respondents do not argue that the allegations of violations of the Act are frivolous, but rather that the remedy sought by BNSF cannot be granted.

Respondents specifically assert that the Board lacks the authority to grant the relief requested under Section 22.2d of the Act (415 ILCS 5/22.2d (2012)). To be clear, the complaint quotes Section 22.2d(f) of the Act (415 ILCS 5/22.2d(f) (2012)) and then alleges that Agency wrongfully required BNSF to remediate contaminates on respondent's property that were respondent's responsibility. Comp. at ¶ 36, 37. The complaint then states:

> BNSF is entitled to a judgment in its favor and against respondent in an amount to all of the costs that BNSF has incurred to investigate and remediate the ICDC Site. Alternatively, BNSF is entitled to a judgment in its favor and against respondents in an amount commensurate with respondents' comparative responsibility for the presence of contaminants on the ICDC Site. Comp. at ¶38.

In this instance the complaint alleges violations of the Act and seeks recovery of costs for clean-up at the site, and the complaint cites to a statutory provision for the premise that the Board can allocate costs. Section 22.2d(f) of the Act (415 ILCS 5/22.2d(f) (2012)) grants the Board the authority to allocate response costs among responsible parties under specific circumstances. Therefore, the Board finds it does have the authority to grant BNSF the relief requested in the complaint.

Furthermore, regarding respondents' arguments concerning Part 741, there is no requirement for a complaint to plead that Part 741 applies. *See* People v. Waste Hauling Landfill, Inc., PCB 10-9, slip op. at 14-15 (Dec. 3, 2009) (noting Part 741 applicable though complaint makes no reference to Part 741); *see also* 35 Ill. Adm. Code 741. Nor is there any requirement that the complaint plead a specific percentage of liability for response costs. *See* 35 Ill. Adm. Code 741.205(c). Generally, Part 741 applies whenever a complaint is filed with the Board that seeks, under the Act, to require another person to perform, or to recover the costs of, a response that results from a release or substantial threat of a release of regulated substances or pesticides on, in, under, or from a site. *See* 35 Ill. Adm. Code 741.105(a)(1), (d). Also contrary to respondents' claim, Part 741 does not provide that a complainant and respondent must be jointly liable for alleged contamination. Part 741 merely places the burden on complainant to prove, and limits the clean-up cost recovery to, respondent's proportionate share. *See* 35 Ill. Adm. Code 741.205(a), 741.210(b).

A complaint is frivolous if it requests "relief that the Board does not have the authority to grant" or "fails to state a cause of action upon which the Board can grant relief." *See* 35 Ill. Adm. Code 101.202. Considering the facts in the complaint as true, and drawing all inferences in favor of the non-movant, the Board finds that this matter is not frivolous as the Board can award contribution of remediation costs. The Board further finds that the complaint sufficiently alleges violations of the Act pursuant to Section 31 of the Act (415 ILCS 5/31 (2012)).

The Board notes that the reference to Section 22.2d(f) of the Act Act (415 ILCS 5/22.2d(f) (2012)) in the complaint seems to be one theory that BNSF is putting forward for relief. In BNSF's responses to the motion to dismiss, BNSF offers another theory for the relief BNSF is seeking. The Board cannot determine at this time whether complainant's requested relief is available under Section 22.2d(f). However, under Section 58.9 a person may seek contribution for remediation costs of a site where other persons have proximately contributed to contamination and, under Part 741, the Board is authorized to order a party to pay its proportionate share of liability for remediation costs.

Respondents further argue that the complaint should be dismissed because it is duplicative. Reply at 2-3. Respondents argue that the only course of action following from the previous complaint in PCB 07-44 would be to deny liability, which BNSF has already done. *Id.* at 3. First, the Board finds that the complaint at issue here is not duplicative. While BNSF has denied liability before, BNSF is now bringing a complaint alleging that respondents violated the Act and are responsible for a portion of the contamination on the ICDC site. Comp. at ¶¶ 13-14. BNSF, in its actions pursuant to the previous Consent Order, argues that it has incurred substantial costs in remediating contamination that allegedly was not caused by the 1993 collision and spill. *Id.* The Board finds that these allegations were not previously alleged in the former proceeding (PCB 07-44), and thus the complaint at issue is not duplicative. *See* PCB 07-44.

Conclusion on the Motion

Under these circumstances, the Board denies the motion to dismiss. The complaint sufficiently pleads a violation of the Act and thus is properly filed with the Board under Section 31(d) of the Act (415 ILCS5/31(d) (2012)). The Board cannot determine at this time whether BNSF's requested relief is available under Section 22.2d(f). However, under Section 58.9 a person may seek contribution for remediation costs of a site where other persons have proximately contributed to contamination and, under Part 741, the Board is authorized to order a party to pay its proportionate share of liability for remediation costs. Viewing the allegations in the complaint in the light most favorable to BNSF, the complaint sufficiently pleads what relief BNSF seeks. Therefore, the Board accepts the complaint for hearing. .

HEARING

The Board accepts the complaint for hearing. *See* 415 ILCS 5/31(d)(1) (2012); 35 Ill. Adm. Code 103.212(a). A respondent's failure to file an answer to a complaint within 60 days after receiving the complaint may have severe consequences. Generally, if respondents fail within that timeframe to file an answer specifically denying, or asserting insufficient knowledge to form a belief of, a material allegation in the complaint, the Board will consider respondents to have admitted the allegation. *See* 35 Ill. Adm. Code 103.204(d).

The Board directs the hearing officer to proceed expeditiously to hearing. Among the hearing officer's responsibilities is the "duty . . . to ensure development of a clear, complete, and concise record for timely transmission to the Board." 35 Ill. Adm. Code 101.610. A complete record in an enforcement case thoroughly addresses, among other things, the appropriate remedy, if any, for the alleged violations, including any civil penalty.

If a complainant proves an alleged violation, the Board considers the factors set forth in Sections 33(c) and 42(h) of the Act to fashion an appropriate remedy for the violation. *See* 415 ILCS 5/33(c), 42(h) (2012). Specifically, the Board considers the Section 33(c) factors in determining, first, what to order the respondent to do to correct an on-going violation, if any, and, second, whether to order the respondent to pay a civil penalty. The factors provided in Section 33(c) bear on the reasonableness of the circumstances surrounding the violation, such as the character and degree of any resulting interference with protecting public health, the technical practicability and economic reasonableness of compliance, and whether the respondent has subsequently eliminated the violation.

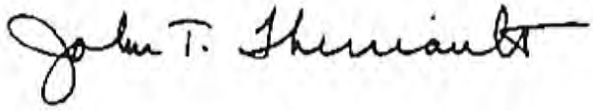
If, after considering the Section 33(c) factors, the Board decides to impose a civil penalty on the respondent, only then does the Board consider the Act's Section 42(h) factors in determining the appropriate amount of the civil penalty. Section 42(h) sets forth factors that may mitigate or aggravate the civil penalty amount. These factors include the following: the duration and gravity of the violation; whether the respondent showed due diligence in attempting to comply; any economic benefits that the respondent accrued from delaying compliance based upon the "lowest cost alternative for achieving compliance"; the need to deter further violations by the respondent and others similarly situated; and whether the respondent "voluntarily self-disclosed" the violation. 415 ILCS 5/42(h) (2012). Section 42(h) requires the Board to ensure

that the penalty is "at least as great as the economic benefits, if any, accrued by the respondent as a result of the violation, unless the Board finds that imposition of such penalty would result in an arbitrary or unreasonable financial hardship." *Id.* Such penalty, however, "may be off-set in whole or in part pursuant to a supplemental environmental project agreed to by the complainant and the respondent." *Id.*

Accordingly, the Board further directs the hearing officer to advise the parties that in summary judgment motions and responses, at hearing, and in briefs, each party should consider: (1) proposing a remedy for a violation, if any (including whether to impose a civil penalty), and supporting its position with facts and arguments that address any or all of the Section 33(c) factors; and (2) proposing a civil penalty, if any (including a specific total dollar amount and the portion of that amount attributable to the respondent's economic benefit, if any, from delayed compliance), and supporting its position with facts and arguments that address any or all of the Section 42(h) factors. The Board also directs the hearing officer to advise the parties to address these issues in any stipulation and proposed settlement that may be filed with the Board.

IT IS SO ORDERED.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on March 20, 2014, by a vote of 4-0.



John T. Therriault, Clerk
Illinois Pollution Control Board

EXHIBIT B

IN THE CIRCUIT COURT FOR THE SIXTEENTH JUDICIAL CIRCUIT
KANE COUNTY, ILLINOIS
CHANCERY DIVISION

PEOPLE OF THE STATE OF ILLINOIS, ex rel. JAMES E. RYAN, Attorney General of the State of Illinois and ex rel. DAVID R. AKEMANN, State's Attorney of Kane County, Plaintiff, vs. BURLINGTON NORTHERN RAILROAD COMPANY, a Delaware corporation, SOUTHERN PACIFIC TRANSPORTATION COMPANY, a Delaware corporation, and subsidiary of SOUTHERN PACIFIC RAIL CORPORATION, a Delaware corporation, and SPCSL CORP., a Delaware corporation and subsidiary of SOUTHERN PACIFIC TRANSPORTATION COMPANY, Defendants.	)	No. CH KA 95 0527

JAN CARLSON
Clerk of the Circuit Court
Kane County, IL
FEB 06 1996
FILED

COMMENT ORDER

Plaintiff, the PEOPLE OF THE STATE OF ILLINOIS, ex rel. JAMES E. RYAN, Attorney General of the State of Illinois, ex rel. DAVID R. AKEMANN, State's Attorney of Kane County, Illinois, and Defendants, BURLINGTON NORTHERN RAILROAD COMPANY, a Delaware corporation, SOUTHERN PACIFIC TRANSPORTATION COMPANY, a Delaware corporation, and subsidiary of SOUTHERN PACIFIC RAIL CORPORATION, a Delaware corporation, and SPCSL CORP., a Delaware corporation and subsidiary of SOUTHERN PACIFIC TRANSPORTATION COMPANY, having agreed to the making of this stipulation and the entry of this Consent Order, do hereby stipulate and agree as follows:

I.

STIPULATION OF USE AND AUTHORIZATION

The parties stipulate that this Consent Order is entered into for purposes of settlement only and that neither the fact that a party has entered into this Consent Order, nor any of the facts stipulated herein, shall be used for any purpose in this or any other proceeding except to enforce the terms hereof by the parties to this agreement. Further, this Consent Order or the performance hereunder by the defendants BURLINGTON NORTHERN RAILROAD COMPANY, a Delaware corporation, SOUTHERN PACIFIC TRANSPORTATION COMPANY, a Delaware corporation, and subsidiary of SOUTHERN PACIFIC RAIL CORPORATION, a Delaware corporation, and SPCSL CORP., a Delaware corporation and subsidiary of SOUTHERN PACIFIC TRANSPORTATION COMPANY, shall not create any right on behalf of any person or entity not a party hereto. Notwithstanding the previous sentences, this Consent Order may be used in any future enforcement action as evidence of a past adjudication of violation of the Illinois Environmental Protection Act ("Act") for purposes of Section 42(h) of the Act, 415 ILCS 5/42(h)(1994).

The undersigned representative for each party certifies that he/she is fully authorized by the party who he/she represents to enter into the terms and conditions of this Consent Order and to legally bind the party he/she represents to the Consent Order.

II.

STATEMENT OF FACTS

A. Parties

1. The Attorney General of the State of Illinois brings this action on his own motion as well as at the request of the Illinois Environmental Protection Agency ("Agency"), and the State's Attorney of Kane County, Illinois, brings this action on his own motion, pursuant to the statutory authority vested in them under Section 42 of the Act, 415 ILCS 5/42 (1994).

2. The Agency is an agency of the State of Illinois created pursuant to Section 4 of the Act, 415 ILCS 5/4 (1994), and charged, *inter alia*, with the duty of enforcing the Act.

3. At all times relevant to this Consent Order, Burlington Northern Railroad Company ("Burlington"), is a Delaware corporation authorized to do business in Illinois since February 27, 1970, and is engaged in the business of providing rail transportation services.

4. At all times relevant to this Consent Order, Southern Pacific Rail Corporation ("SPRC"), is a Delaware rail holding corporation and is not authorized to do business in Illinois. SPRC is the parent company of Southern Pacific Transportation Company, owning 100% of its capital stock.

5. At all times relevant to this Consent Order, Southern Pacific Transportation Company, ("Southern Pacific"), a Delaware corporation and subsidiary of Southern Pacific Rail Corporation, is the parent company of SPCSL Corp. Southern Pacific is in the business of providing railroad freight transportation services and provides such services in Illinois through its wholly-owned

subsidiary SPCSL. Southern Pacific itself is not authorized to do business in Illinois. On information and belief Southern Pacific conducts business in Illinois through its wholly owned subsidiary SPCSL Corp.

6. At all times relevant to this Consent Order, SPCSL Corp. ("SPCSL") was and is a Delaware corporation qualified to do business in Illinois on November 3, 1989. SPCSL is a wholly-own subsidiary of Southern Pacific and is in the business of providing rail transportation services in Illinois.

7. Defendants Southern Pacific, SPRC and SPCSL, shall hereinafter be referred to collectively as Southern Pacific.

B. Site Description

1. At all times relevant to this Consent Order, the site is located on the Burlington rail lines east of the Village of Aurora near the community of Eola, Aurora, Kane County, Illinois. The site consists of five east-west rail tracks and spurs with a warehouse forming its southern boundary and a smaller building forming the northern boundary.

2. Of the five east west rail tracks, three are mainline tracks and the other two are siding tracks. The three mainline tracks provide Burlington access into the Chicago, Illinois gateway. The three mainline tracks originate in Chicago, Illinois and extend west to Galesburg, Illinois, and Kansas City, Missouri and also to St. Paul, Minnesota and to Seattle, Washington. The mainline tracks are utilized to provide through freight rail service, Amtrak service and Metra computer service. In excess of 155 trains per 24 hour period operate over the three mainline tracks. The two siding tracks are used as passing tracks and for the storage of cars and

trains. They are also used to assist in train movement over the three mainline tracks.

3. Located parallel to the site is a drainage ditch. Surface runoff is collected by a storm sewer that discharges into Indian Creek which is a tributary of the Fox River.

4. At all times relevant to this Consent Order, Burlington owns, operates and is in control of the site. The movement of trains, cars and engines over and along its tracks are subject to Burlington's direction and control.

5. At all times relevant to this Consent Order, pursuant to a Trackage Rights Agreement entered into by and between Burlington and Southern Pacific, Southern Pacific uses the site for the conduct of its rail services.

C. Alleged Violations

1. Section 12(a) of the Act, 415 ILCS 5/12(a) (1994), provides as follows:

> No person shall:
>
> a. 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;

2. Section 12(d) of the Act, 415 ILCS 5/12(d) (1994), provides as follows:

> No person shall:
>
> d. Deposit any contaminants upon land in such place and manner so as to create a water pollution hazard;

3. Plaintiff alleges that on January 20, 1993, due to errors on the part of certain Burlington employees, including, its

dispatcher, train engineer and conductor, a train owned and operated by Burlington and traveling westbound over the site, collided head-on with a train owned and operated by Southern Pacific which was traveling eastbound. Burlington denies this allegation.

4. On January 20, 1993, when the trains collided, three diesel fuel tanks with combined fuel capacity of 10,800 gallons of fuel, ruptured, releasing approximately 5,800-6,800 gallons of diesel fuel onto the ground and into a nearby creek causing an "oily" sheen to appear on the waters in the nearby ditch and creek.

5. To date, 208 gallons of the 5,800-6,800 gallons of diesel fuel spilled at the site have been recovered via the recovery trench system installed. Burlington as the owner and operator of the site has not fully remediated the diesel fuel contaminated soil at the site.

III.

APPLICABILITY

This Consent Order shall apply to and be binding upon the State or plaintiff, Burlington and Southern Pacific. Burlington and Southern Pacific shall not raise as a defense to any action to enforce this Consent Order, the failure of any of its officers, agents, servants or employees to take such action as shall be required to comply with the provisions of this Consent Order.

IV.

COMPLIANCE WITH OTHER LAWS AND REGULATIONS

This Consent Order in no way affects the responsibilities of Burlington and Southern Pacific to comply with any other federal, state or local regulations, including but not limited to the Act, and the Board Rules and Regulations, 35 Ill. Adm. Code Subtitles A

through H.

V.

VENUE

The parties agree that the venue of any action commenced in Circuit Court for the purpose of interpretation and enforcement of the terms and conditions of this Consent Order shall be in Kane County.

VI.

SEVERABILITY

It is the intent of the parties hereto that the provisions of this Consent Order shall be severable, and should any provisions be declared by a court of competent jurisdiction to be inconsistent with state or federal law, and therefore unenforceable, the remaining clauses shall remain in full force and effect. In the event that any provision of this Consent Order and plans implemented herein shall be declared inconsistent with the provisions of the Act, 415 ILCS, 5/1 *et seq.* (1994), the provisions of the Act shall be controlling.

VII.

FINAL JUDGMENT ORDER

NOW, THEREFORE, in consideration of the foregoing, and upon the consent of the parties hereto to perform the activities to be ordered by the court, it is hereby ORDERED, ADJUDGED AND DECREED:

A. Jurisdiction

This court has jurisdiction of the subject matter herein and of the parties consenting hereto pursuant to the Act.

B. Objective

The objective of this Consent Order is to have an enforceable order which will ensure the implementation of the terms hereof, to obtain remediation of the site as is economically reasonable and technologically feasible, to assure the protection of public health, safety, welfare and the environment, and compliance with the Act, Board's Water Pollution Regulations, the Federal Clean Water Act and any applicable rules and regulations promulgated thereunder.

C. Terms of Settlement

1. Payment to the Environmental Protection Trust Fund

a. Penalty

i. Burlington and Southern Pacific shall together pay a penalty of $85,000.00 into the Illinois Environmental Protection Trust Fund. Such penalty amount shall be paid within thirty (30) days of the date of this order. This penalty shall be paid by check to the Treasurer of the State of Illinois for deposit in the Environmental Protection Trust Fund and delivered to:

Illinois Environmental Protection Agency
Fiscal Services Division
2200 Churchill Road
P.O. Box 19276
Springfield, IL 62794-9276

The name and number of the case, the Agency's incident number that was assigned to this release and Burlington's and Southern Pacific's Federal Employer's Identification Number

("FEIN") shall appear in the face of the check. Burlington's FEIN is 41-6034000. Southern Pacific's FEIN is 94-600123. The Agency's incident number is 930190.

ii. Burlington and Southern Pacific are jointly and severally liable for the $85,000.00 civil penalty required in Section VII.C.1.a.i. herein.

b. Stipulated Penalties

i. In the event Burlington fails to satisfy any requirement or comply with any provision of this Consent Order, or fails to satisfy any requirement of any plaintiff-approved work plan or schedule developed pursuant to this Consent Order, Burlington shall pay to the plaintiff for payment into the Illinois Environmental Protection Trust Fund, stipulated penalties in the amount of $500.00 per day of noncompliance until such time as compliance is achieved.

ii. All penalties owed the plaintiff under this subsection VII.C.1.b. shall be payable within thirty (30) days of the date Burlington knows or should have known of its noncompliance with any provision of the Consent Order.

iii. All penalties shall begin to accrue on the day that complete performance is due and continue to accrue through the final day of

correction of the non-compliance.

iv. All stipulated penalties shall be paid by check made payable to the Treasurer of the State of Illinois for deposit in the Environmental Protection Trust Fund and delivered to:

Illinois Environmental Protection Agency
Fiscal Services Division
2200 Churchill Road
P.O. Box 19276
Springfield, Illinois 62794-9276

The name and number of the case and Burlington's Federal Employer's Identification Number ("FEIN") shall appear on the face of the check.

v. The stipulated penalties shall be enforceable by the plaintiff and shall be in addition to and shall not preclude the use of any other remedies or sanctions arising from Burlington's failure to comply with the Consent Order.

c. Past Response Costs

Within thirty (30) days of entry of the Consent Order, Burlington shall pay the amount of $1,430.55 in satisfaction of claim(s) the plaintiff may have for all investigation, response, and oversight costs that occurred prior to the entry of this Consent Order. The $1,430.55 payment required herein shall be paid to the Treasurer of the State of Illinois designated to the Hazardous Waste Fund with the Emergency Oversight number, 930190 on the face of the check, and submitted to:

Illinois Environmental Protection Agency
Fiscal Services Division
2200 Churchill Road
P.O. Box 19276
Springfield, IL 62794-9276

d. Future Response Costs

Subject to Section F below, Burlington shall reimburse the Agency for any response and oversight cost incurred subsequent to the entry of this Consent Order. The Agency agrees to submit to Burlington, on a quarterly or annual basis at its discretion, a detailed accounting that shall include a summary of response and oversight activities performed, a detailed summary of all expenses claimed and a statement that the expenses have actually been incurred. Upon request, the Agency shall provide Burlington with copies of all receipts and other documents evidencing such expenditures, excluding actual Agency employee signed timesheets. No reimbursement shall be required for the costs for which no documentation was provided, until such time as the required documentation is provided for such costs. Said detailed accounting shall include all response and oversight costs incurred pursuant to this Consent Order by the Agency with respect to this Consent Order after the effective date of this Consent Decree. Specifically relating to the issue of future response cost only, where the Dispute Resolution provision of Section F is invoked herein in good faith, each party to bear its own legal costs associated with the resolution of the future response costs dispute.

Within thirty (30) days of receipt of the accounting required herein, any payments required herein shall be paid to the Treasurer of the State of Illinois designated to the

Hazardous Waste Fund on the check, and submitted to:

Illinois Environmental Protection Agency
Fiscal Services Division
2200 Churchill Road
P.O. Box 19276
Springfield, IL 62794-9276

e. The name and number of the case and Burlington's Federal Identification Number ("FEIN") shall appear on the face of all checks required herein.

f. Interest on Penalty

Pursuant to Section 42(g) of the Act, 415 ILCS 5/42(g) (1994), interest shall accrue on any penalty amount not paid within the time prescribed herein, at the maximum rate allowable under Section 1003(a) of the Illinois Income Tax Act, 35 ILCS 5/1003(a) (1994).

i. Interest on unpaid penalties shall begin to accrue from the date the penalty payment is due and continue to accrue to the date payment is received.

ii. Where partial payment is made on any payment amount that is due, such partial payment shall be first applied to any interest on unpaid penalties then owing.

iii. All interest on penalties owed the plaintiff, shall be paid by certified check payable to the Treasurer of the State of Illinois for deposit in the Environmental Protection Trust Fund and delivered to:

Illinois Environmental Protection Agency
Fiscal Services Division
2200 Churchill Road
P.O. Box 19276
Springfield, IL 62794-9276

The name and number of the case and Burlington's Federal Identification Number ("FEIN") shall appear on the face of the check.

2. Fuel Containment and Recovery Activities

Burlington shall minimize the impact to the environment from the approximately 5,800 - 6,800 gallons of diesel fuel spilled and released at the site. The following is designed to achieve this objective:

a. On approximately February 14, 1994, Burlington provided to Plaintiff, a report titled, Phase I Emergency Fuel Containment ("Phase I Report"), which outlined the activities and measures implemented by Burlington in its initial response to contain, the 5,800 - 6,800 gallons of diesel fuel spilled and released at the site. These included the following:

i. On January 20, 1993, absorbent material was placed in the creek immediately north of the site where fuel was ponding.

ii. Shallow cut-off trenches were dug on either side of the tracks in the area of the spill and two (2) over and under dams were constructed.

iii. Booms were deployed at the east end of the storm sewer and at the west end of the storm sewer where such storm sewer discharges.

iv. From February 8 - 10, 1993, four soil borings were installed and completed as monitoring wells on each side of the track in the area of the diesel fuel release. Four additional monitoring wells were installed downgradient of the area of the diesel fuel spill.

b. In approximately March, 1993, Burlington retained the services of Radian Corporation ("Radian"), an Engineering firm, to characterize the subsurface extent of any diesel fuel contamination of the site, and to implement a diesel fuel recovery system. These included but were not limited to the following activities:

i. Soil and groundwater samples were obtained and analyzed for total petroleum hydrocarbons ("TPH"). The result from such sampling activity showed diesel fuel contamination of the area soil and groundwater. Free diesel fuel was also observed in one of the monitoring wells.

ii. Between April 2, 1993 and August 17, 1993, a groundwater intercepter trench with a groundwater depression pump and scavenger pump was installed to remove free diesel fuel from the groundwater.

iii. On May 30, 1993, a Wastewater Discharge Permit IWDP-029 was issued by the Aurora Sanitary District ("Sanitary District") for the discharge of groundwater from Burlington's remediation system to the sanitary district sewer. 525,360 gallons of groundwater have been pumped and discharged to the sanitary district sewer.

iv. The Phase I Report provided for a Phase II Follow-up Response which included among other things, the performance of a supplemental site characterization and evaluation of remedial options.

c. Effective immediately, Burlington shall at all times maintain in good working order its diesel fuel containment and recovery system.

d. Effective immediately and continuing until the site, including the soil and groundwater, and off-site areas are remediated to meet any and all Agency-approved closure criteria established for this site, Burlington shall continue to monitor its diesel fuel containment and recovery system and implement as appropriate, all measures designed to prevent the diesel fuel spilled and released at its site, from migrating further off-site.

e. No later than sixty (60) days of entry of this Consent Order, Burlington shall prepare and provide to the plaintiff and the Agency, a report which

summarizes all fuel containment, recovery, remediation, monitoring and maintenance activities conducted at the site since the January 20, 1993 diesel fuel release. Burlington shall also document in said report all soil and groundwater analyses conducted at the site from January 20, 1993 to the date of entry of this Consent Order. Burlington shall also include copies of all analytical results and all boring logs obtained during this period of time.

3. Identified Response Action

Burlington shall determine the extent to which the soil and groundwater are impacted by the diesel fuel released, and shall remediate the site including the soil and groundwater and any off-site impacted area(s) to achieve the Agency-approved closure criteria established for the site and to prevent further migration of the released and unrecovered diesel fuel. The following is designed to achieve this requirement:

a. Beginning not later than forty-five (45) days from the date of entry of this Consent Order, Burlington's Engineering Consultant shall prepare and provide to the plaintiff and the Agency for review and approval, a draft Phase II Work Plan ("Work Plan") and schedule for all of the activities required herein. This Work Plan shall include a detailed description of the procedures for the conduct of a study to determine the technical feasibility of in-situ bioremediation and soil

flushing as well as other technologically feasible technologies to address soil and groundwater remediation on and off-site. The Work Plan shall also include the activities to be performed for the characterization of the soil and groundwater, the identification of potential pathways of migration of the diesel fuel contaminated soil and groundwater, and identification of potentially affected human and environmental receptors. The Work Plan shall also propose the site closure criteria for the plaintiff and Agency approval. Such approval shall not be unreasonably withheld. The plaintiff shall have thirty (30) days for the review of this Work Plan. The plaintiff may extend the time for review by a period not to exceed fourteen (14) days by notifying Burlington prior to the expiration of the initial thirty (30) day review period.

i. If the plaintiff accepts the Phase II Work Plan required in paragraph VII.C.3.a. above, Burlington shall implement said Work Plan in accordance with the schedule contained therein.

ii. If the plaintiff objects to any recommended activity, or requires any additional activity to be performed by Burlington, it shall provide Burlington with a detailed statement as to reasons for its objections, including the specific type of information which the plaintiff deems Burlington did not provide in

the Phase II Work Plan, or the specified activity Burlington is required to perform.

iii. Within thirty (30) days of receipt of any Phase II Work Plan disapproval or modification, Burlington shall submit a revised Phase II Work Plan to the plaintiff which incorporates the modifications required by the plaintiff, or shall invoke the Dispute Resolution provisions of Section VII.F. below. If Burlington fails to initiate the Dispute Resolution procedures within the thirty (30) day time period specified herein, Burlington shall be deemed to have agreed to the specified modifications.

iv. In the event that the Dispute Resolution provision of paragraph VII.F. herein, is invoked, within twenty-one (21) days from the date of the resolution, of the dispute, Burlington shall provide to the plaintiff a revised Phase II Work Plan consistent with the results of the Dispute Resolution addressing Plaintiff's comments. Plaintiff shall have thirty (30) days to review this revised Phase II Work Plan.

v. Burlington shall initiate and complete the implementation of the Phase II Work Plan including the study of the technical feasibility of in-situ bioremediation and soil flushing or other possible technologies to

address soil and groundwater remediation on and off-site, within the time frame specified in any Phase II Work Plan approved by the Plaintiff.

b. Within forty-five (45) days of the completion of all activities required pursuant to the plaintiff-approved Phase II Work Plan, the engineering consultant shall prepare a draft report of all Phase II activities performed. This draft report shall be submitted to the plaintiff and the Agency for review and comments. The draft report shall document the study process including copies of all drawings indicating all materials and equipment examined in the study. The report shall also include, Burlington's determination of technical feasibility of in-situ bioremediation and soil flushing or other technologies to address soil and groundwater remediation on and off-site, all findings of Burlington's site characterization including results of the groundwater sampling analyses, and all identified potential pathways for migration of the diesel fuel contaminated soil and groundwater and the potentially affected human and environmental receptors. This draft report shall also include any and all recommended remedies including but not limited to in-situ bioremediation and soil flushing to remediate the site, as well as other technologies to remediate soil and groundwater on and off-site.

Plaintiff shall have thirty (30) days to comment on the draft report.

c. Within thirty (30) days of receiving plaintiff's comments, Burlington shall provide to the Plaintiff a final report which shall incorporate the Plaintiff's comments. Concurrent with this report, Burlington shall notify the plaintiff and the Agency in writing, of the action(s) to be taken by Burlington to remediate the site, including soil and groundwater.

d. If Burlington proposes not to remediate the site, including the soil and groundwater contamination, or proposes an alternative remedial measure not outlined in its final report, the notification required in Section VII.C.3.c. above shall set forth in detail, all reasons for either the non-action or the alternative remedial action being proposed.

e. The plaintiff retains the right to among other things, rebut and/or reject Burlington's selection of a particular remedial action or its decision of non-action or selection of an alternative remedial action not outlined in its final report and pursuant to Section VII.F. of this Consent Order, request that the Kane County Circuit Court decide the propriety of Burlington's decision.

f. If Burlington proposes to remediate the site, including the soil and groundwater, the notification required in Section VII C.3.c. above, must also

include for review and approval, a work plan for implementation of the selected remedial activity. The work plan shall detail all soil and groundwater remedial activities to be performed at the site and the date(s) on which all such activities will be implemented. The Work Plan shall also propose the site closure criteria for the plaintiff and Agency approval. Such approval shall not be unreasonably withheld.

i. If the plaintiff accepts the work plan for implementation of selected remedial activities required in paragraph VII.C.3.f. above, Burlington shall implement the work plan in accordance with the schedule contained therein.

ii. If the plaintiff objects to any recommended activity, or requires any additional activity or work to be performed by Burlington, it shall provide Burlington with a detailed statement as to the reasons for its objections, including the specific type of information which the plaintiff deems Burlington did not provide in the work plan, or the specific activity or work Burlington is required to perform.

g. Within thirty (30) days of receipt of any work plan disapproval or modification, Burlington shall submit a revised work plan to the plaintiff which incorporates the modifications required by the plaintiff, or shall invoke the Dispute Resolution

provisions of Section VII.F. below. If Burlington fails to initiate the Dispute Resolution procedures within the thirty (30) day time period specified herein, Burlington shall be deemed to have agreed to the specified modifications.

h. In the event that the Dispute Resolution provision of paragraph VII.F. herein, is invoked, within thirty (30) days from the date of the resolution of the dispute, Burlington shall provide to the plaintiff a revised work plan consistent with the results of the Dispute Resolution, addressing plaintiff's comments. Plaintiff shall have thirty (30) days to review this revised work plan.

i. Beginning thirty (30) days after Burlington commences the soil and groundwater remediation activities, and monthly for six (6) months and quarterly thereafter until the completion of all such remediation activities, Burlington shall provide to the plaintiff and the Agency reports of the progress of all remediation activities being conducted at the site.

j. Burlington shall initiate and complete all soil and groundwater remediation activities in accordance with the requirements of the plaintiff-approved Work Plan and in accordance with any and all schedule contained therein.

4. Project "Close-Out" Report

a. Subject to Section VII.C.3.d. and e. above, not

later than sixty (60) days of the completion of all remedial activities at the site, including soil and groundwater remediation, Burlington shall prepare and submit to the plaintiff and the Agency a project "close-out" report. This report shall include at a minimum the following:

i. A summary of all data required to be collected pursuant to this Consent Order, including sampling data from the soil and the groundwater monitoring wells.

ii. A certification by an Illinois Registered Professional Engineer that the requirements pursuant to this Consent Order have been met consistent with the objectives of the Consent Order, including the achievement of the Agency-approved closure criteria. The certification shall also include his/her conclusion(s) regarding the condition of the site, including the soil and groundwater.

iii. A compilation of each written report previously prepared and provided to the plaintiff pursuant to Section VI.C.3. above.

iv. All laboratory reports and boring logs referenced in the data summary required herein.

b. Plaintiff shall have ninety (90) days to review and provide comment(s) on the project "close-out" report required herein. The plaintiff may extend this time for review for a period not to exceed thirty (30)

days, by notifying Burlington in writing prior to the expiration of the initial (90) day review period.

c. Within seven (7) days following the completion of its review, the plaintiff shall notify Burlington in writing whether plaintiff accepts or rejects the project "close-out" report.

d. If the plaintiff accepts the project "close-out" report provided by Burlington, the report shall then be filed by the parties with this Court as an amendment to this Consent Order, within fourteen (14) days of the date of the acceptance notification.

e. If the plaintiff rejects the project "close-out" report provided by Burlington it shall provide Burlington with a detailed statement as to the reasons for its rejection, including any insufficiency found in the evaluation of the remediation activities conducted on and off-site and the completeness of such remediation, the specified type of information which the plaintiff deems Burlington did not provide in the report or other deficiencies contained therein. Plaintiff reserves its right to seek judicial intervention pursuant to Section VII.F. below to resolve any dispute regarding the project "close-out" report.

D. Certification and Reports

1. All certifications, correspondence(s), documents,

notifications, reports, plans, scope of work, studies, and any other documentation required by this Consent Order shall be submitted in writing and sent by certified mail or any other form of mail delivery which records the date of receipt, to the plaintiff and the Agency at the addresses which appear below or to such other addresses which the plaintiff and the Agency may hereafter designate in writing.

John Waligore
Assistant Counsel
Illinois EPA
P.O. Box 19276
2200 Churchill Road
Springfield, IL 62794-9276

Stan Komperda
Bureau of Land
Illinois EPA
2200 Churchill Road
Springfield, IL 62794

Dennis Ahlberg
Emergency Response Unit
Illinois EPA
2200 Churchill Road
Springfield, IL 62794

RoseMarie Cazeau
Senior Assistant Attorney General
Environmental Bureau
Illinois Attorney General's Office
100 W. Randolph Street, 11th Flr.
Chicago, Illinois 60601

Michele Niermann
Assistant State's Attorney
Kane County State's Attorney's Office
Kane County Judicial Center
37 W 777 Route 38, Suite 300
St. Charles, IB 60175-7535
Chicago, Illinois 60601

Howard Chinn, P.E.
Chief Engineer
Illinois Attorney General's Office
100 W. Randolph Street, 11th Flr.
Chicago, IL 60601

2. All documents including plans, approvals and all other correspondences to be submitted to Burlington pursuant to this Consent Order shall be sent to:

Michael L. Sazdanoff, Esq.
Kenneth J. Wysoglad & Associates
Suite 10028
2200 West Monroe Street
Chicago, Illinois 60606

Elizabeth Hill
Law Department
Burlington Northern Rail Co.
3800 Continental Plaza
777 Main Street
Fort Worth, TX 76102

Greg Jeffries, Manager
Environmental Operations
Burlington Northern Railroad Co.
4105 Lexington Avenue
North Arden Hills, MN 55126

E. Cease and Desist

Burlington and Southern Pacific shall cease and desist from violation of the Act, any and all of 35 Ill. Adm. Code, Subtitle C, and any and all federal laws and regulations except as specifically provided in this Consent Order. Burlington shall at all times properly operate and maintain its site and take all reasonable measures to prevent releases which violate the Act and the Board's Air Pollution Regulations, in accordance with the Compliance Plan set forth in Section VII.C.

F. Disputs Resolution

The parties shall use their best efforts to resolve all disputes or differences of opinion arising with regards to this Consent Order, informally and in good faith. If, however, disputes arise concerning this Consent Order which the parties are unable to resolve informally, either party may, by written motion, request that an evidentiary hearing be held before the Kane County Circuit Court to resolve the dispute between the parties.

Burlington shall have the burden of persuasion, by a preponderance of the evidence, on all issues concerning the activities required in Sections VII.C.2., VII.C.3. and VII.C.4. of this Consent Order. Except as specifically provided herein and in Section VII.G. below, the rules of civil procedure shall govern these proceedings.

G. Force Majeure

1. Force Majeure for purposes of this Consent Order is defined as any event arising from causes beyond the control of Burlington which delays or prevents the performance of any obligation under this Consent Order. "Force Majeure" shall not include increased costs or expenses associated with performance of the obligations under this Consent Order.

2. When an event occurs which will delay the timely completion of any obligation under this Consent Order, whether or not caused by a force majeure event, Burlington shall promptly notify the plaintiff and the Agency in writing within forty-eight (48) hours of the occurrence of the event. Within ten (10) days of the occurrence of the event which Burlington contends will be responsible for a delay, Burlington shall also provide to the plaintiff and the Agency in writing, the reason(s) for and anticipated duration of such delay, the measures taken and to be taken by Burlington to prevent or minimize the delay, and the timetable for implementation of such measures. Failure to provide the 48-hour notice and/or provide the 10-day follow-up written explanation to the plaintiff and the Agency in a timely manner, shall constitute a waiver of any claim of force majeure.

3. If within thirty (30) days of the date of Burlington's 48-hour notification, the plaintiff agrees that a delay is or will be attributable to a force majeure event, the parties shall modify the relevant schedules to provide such additional time as may be necessary to allow the completion of the specific obligation.

4. If the plaintiff and Burlington cannot agree whether the reason for the delay was a force majeure event, or whether the duration of the delay is or will be warranted under the circumstances, Burlington may invoke the Dispute Resolution provisions of paragraph VII.F. of this Consent Order. However, Burlington invoking the Dispute Resolution provisions of Section VII.F. is not in and of itself a force majeure event. Burlington has the burden of proving force majeure by a preponderance of the evidence.

H. Right of Entry

In addition to any other authority, the Agency, its employees and representatives, and the plaintiff his agents and representatives, in accordance with constitutional limitations, shall have the right of entry into and upon Burlington's site which is the subject of this Consent Order, at all reasonable times, with twenty-four (24) hours notice, for the purposes of carrying out inspections including taking photographs, collecting samples, collecting information, and enforcing the terms of this Consent Order.

The individuals conducting any inspections of the site shall make all reasonable attempts to ensure that inspection activities will not impede the safe and efficient operation of rail traffic at the site. Further, the individuals conducting the inspections will comply with reasonable site safety rules and regulations in effect at the site at the time of such inspections. A copy of Burlington's Safety Rules and Regulations were provided to the plaintiff.

I. Transfer of Interest

No less than thirty (30) days prior to any transfer by Burlington of an ownership interest and/or control in the Burlington's site, Burlington shall notify the plaintiff and the Agency of the transfer, as provided in Section VII.D.1. Burlington shall also notify the transferee of this Consent Order and provide to the transferee a copy of this Consent Order. Burlington shall include in any agreement or contract for such transfer a provision requiring the transferee to implement the compliance plan contained in Section VII.C. herein. In any event, Burlington shall remain responsible for the completion of all activities specified herein.

J. Covenant Not to Sue

1. Southern Pacific

Upon receipt of Southern Pacific's payment of a $85,000.00 penalty jointly with Burlington and commitment to refrain from future violations of the Act, the plaintiff or State covenants not to sue or bring any civil, judicial or administrative action against Southern Pacific for known violations of the Act which were the subject matter of the Consent Order herein. In the event the $85,000.00 penalty is not paid, the State shall be released from this covenant not to sue.

Further, nothing in this Consent Order shall be construed as a waiver by the plaintiff of the right to redress future violations of the Act, the Board's regulations, or this Consent Order, or to obtain penalties with respect thereto.

2. Burlington

Upon receipt of Burlington's payment of a $85,000.00 penalty

jointly with Southern Pacific and the payment of past costs of $1,430.55 and the actions Burlington has taken to date, the completion of all actions required pursuant to this Consent Order and commitment to reimburse the plaintiff its future response and oversight costs and to refrain from future violations of the Act, the plaintiff or State covenants not to sue or bring any civil, judicial or administrative action against Burlington for known violations of the Act which were the subject matter of the Consent Order herein. In the event any money owing the State is not paid and/or Burlington refuses or fails to perform to completion all actions required by this Consent Order, the State shall be released from this covenant not to sue.

Further, nothing in this Consent Order shall be construed as a waiver by the plaintiff of the right to redress future violations of the Act, the Board's regulations, or this Consent Order, or to obtain penalties with respect thereto.

K. Enforcement of Consent Order

Upon entry of this Consent Order, any party hereto, upon motion, may reinstate these proceedings solely for the purpose of enforcing the terms and conditions of this Consent Order. This Consent Order is a binding and enforceable Order of the Court and

may be enforced as such through any and all available means.

PEOPLE OF THE STATE OF ILLINOIS
ex rel. JAMES E. RYAN,
Attorney General of the
State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement Division

Date: 1/18/96 By: _____
WILLIAM D. SMITH, Chief
Environmental Bureau
Assistant Attorney General

ex rel. DAVID R. AKEMANN,
State's Attorney of
Kane County, Illinois

By: _____
PATRICIA JOHNSON-LORD
Chief, Civil Division

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

Date: 1/11/96 By: _____
JOSEPH E. SVOBODA
General Counsel

BURLINGTON NORTHERN RAILROAD COMPANY

Date: 1/3/96 By: J. Elizabeth Hill

Title: Attorney

SOUTHERN PACIFIC
TRANSPORTATION COMPANY,
subsidiary of SOUTHERN PACIFIC RAIL
CORPORATION, and SPCSL Corp.

Date: 1/9/96 By: _____

Title: _____

Entered: FEB 0 5 1996
MELVIN E. DUNN
Judge

o:\wpwin60\wpdocs\enviso\rmcc019b

EXHIBIT C

C

IN THE CIRCUIT COURT FOR THE SIXTEENTH JUDICIAL CIRCUIT
KANE COUNTY, ILLINOIS
CHANCERY DIVISION

PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* LISA MADIGAN, Attorney General of the State of Illinois, and *ex rel.* JOHN A. BARSANTI, State's Attorney of Kane County, Illinois,	
Plaintiff,	
vs.	CH KA 95 0527
BURLINGTON NORTHERN RAILROAD COMPANY, a Delaware corporation,	
Defendant.	

AMENDMENT TO CONSENT ORDER DATED FEBRUARY 5, 1996

1. This Amendment to Consent Order Dated February 5, 1996 ("Amendment") amends the Consent Order entered in Kane Co. Case No. CH KA 95 0527 on February 5, 1996 ("Consent Order") and supersedes that Consent Order to the extent that is specifically stated herein. Plaintiff, PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* LISA MADIGAN, Attorney General of the State of Illinois, and *ex rel.* JOHN A. BARSANTI, State's Attorney of Kane County, Illinois, the Illinois Environmental Protection Agency, and Defendant, Burlington Northern Railroad Company, n/k/a BNSF Railway Company, (collectively, "parties") have agreed to the making of this Amendment and submit it to this Court for approval.

2. Section II.B.1 of the Consent Order is amended by the addition of the following sentence as its final sentence:

> The site shall also include all properties and media (hereinafter media shall include but not be limited to soil, groundwater, sediment and surface water) not owned or under the control of Burlington impacted by the diesel fuel release that resulted from the January 20, 1993 collision, including, but not limited to, the property owned by Indian Creek Development Corporation ("ICDC"), which is on the southern boundary of the five east-west rail tracks and spurs of Burlington rail lines east of the Village of Aurora near the community of Eola, Aurora, Kane County,

Illinois, and the sediments in Indian Creek, but only to the extent such properties or media are impacted by diesel fuel contamination resulting from the January 20, 1993 collision.

3. Section II.B.4 of the Consent Order is amended by the addition of the following sentences as its final sentences:

> The portion of the site owned by third parties, including ICDC, is not under the control of Burlington. As of the time of the entry of this Amendment, Burlington has access to the ICDC property pursuant to an access agreement.

4. Section II.D of the Consent Order is added as follows:

> Burlington represents that it has entered into this Consent Order for the purpose of settling and compromising disputed claims without having to incur the expense of contested litigation. By entering into this Consent Order and complying with its terms, Burlington does not affirmatively admit the allegations of violation within the Complaint, the Verified Petition to Enforce Court Order and For Rule to Show Cause filed September 26, 2007 and/or referenced above, and this Consent Order shall not be interpreted as including such admission.

5. Section VII.C.1.b.iv and Section VII.C.1.d of the Consent Order are amended by substitution of the following address for the Illinois Environmental Protection Agency ("Agency"):

> Illinois Environmental Protection Agency
> Fiscal Services Division
> 1021 North Grand Avenue East
> P.O. Box 19276
> Springfield, IL 62794-9276

6. A new Section VII.C.1.b.vi is hereby added to the Consent Order, to read:

> The stipulated penalties provision of the Consent Order shall apply with equal force in the event that Burlington fails to satisfy any requirement or comply with any provision of this Amendment.

7. Section VII.C.2, 3 and 4 of the Consent Order shall be of no further effect and shall be null and void.

8. Identified Response Action

a. Burlington shall implement (to the extent not yet completed as determined by the Agency) the pilot project for remediation of diesel fuel contamination on the ICDC property as specified in the Draft Pilot Test Study Work Plan dated September 7, 2006, as approved and modified by the Illinois EPA in its review letter dated March 22, 2007.

b. Within 60 days of entry of this Amendment, Burlington shall submit a Pilot Test Study Results Report to the Agency for its review and approval.

c. Within 30 days of the Agency's approval of the Pilot Test Study Results Report, Burlington shall submit to the Agency for its review and approval, a Site Investigation Plan ("SIP"), which shall include the ICDC property, sediments in Indian Creek and soils and groundwater at all other impacted properties to determine whether and to what extent such soils, groundwater and sediments may have been impacted by diesel fuel contamination resulting from the January 20, 1993 collision. The SIP shall include a proposed schedule for the Agency's review and approval. The investigation shall be conducted in accordance with the applicable requirements of Attachment B to this Amendment. In all instances, the investigation of the soils, groundwater and sediments shall be limited to diesel fuel contamination resulting from the January 20, 1993 collision.

d. Within 30 days of Agency approval of the SIP and obtaining all necessary governmental permits and authorizations, for which Burlington has timely filed a request and/or application as applicable for said permits and authorizations, Burlington shall begin implementation of the Agency approved SIP and shall complete the investigation in accordance with the Agency approved schedule. Burlington shall notify the Agency in writing within seven (7) days when it has filed an application or request for any such permit or authorization. The Agency-approved SIP and schedule for investigation of sediments in Indian Creek and soils and groundwater at all impacted properties shall be incorporated herein and shall constitute enforceable parts of this Amendment. Burlington shall notify the Agency in writing within seven (7) days of its completion of the work specified and approved in the SIP.

e. Within 90 days of completion of the work approved by the Agency and specified in the SIP, Burlington shall submit a Site Investigation Report ("SIR") to the Agency for review and approval. The SIR shall conform to the applicable requirements of Attachment B.

f. Within 60 days of Agency approval of the SIR, Burlington shall submit a Remedial Objectives Report ("ROR") for all properties and media, which the Agency reasonably determines have been impacted by diesel fuel contamination resulting from the January 20, 1993 collision.

g. Within 60 days of the Agency's approval of the ROR, Burlington shall submit a Remedial Action Plan ("RAP"), if determined to be necessary by the Agency, for cleanup of the ICDC property, sediments in Indian Creek and all other impacted properties and media, which the Agency reasonably determines have been impacted by diesel fuel contamination resulting from the January 20, 1993 collision.

h. Within 30 days of the Agency's approval of the RAP and obtaining all necessary governmental permits and authorizations, for which Burlington has timely filed a request and/or application as applicable for said governmental permits and authorizations, Burlington shall begin implementation of the RAP, if determined to be necessary by the Agency, and shall conduct to completion the Agency-approved RAP in accordance with the Agency approved schedule, which shall be incorporated herein and shall constitute enforceable parts of this Amendment. Burlington shall notify the Agency in writing within seven (7) days when it has filed an application or request for any such permit or authorization.

i. When Burlington believes it has completed remediation of the ICDC property, sediments in Indian Creek and soils and groundwater at all other impacted properties, in accordance with the Agency-approved RAP, if determined to be necessary by the Agency, it shall notify the Agency in writing within seven (7) days, and it shall submit a proposed Remedial Action Completion Report ("RACR") to the Agency for its review and approval within 90 days.

j. No later than six (6) years from the date of the Agency's approval of the RAP, Burlington shall complete the remediation (including any post-remediation groundwater or surface water monitoring, if required) of the diesel contamination on all impacted properties and medias identified in the RAP resulting from the January 20, 1993 collision consistent with the Tiered Approach to Corrective Action Objectives, 35 Ill. Admin. Code Part 742, and submit a RACR to the Agency, subject to modification pursuant to Paragraph 15 of this Amendment. If Burlington is unable to comply with this final compliance date, Burlington shall submit a written request for extension of time of the deadline for completion to the State pursuant to Section VII.D. of the Consent Order as amended in this Amendment at Paragraph 9, and

subject to modification pursuant to Paragraph 15 of this Amendment no later than six months prior to the expiration of six years from approval of the RAP. Burlington's timely request for extension of time of the deadline for completion will not be unreasonably denied.

k. Burlington shall prepare its ROR, RAP (if determined to be necessary by the Agency) and RACR, in accordance with the applicable requirements of Attachment A to this Amendment.

l. Plaintiff and the Agency reserve the right to require Burlington to conduct further investigation and remediation if additional properties or media are reasonably determined to be impacted by diesel fuel contamination resulting from the January 20, 1993 collision. Such activities shall be subject to Agency review and approval. Any required investigations and reports shall conform with the applicable requirements of Attachments A and B to this Amendment. In all instances, any required investigations, remediation or reports shall be limited to diesel fuel contamination resulting from the January 20, 1993 collision.

m. Burlington shall provide the Agency with at least five (5) business day's notice of any site work that is to occur except when emergency conditions warrant more immediate attention or action, then Burlington shall notify the Agency no more than 72 hours after undertaking said site work.

n. Within 30 days of entry of this Amendment, Burlington shall conduct (to the extent not yet completed as determined by the Agency) a potable well survey and submit a potable well survey report to the Agency for review and approval. The well survey shall be designed to accomplish the following requirements:

Identify all potable water supply wells located at the Site or within 200 feet of the Site, all community water supply wells located at the Site or within 2,500 feet of the Site, and all regulated recharge areas and wellhead protection areas in which the Site is located and any additional wells as the Agency reasonably requires. Identification of wells shall include a visual check of the areas for evidence of private wells. Burlington shall submit the following to the Agency:

1. A map to scale showing community and other potable water wells and setback zones;
2. A map demonstrating the extent of the measured and modeled contamination plume;

3. A map to scale of locations of any regulated recharge areas and wellhead protection areas in close proximity to the Site;
4. Tables showing the setback zone for each potable water well; and
5. Narrative identifying field observations, persons contacted, and sources of information used.

If any potable wells are located within 200 feet of the area of contamination (on and off-site), sampling and/or notification may be required by the Agency.

o. During the pendency of the Consent Order and this Amendment, Burlington shall provide monthly written progress reports of its work to Plaintiff and the Agency. These reports shall be due by the 15th of each month and shall include, as applicable, work performed, work anticipated for the next month, amounts of free product and contaminated groundwater recovered, results of any analytical sampling, and any problems encountered during conduct of the work.

p. During the pendency of the Consent Order and this Amendment, Burlington shall provide a written notice to the Plaintiff and the Agency within five (5) business days when it is refused access to off-site property.

q. If the Agency disapproves of any work plan, report or other submittal required herein (or any portion thereof), including the initial submission or any revisions thereto, Burlington shall, within 45 days after receiving notice of such disapproval, submit a proposal that addresses all deficiencies identified by the Agency in its disapproval.

r. Burlington shall conduct site investigation and remediation activities under the oversight of the Agency's State Sites Unit in accordance with the Agency's approved schedules required by this Amendment. All activities required under this Amendment and Attachments hereto shall be subject to the Agency's review and approval.

s. The Agency's review, approval and determinations under this paragraph 8 shall be consistent with the Tiered Approach to Corrective Action Objectives, 35 Ill. Adm. Code Part 742.

9. Section VII.D of the Consent Order is amended as follows:

delete the reference to Dennis Ahlberg of the Agency; substitute Ann Cross for Stan Komperda; change the address for the Agency staff to 1021 North Grand Avenue East, P.O. Box 19276, Springfield, IL 62794-9276;

substitute Nancy Tikalsky for RoseMarie Cazeau; and change the address for the Attorney General's staff to 69 West Washington Street, Suite 1800, Chicago, IL 60602.

10. Section VII.F, paragraph 2 of the Consent Order is amended as follows:

delete the phrase "Section VII.C.2, VII.C.3 and VII.C.4 of this Consent Order." and replace it with "Paragraph 8 of this Amendment"

11. Burlington shall undertake all best efforts to obtain and maintain access for itself to the ICDC property and any other properties and media impacted by the diesel contamination from the 1993 train collision, including the filing of any suits necessary under Section 22.2c of the Environmental Protection Act, 415 ILCS 5/22.2c (2008). The failure of Burlington to, in good faith, undertake all best efforts to obtain and maintain access to ICDC property and all other impacted properties in accordance with this paragraph shall subject Burlington to the imposition of stipulated penalties, as provided in the prior Consent Order and Paragraph 6 of this Amendment. Burlington shall file a lawsuit under Section 22.2c of the Environmental Protection Act, 415 ILCS 5/22.2c (2008), against a third-party landowner within 60 days of being denied access by such third-party landowner to any property that has been impacted by diesel fuel contamination resulting from the January 20, 1993 collision.

12. Plaintiff's covenant not to sue set forth in Section VII.J.2 of the Consent Order shall apply with equal force and effect to the matters addressed in this Amendment. The covenant not to sue shall not become effective until such time as Burlington has completed all activities required under this Amendment, and shall only become effective if Burlington has achieved and maintained compliance with all requirements of the Consent Order and this Amendment from the entry of this Amendment through such time.

13. Release of Liability:

In consideration of Burlington's commitment to Cease and Desist, payment of all oversight and response costs incurred by Illinois EPA, and completion of all activities required in the Consent Order and this Amendment, the Plaintiff releases, waives and discharges Burlington from any further liability or penalties for the violations of the Act and Board Regulations that were the subject matter of the Complaint filed on December 29, 1995 and Plaintiff's Verified Petition to Enforce Court

Order and for Rule to Show Cause filed on September 26, 2007 ("Petition") herein. The release set forth above does not extend to any matters other than those expressly specified in Plaintiff's Complaint filed on December 29,1995 or Plaintiff's Petition filed on September 26, 2007. The Plaintiff reserves, and this Consent Order is without prejudice to, all rights of the State of Illinois against Burlington with respect to all other matters, including but not limited to the following:

a. criminal liability;
b. liability for future violations;
c. liability for natural resources damage arising out of the alleged violations; and
d. Burlington's failure to satisfy the requirements of the Consent Order or this Amendment.

Nothing in this Consent Order and/or this Amendment is intended as a waiver, discharge, release, or covenant not to sue for any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which the State of Illinois or the Illinois EPA may have against any person, as defined by Section 3.315 of the Act, 415 ILCS 5/3.315 (2008), other than Burlington.

14. The individuals entering the Burlington site shall comply with Burlington's Safety Rules and Reguations, a copy of which has been provided to Plaintiff and the Agency.

15. Modification

The parties to this Amendment may, by mutual written consent, extend any compliance dates or modify the terms of the Consent Order or this Amendment without leave of this Court. A request for modification shall be made in writing and submitted to the designated representatives. Any such request shall be made by separate document, and shall not be submitted within any other report or submittal required by the Consent Order or this Amendment. Any such agreed modification shall be in writing and signed by representatives of each party to this Amendment, for filing and incorporation by reference into the Consent Order.

16. A copy of the Consent Order is provided as Attachment C to this Amendment.

17. This Amendment may be executed in counterparts.

18. Plaintiff, the Agency, and Burlington are the parties to this Amendment. ICDC, any other owner of impacted property and the successor to Southern Pacific are

not parties to this Amendment and shall acquire no rights against Plaintiff, the Agency or Burlington as a result of the entry of this Amendment.

14. This Amendment to Consent Order Dated February 5, 1996 is hereby incorporated by reference into the Consent Order that was entered by this Court on February 5, 1996 in this matter.

15. Except as modified herein, all of the other provisions of the Consent Order that were entered by this Court on February 5, 1996 remain in full force and effect.

FOR THE PLAINTIFF:

PEOPLE OF THE STATE OF ILLINOIS
ex rel. LISA MADIGAN,
Attorney General of the
State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/
Asbestos Litigation Division

BY: _____
ROSEMARIE CAZEAU, Chief
Environmental Bureau

DATE: 11/5/09

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

DOUGLAS P. SCOTT, Director
Illinois Environmental Protection Agency

BY: _____
JOHN J. KIM
Chief Legal Counsel

DATE: 11/3/09

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. JOHN A. BARSANTI
State's Attorney of Kane County, Illinois

BY: _____
Michele Niermann
Assistant State's Attorney

DATE: 11.18.09

FOR THE DEFENDANT:

BNSF RAILWAY COMPANY

BY: _____

Name: Allen M. Stevens

Title: General Director - Environmental

DATE: 10/21/09

ENTERED:

MICHAEL J. COLWELL

JUDGE

DATE: NOV 18 2009

EXHIBIT D

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

INDIAN CREEK DEVELOPMENT COMPANY, an Illinois Partnership, Individually as beneficiary under trust 3291 of the Chicago Title and Trust Company dated December 15, 1981 and the Chicago Title and Trust Company, as trustee under trust 3291, dated December 15, 1981 Complainant, vs. The BURLINGTON NORTHERN SANTA FE RAILWAY COMPANY, a Delaware Corporation Respondents.	PCB- 07-44 Citizen's Enforcement §21(e), §12(a), §12(d)

NOTICE OF FILING

TO: Weston W. Marsh
Robert M. Barratta Jr.
James H. Wiltz
c/o Freeborn & Peters, LLP
311 S. Wacker Drive
Suite 3000
Chicago, IL 60606

The Burlington Northern and
Santa Fe Railway Company
r/a CT Corporation System
208 S. LaSalle Street
Suite 814
Chicago, Illinois 60604

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board the Complaint of Indian Creek Development Company, a copy of which is herewith served upon you. Take note that you may be required to attend a hearing at a date set by the Board.

Failure to file an answer to this Complaint within 60 days may have severe consequences. Failure to answer will mean that all allegations in the Complaint will be taken as admitted for the purposes of this proceeding. If you have any questions about this procedure you should contact the hearing officer assigned to this proceeding, the Clerk of the Illinois Pollution Control Board, or an attorney.

Date: 12/4/2006

Indian Creek Development Company and Chicago Land Trust Company t/u/t 3291, dated December 15, 1981

By: M. Hope Whitfield
One of Its Attorneys

GLENN C. SECHEN
JAMES R. GRIFFIN
M. HOPE WHITFIELD
Schain, Burney, Ross & Citron, Ltd.
222 North LaSalle St., #1910
Chicago, IL 60601
312-332-0200
312-332-4514 telefax
gsechen@schainlaw.com
F:\GCS\Indian Creek Development JB Industries\PCB Enforcement Action\Pleadings, Draft\NOF-PCB Complaint.doc

CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the Complaint of Indian Creek Development Company, by Registered Certified Mail, return receipt requested, upon the following persons:

Weston W. Marsh
Robert M. Barratta Jr.
James H. Wiltz
c/o Freeborn & Peters, LLP
311 S. Wacker Drive
Suite 3000
Chicago, IL 60606

The Burlington Northern and
Santa Fe Railway Company
r/a CT Corporation System
208 S. LaSalle Street
Suite 814
Chicago, Illinois 60604

M. Hope Whitfield

SUBSCRIBED AND SWORN TO BEFORE ME
this 4th day of December, 2006.

Janet L Baumann
Notary Public

Official Seal
Janet L Baumann
Notary Public State of Illinois
My Commission Expires 12/16/2009

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

INDIAN CREEK DEVELOPMENT COMPANY, an Illinois Partnership, Individually as beneficiary under trust 3291 of the Chicago Title and Trust Company dated December 15, 1981 and the Chicago Title and Trust Company, as trustee under trust 3291, dated December 15, 1981 Complainant, vs. The BURLINGTON NORTHERN SANTA FE RAILWAY COMPANY, a Delaware Corporation Respondents.	PCB- 07-44 Citizen's Enforcement §21(e), §12(a), §12(d)

COMPLAINT

VIOLATIONS OF SECTION 21(e) OF THE ILLINOIS ENVIRONMENTAL PROTECTION ACT (415 ILCS 5/21(e))

NOW COME the complainants, Indian Creek Development Company, individually and as the beneficiary owner under the Chicago Title and Trust Company trust number 3291 dated December 15, 1981 and the Chicago Title and Trust Company, trustee under trust number 3291 dated December 15, 1981 (collectively, "Indian Creek") and in support of its complaint against the Respondent, the Burlington Northern Santa Fe Railway Company ("BNSF") Indian Creek states as follows:

1. At all times relevant hereto, complainant, Indian Creek Development Company, an Illinois Partnership, was the beneficial owner, through the aforesaid Chicago Title and Trust Company t/u/t 3291, of certain real property in Kane County, Illinois commonly known as 1500 Dearborn Avenue, Aurora, Illinois 60505 and including

property index numbers: 15-13-376-001; 15-14-479-005, 15-14-479-006, 15-14-479-009, and 15-14-479-010; 15-23-227-026 and 15-23-227-028; 15-24-101-004; 15-24-102-001, 15-24-102-008, 15-24-102-009 and 15-24-102-010; 15-24-103-002 and 15-24-103-003. (collectively the "Premises").

2. At all times relevant hereto, respondent, BNSF, a Delaware corporation, owned real property adjacent to the Premises which contained railroad tracks upon which BNSF operated a railroad ("BNSF Property").

3. On or about January 20, 1993 there occurred a release through the discharging, depositing, dumping, leaking and spilling of thousands of gallons of diesel fuel as a result of the industrial or commercial railroad operations conducted on the BNSF Property.

4. The direction of groundwater flow is from the BNSF Property to the Premises and Indian Creek, which runs through the Premises.

5. Subsequent to the release and pursuant to the Act, including Sections 12(a) and 12(d), the Attorney General and State's Attorney of Kane County filed an enforcement action against the BNSF and others in Circuit Court bearing case number CH KA 95 0527.

6. On or about February 5, 1996, a consent decree (hereinafter, "Consent Decree") was entered in the Kane County enforcement action regarding the release of diesel fuel on the BNSF Property. A copy of that Consent Decree is attached hereto as Exhibit A.

there. The area of the excavation of the Premises was located near the boundaries of the BNSF Property.

13. During the excavation, an odor was noted and free product and apparently contaminated soil and groundwater were observed. Subsequently, samples of the free product were taken from the excavated part of the Premises, and lab analysis identified the free product as diesel fuel.

14. Indian Creek notified BNSF of the excavation on the Premises, and the attendant odor, and the BNSF responded by removing some of the contaminated soil from the excavation on the Premises.

15. The BNSF has a duty to prevent the migration to and contamination of the soil and groundwater on and under the Premises, but despite the obligations imposed by law and the Consent Decree, the BNSF has completely failed to take sufficient steps to halt the migration of the diesel fuel contamination onto the soil and groundwater on and under the Premises.

16. In contravention of its duty, the BNSF did little to remediate the affected areas, recover released diesel fuel, limit the migration of the diesel fuel contamination, adequately sample to determine the extent of contamination, and to monitor the migration of the diesel fuel contaminants from the BNSF Property.

17. Diesel fuel contamination on the BNSF Property continues to migrate onto the Premises, further contaminating the soil and groundwater located on and under the Premises on an ongoing basis.

18. Subsequent to the discovery of diesel fuel contamination on the Premises, without having performed any remediation of the premises and without prior

7. Among other things, the Consent Decree required the BNSF to prevent further migration of the diesel fuel contamination and to determine the extent to which the soil and groundwater were impacted both on and off of the BNSF Property.

8. Pursuant to specific deadlines, the Consent Decree required the BNSF to submit a work plan to, and obtain the approval of, the Illinois Environmental Protection Agency ("Agency"), and it also required that the BNSF notify the State's Attorney, Attorney General and IEPA in writing of the action(s) taken. See generally Exhibit A.

9. Thereafter, the BNSF was, pursuant to the Consent Decree, required to file a close-out report which, at a minimum, was to include a summary of all sampling and other data required to be collected, as well as a certification by an Illinois Registered Professional Engineer that the requirements of the Consent Decree had been met.

10. The BNSF's initial efforts to remediate the affected areas, limit the migration of free product, and recover released diesel fuel were primarily focused on areas distanced from the Premises. Moreover, these efforts were largely unsuccessful, resulting in the recovery of only a small amount of the diesel fuel that was actually released.

11. Since 1993, the diesel fuel has remained abandoned on and under the BNSF Property and thereafter has migrated, and continues to migrate, from the BNSF Property onto and under the Premises.

12. On or about late October or November, 2000, Indian Creek excavated a small portion of a building floor on the Premises in order to install a piece of equipment

notification to Indian Creek, the BNSF requested Agency closure of the incident pursuant to the Consent Decree without notifying the Agency of the contamination that Indian Creek found on the Premises.

19. The BNSF failed to disclose the contamination of the Premises to the Agency despite Indian Creek's notification to the BNSF regarding the contamination it found on and under the Premises when it excavated, despite the BNSF's removal of contaminated soil from the excavation on the Premises, despite the observations of BNSF's agents, servants, and employees when it removed the contaminated soil, and despite the fact that laboratory analysis of samples taken from the excavations of the Premises revealed that the contamination was diesel fuel. A copy of the BNSF's request for closure dated April 2, 2001 with a prior request for closure dated November 6, 1998 attached thereto, attached to this petition as Exhibit B.

20. The spread of diesel fuel contamination to portions of the BNSF property not initially impacted and eventually to the Premises was willful, as is amply demonstrated by the BNSF's attempt to close the incident under the Consent Decree without informing the Agency of the diesel fuel contamination on and under the Premises.

21. The Agency is working to fulfill its role under the Consent Decree and to obtain the remediation by the BNSF.

22. The diesel fuel contamination in the groundwater under both the BNSF Property and under the Premises constitutes Water Pollution within the meaning of Section 3.545 of the Environmental Protection Act, 415 ILCS 5 *et. seq.* ("the Act"), as it is a nuisance, renders such groundwater harmful or detrimental or injurious to public

health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life.

23. This case is a refiling of Kane County case number 04 L 607 filed on or about December 7, 2004.

24. This case, like the Kane County case, concerns contamination that has migrated to and continues to migrate onto the Premises from the BNSF Property. The Kane County case was voluntarily dismissed on November 21, 2006. A copy of the order of dismissal is attached as Exhibit C.

COUNT I
Section 12(a) Violation

25. Paragraphs 1-24 are incorporated by reference as paragraph 25 hereof.

26. Section 12(a) of the Act provides that no person shall:

> 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.

27. Section 3.550 of the Act defines "Waters" as all accumulations of water, surface and underground, natural, and artificial, public and private, or parts thereof, which are wholly or partially within, flow through, or border upon this State.

28. Accordingly, the groundwater under the Premises and that under the BNSF Property are Waters within the meaning of Section 3.550 of the Act.

29. Section 3.165 of the Act (415 ILCS 5/3.165) defines "Contaminant" as any solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source.

30. The diesel fuel which was released is a Contaminant within the meaning of Section 3.165 of the Act.

31. Section 3.545 of the Act defines "Water Pollution" as such alteration of the physical, thermal, chemical, biological or radioactive properties of any waters of the State, or such discharge of any contaminant into any waters of the State, as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life. 415 ILCS 5/3.545.

32. The General Assembly has expressly found "that pollution of the waters of this State constitutes a menace to public health and welfare, creates public nuisances, is harmful to wildlife, fish, and aquatic life, impairs domestic, agricultural, industrial, recreational, and other legitimate beneficial uses of water, depresses property values, and offends the senses". 415 ILCS 5/11(a).

33. The BNSF caused and allowed the discharge of diesel fuel contaminants on the BNSF Property in 1993, threatened, caused and allowed the discharge of said diesel fuel contaminants through migration to other parts of the BNSF Property, and threatened and eventually caused and allowed the ongoing discharge of contaminants onto the soil and into the groundwater on and under the Premises so as to cause and tend to cause water pollution in violation of Section 12(a) of the Act.

34. Because of the ongoing migration of the diesel contamination and its continued discharge onto and under the Premises, the violation of Section 12(a) of the

Act is ongoing and will continue unless and until abated by order of the Pollution Control Board.

WHEREFORE, Complainants, pray that the Board grant the following relief in favor of Indian Creek and against the BNSF:

A. Find the BNSF in violation of Section 12(a) of the Act;

B. Direct the BNSF to cease and desist from further violations of Section 12(a) of the Act;

C. Mandate and direct the abatement of the continuing violation of Section 12(a) of the Act at the expense of the BNSF as follows:

i. Mandate the remediation of the BNSF Property in such a manner as to stop the ongoing contamination of the Premises; and

ii. Mandate that the Premises be remediated to achieve the removal of all contamination on the Premises that flowed from the BNSF Property;

iii. Mandate, to the extent technically feasible, that all remediation be performed to background levels and that, in no event, remediation be performed to a level less than the applicable residential standards contained in the Tiered Approach to Corrective Action Objectives, 35 Ill. Admn. Code 742; and

iv. Mandate that the remediation of the Premises occurs pursuant to the Agency's Site Remediation Program and that a No Further Remediation Letter be obtained;

D. Mandate that the Agency as well as the Parties hereto and their consultants and attorneys be permitted to monitor the remediation of the BNSF Property and the Premises, and allow them to have access to all reports and laboratory analyses related in any way to the BNSF Property and the contamination thereon;

E. Order that any and all remediation be conducted by consultants and engineers selected by either Indian Creek or the Board due to the BNSF's failure to take adequate steps over more than 13 years to prevent to migration of the contamination to other properties, and based on the BNSF's attempt to obtain closure of the incident without notification to Indian Creek and without informing the Agency of the contamination that it knew existed on and under the Premises;

F. Order that any and all remediation that is conducted be conducted by utilizing methods selected by either Indian Creek or the Board;

G. That the Board request the Agency to investigate the facts and violations set forth herein pursuant to Section 30 of the Act and thereafter name the Agency as a party in interest, pursuant to 35 Ill. Adm. Code 101.404 and 103.202, to coordinate the Agency's duties and efforts pursuant to the Consent Decree, Exhibit B;

H. Mandate that the BNSF reimburse Indian Creek for its all of its costs and expenses (including the fees of consultants and experts as well as the cost of sampling and laboratory analysis) related to the contamination, including but not limited to:

i. The costs of past and, to the extent reasonably necessary, future investigation of the contamination on the Premises;

ii. The costs of past and, to the extent reasonably necessary, future sampling and monitoring of the contamination on the Premises, its migration from the BNSF Property to the Premises; AND

I. Grant such other and further relief as the Illinois Pollution Control Board deems appropriate.

COUNT II
Section 12(d) Violation

35. Paragraphs 1 to 34 are incorporated by reference as paragraph 35 hereof.

36. Section 12(d) of the Act provides that no person shall:

> Deposit any contaminants upon the land in such a place and manner so as to create a water pollution hazard.

37. The BNSF caused and allowed the deposit of diesel fuel contaminants on the BNSF Property in 1993. Subsequently, the BNSF caused and allowed the deposited contaminants to move, migrate, and deposit onto other portions of the BNSF Property, and eventually to the Premises.

38. Accordingly, the BNSF's actions have created a water pollution hazard on both the BNSF Property and the Premises in violation of Section 12(d) of the Act.

39. Because of the ongoing migration of the diesel contamination onto the Premises, the violation of Section 12(d) of the Act is ongoing and will continue unless and until abated by order of the Pollution Control Board.

WHEREFORE, Complainants, pray that the Board grant the following relief against the BNSF:

A. Find the BNSF in violation of Section 12(d) of the Act;

B. Direct the BNSF to cease and desist from further violations of Section 12(d) of the Act;

C. Mandate and direct the abatement the continuing violation of Section 12(d) of the Act at the expense of the BNSF as follows:

i. Mandate the remediation of the BNSF Property in such a manner as to stop the ongoing contamination of the Premises;

ii. Mandate the Premises be remediated causing the removal of all contamination on the Premises which flowed from the BNSF Property;

iii. Mandate, to the extent technically feasible, that all remediation be performed to background levels and, in no event, that the remediation be performed to a level less than applicable residential standards contained in the Tiered Approach to Corrective Action Objectives, 35 Ill. Admn. Code 742;

iv. Mandate that the remediation of the Premises occur pursuant to the Agency's Site Remediation Program and that a No Further Remediation Letter be obtained;

D. Mandate that the Agency as well as the Parties hereto and their consultants and attorneys be permitted to monitor the remediation of the BNSF Property and the Premises, and allow them to have access to all

reports and laboratory analysis related in any way to the BNSF Property and the contamination thereon;

E. Order that any and all remediation be conducted by consultants and engineers selected by either Indian Creek or the Board due to the BNSF's failure to take adequate steps over more than 13 years to prevent to migration of the contamination to other properties, and based on the BNSF's attempt to obtain closure of the incident without notification to Indian Creek and without informing the Agency of the contamination that it knew existed on and under the Premises;

F. Order that any and all remediation that is conducted be conducted by utilizing methods selected by either Indian Creek or the Board;

G. That the Board request the Agency to investigate the facts and violations set forth herein pursuant to Section 30 of the Act and thereafter name the Agency as a party in interest, pursuant to 35 Ill. Adm. Code 101.404 and 103.202, to coordinate the Agency's duties and efforts pursuant to the Consent Decree, Exhibit B.

H. Mandate that the BNSF reimburse Indian Creek for its all of its costs and expenses (including but not limited to the fees of consultants and experts as well as the cost of sampling and laboratory analysis) related to the contamination including but not limited to:

    i. The costs of past and, to the extent reasonably necessary, future investigation,

ii. The costs of past and, to the extent reasonably necessary, future sampling and otherwise monitoring the contamination on the Premises and the migration of contamination on the BNSF Property;

iii. such costs and expenses include but are not limited to the fees of consultants and experts as well as the cost of sampling and laboratory analysis; AND

l. Grant such other and further relief as the Illinois Pollution Control Board may deem appropriate.

COUNT III
Section 21(e) Violation

40. Paragraphs 1 to 38 are incorporated by reference as paragraph 39 hereof.

41. Section 21(e) of the Act provides that:

> No person shall. . .[d]ispose, treat, store or abandon any waste, or transport any waste into this State for disposal, treatment, storage or abandonment, except at a site or facility which meets the requirements of this Act and of regulations and standards thereunder.

42. Section 3.535 of the Act defines "Waste" as, *inter alia*, any "discarded material" resulting from industrial or commercial operations. 415 ILCS 5/3.535.

43. The diesel fuel and contaminated media on and under the BNSF Property that the BNSF has abandoned and disposed of is Waste under the Act.

44. Section 3.185 of the Act defines "Disposal" as the discharge, deposit, injection, dumping, spilling, leaking or placing of any waste or hazardous waste into or on any land or water or into any well so that such waste or hazardous waste may enter

the environment or be emitted into the air or discharged into any waters, including groundwater. 415 ILCS 5/3.185.

45. By allowing the diesel fuel spilled in 1993 to remain on and under the BNSF Property and the Premises to mix with soil and groundwater media, the BNSF has abandoned and disposed of said diesel fuel and diesel fuel contaminants.

46. The BNSF's abandonment and disposal of the diesel fuel and diesel fuel contaminated media under the BNSF Property and the Premises are knowing violations of the Act, as aptly demonstrated by the BNSF's attempt to close the incident pursuant to the Consent Decree without informing the Agency of the diesel fuel contamination on and under the Premises – contamination of which the BNSF was fully aware.

47. Neither the BNSF Property nor the Premises are permitted by the Agency to be waste disposal sites or facilities and for that reason and otherwise they do not meet the requirements of a waste disposal site or facility under the Act or under applicable Illinois Pollution Control Board regulations.

48. Such violation of Section 21(e) of the Act is ongoing and will continue unless and until abated by order of the Pollution Control Board.

WHEREFORE, Complainants, pray that the Board grant the following relief against the BNSF:

A. Find the BNSF in violation of Section 21(e) of the Act;

B. Direct the BNSF to cease and desist from further violations of Section 21(e) of the Act;

C. Mandate and direct the abatement the continuing violation of Section 21(e) of the Act at the expense of the BNSF as follows:

i. Mandate the remediation of the BNSF Property in such a manner as to stop the ongoing contamination of the Premises;

ii. Mandate the Premises be remediated causing the removal of all contamination on the Premises which flowed from the BNSF Property;

iii. Mandate, to the extent technically feasible, that all remediation be performed to background levels and, in no event, that the remediation be performed to a level less than applicable residential standards contained in the Tiered Approach to Corrective Action Objectives, 35 Ill. Admn. Code 742;

iv. Mandate that the remediation of the Premises occur pursuant to the Agency's Site Remediation Program and that a No Further Remediation Letter be obtained;

D. Mandate that the Agency as well as the Parties hereto and their consultants and attorneys be permitted to monitor the remediation of the BNSF Property and the Premises, and allow them to have access to all reports and laboratory analysis related in any way to the BNSF Property and the contamination thereon;

E. Order that any and all remediation be conducted by consultants and engineers selected by either Indian Creek or the Board due to the BNSF's failure to take adequate steps over more than 13 years to prevent to migration of the contamination to other properties, and based on the BNSF's attempt to obtain closure of the incident without notification to

Indian Creek and without informing the Agency of the contamination that it knew existed on and under the Premises;

F. Order that any and all remediation that is conducted be conducted by utilizing methods selected by either Indian Creek or the Board;

G. That the Board request the Agency to investigate the facts and violations set forth herein pursuant to Section 30 of the Act and thereafter name the Agency as a party in interest, pursuant to 35 Ill. Adm. Code 101.404 and 103.202, to coordinate the Agency's duties and efforts pursuant to the Consent Decree, Exhibit B.

H. Mandate that the BNSF reimburse Indian Creek for its all of its costs and expenses (including but not limited to the fees of consultants and experts as well as the cost of sampling and laboratory analysis) related to the contamination including but not limited to:

iv. The costs of past and, to the extent reasonably necessary, future investigation,

v. The costs of past and, to the extent reasonably necessary, future sampling and otherwise monitoring the contamination on the Premises and the migration of contamination on the BNSF Property;

vi. such costs and expenses include but are not limited to the fees of consultants and experts as well as the cost of sampling and laboratory analysis; AND

I. Grant such other and further relief as the Illinois Pollution Control Board may deem appropriate.

Respectfully Submitted,

Indian Creek Development Company and Chicago Land Trust Company t/u/t 3291, dated December 15, 1981

By: _____
One of Its Attorneys

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EXHIBIT E

Case No.: 07 LK 604

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT
COUNTY OF KANE

INDIAN CREEK DEVELOPMENT COMPANY, an Illinois Partnership, INDABA PROPERTIES, LLC and CHICAGO TITLE and TRUST COMPANY, as Land Trustee under Land Trust No. 3291, dated December 15, 1981,	)	Case No.: 07 LK 604
Plaintiffs,	)	
v.	)	
BNSF RAILWAY COMPANY, a Delaware Corporation,	)	
Defendant.	)	

FILED
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2013 DEC -4 A 10:53
THOMAS H. HARTWELL
CIRCUIT COURT CLERK
KANE COUNTY, IL

SECOND AMENDED COMPLAINT

Plaintiffs, INDIAN CREEK DEVELOPMENT COMPANY, an Illinois Partnership, INDABA PROPERTIES, LLC, an Illinois limited liability company, and CHICAGO TITLE and TRUST COMPANY, as Land Trustee under Land Trust No. 3291 dated December 15, 1981, by and through ARNSTEIN & LEHR LLP, and for their Second Amended Complaint against BNSF RAILWAY COMPANY, a Delaware Corporation, state as follows:

General Allegations

The Parties and the Site

1. Chicago Title and Trust Company, as Land Trustee under Land Trust 3291 dated December 15, 1981 (the "Land Trust"), is the owner of the Site commonly known as 601 North Farnsworth Avenue and 1500 Dearborn Avenue, Aurora, Kane County, Illinois (Property Index Numbers: PINS 15-13-376-001; 15-14-479-005, -006, -

009, and -010; 15-23-227-026 and -028, 15-24-101-004; 15-24-102-001, -008, -009, -010; and 15-24-103-002 and -003 (the "Indian Creek Property"). Indian Creek Development Company is an Illinois Partnership and the owner of the beneficial interest and power of direction in the Land Trust. Idaba Properties LLC is an Illinois limited liability company who is purchasing the beneficial interest and power of direction in the Land Trust from Indian Creek Development Company.

2. Since 1993 until the time of this Second Amended Complaint, BNSF has owned, operated, maintained and controlled railroad tracks, a rail yard and a right-of-way adjacent to and immediately north of the Indian Creek Property. Five railroad tracks traverse east and west; and parallel to the northerly line of the Indian Creek Property for approximately 2,200 feet.

The Accident

3. On or about January 20, 1993, without any fault of Plaintiffs or any one of them, a locomotive train owned and controlled by BNSF and traveling westbound on the railroad tracks collided head-on with a locomotive train owned by Southern Pacific Railroad Company traveling eastbound on the same tracks (the "Collision").

4. The Collision took place on real property and on railroad tracks owned and operated by BNSF located immediately north of the Indian Creek Property. A copy of a map showing the BNSF railroad tracks and Indian Creek Property is attached hereto as Exhibit A.

5. As a result of the Collision, three diesel fuel tanks with a combined fuel capacity of 10,800 gallons of fuel ruptured, resulting in the discharge of diesel fuel from the involved locomotives on the ground adjacent to the Indian Creek Property.

6. On or about March 31, 2013 BNSF reported to the Illinois Emergency Management Agency that as a result of the Collision, Locomotive BN 7072 released approximately 3,600 gallons of diesel fuel and Locomotives CSX 844 and CSX 6077 released between 1200 and 1800 gallons of diesel fuel each, for a total release of diesel fuel estimated by BNSF at approximately 7,000 gallons as a result of the Collision. Other petroleum products, including lubricating oil, had been stored on the three locomotives involved in the Collision, which were also released as a result of the Collision.

7. Some or all of the diesel fuel and other petroleum products that were released incident to the Collision migrated from the location of the Collision over, across and under the Indian Creek Property without the approval or permission of the owners of the Indian Creek Property.

8. At the time of the Collision and at all relevant times to this Second Amended Complaint, the movement of trains, cars and engines over, upon and along the railroad tracks north of the Indian Creek Property was subject to BNSF's direction and control. The westbound BNSF train collided with the eastbound Southern Pacific train due, in part, to errors on the part of certain BNSF employees, including its dispatcher, train engineer and conductor.

The State Enforcement Process

9. In response to the release of diesel fuel resulting from the Collision, on February 6, 1996, BNSF entered into a Consent Order with the State of Illinois in a case entitled: *People of the State of Illinois v. Burlington Northern Railroad Company, et al.*, No. CH KA 95 0527, pending in the Circuit Court for the Sixteenth Judicial Circuit, Kane

County, Illinois. The Consent Order required BNSF to investigate and remedy the released diesel fuel, petroleum and contamination associated with the Collision. A copy of that Consent Order is attached hereto as Exhibit B.

10. On November 18, 2009, BNSF and the People of the State of Illinois entered into an Amended Consent Order expanding the scope of the Site for investigation and remediation to specifically include the Indian Creek Property, with a revised schedule to complete the investigation and remediation associated with the release of diesel fuel, petroleum and contamination associated with the Collision. A copy of that Amended Consent Order is attached hereto as Exhibit C.

11. To date, over 20 years after the Collision, BNSF has not completed the court-ordered investigation into the release of diesel fuel, petroleum and contamination at the Site described as on and under its railroad tracks and right-of-way and on and under the Indian Creek Property adjacent to those railroad tracks and right-of-way.

12. To date, over 20 years after the Collision, BNSF has not removed or remediated the diesel fuel, petroleum, and contamination that was released incident to the Collision at the Site described as on and under its railroad tracks and right-of-way and on and under the Indian Creek Property adjacent to the railroad tracks and right-of-way.

Migration of Diesel Fuel, Petroleum and Contamination Associated with the Collision

13. Based on the site geology and the nature of the subsurface, diesel fuel, petroleum and contamination originating from Collision has migrated and continues to migrate from the BNSF railroad track area where the Collision occurred onto and under the Indian Creek Property.

14. Locomotive diesel fuel and petroleum products released as a result of the Collision have flowed and continue to flow from the BNSF tracks over and through land toward and onto and through the Indian Creek Property.

15. Locomotive diesel fuel and petroleum products released incident to the Collision have percolated into the ground, through the ballast under and around the railroad tracks, and have migrated and entered the shallow groundwater at the Site, and migrated down-gradient to the south toward, onto and though the Indian Creek Property.

16. Light Non-aqueous Phase Liquid ("LNAPL") material containing locomotive diesel fuel and petroleum released incident to the Collision in the form of free product has migrated and continues to migrate to and through the Indian Creek Property and has been discovered and observed in groundwater monitoring wells installed by BNSF on its railroad tracks and right-of-way.

17. LNAPL material containing locomotive diesel fuel and petroleum released incident to the Collision in the form of free product from the BNSF property has migrated and continues to migrate to and through the Indian Creek Property and has been discovered and observed in groundwater monitoring wells and test pits installed by BNSF on the Indian Creek Property.

18. LNAPL material containing locomotive diesel fuel and petroleum released incident to the Collision in the form of free product from the BNSF Property has migrated and continues to migrate to and through the Indian Creek property and has been discovered and observed in groundwater monitoring wells installed by BNSF and excavations inside the northernmost building at the Indian Creek Property.

19. Organic chemicals, including toluene, xylene, benzo(a)anthracene, and benzo(a)pyrene, associated with locomotive diesel fuel and petroleum products released incident to the Collision, have been detected in soil and groundwater at the Indian Creek Property. These organic chemicals are recognized by governmental health and environmental agencies as carcinogenic, toxic, and/or otherwise harmful to human health and environment.

20. In 2000, approximately seven years after the Collision, while Indian Creek Development Company was installing concrete footings on the Indian Creek Property, diesel fuel, petroleum, and contamination originating from the Collision was discovered beneath the floor slab on the northern section of Indian Creek Property approximately 100 feet south of the location of the Collision.

21. In 2002, approximately nine years after the Collision, BNSF's environmental consultant, Environmental Management Resources, Inc. ("EMR"), excavated soil at the Indian Creek Property and created pits for the purpose of observation and investigation along the northern property line adjacent to the railroad tracks where the Collision occurred, and discovered diesel fuel, petroleum and contamination in the test pits at the Indian Creek Property, which had originated from the Collision.

22. In February of 2013, over twenty years after the Collision, Plaintiffs excavated two locations inside the northern most building at the Indian Creek Property for the purpose of performing maintenance and repair of a sewer pipe. At the western of the two excavations, diesel fuel odors were observed during the excavation work, and degraded diesel fuel was observed seeping into the western excavation from the north

wall of the excavation. At the eastern of the two excavations, diesel fuel odors were observed during excavation work and degraded diesel fuel and contaminated groundwater were observed at the bottom of the eastern excavation. The source of the diesel fuel discovered at the Indian Creek Property was the release caused by the Collision at the BNSF property in 1993.

23. There is a physical and geological connection between the BNSF Property and the Indian Creek Property that has allowed the diesel fuel, petroleum, and contamination to migrate through porous and permeable geologic materials from the BNSF railroad tracks and right-of-way to and through the Indian Creek Property.

24. There is a geochemical relationship between the diesel fuel, petroleum, and contamination that was released at the BNSF railroad tracks and right-of-way incident to the Collision, discovered migrating from the BNSF property to the Indian Creek Property, and discovered at and under the Indian Creek Property.

Failure to Investigation and Remediate

25. BNSF has failed to adequately characterize the geology and hydrogeology of the area encompassing the BNSF railroad tracks and right-of-way and the Indian Creek Property in order adequately predict the flow of diesel fuel, petroleum and contamination from the BNSF railroad tracks and right-of-way to the Indian Creek Property.

26. BNSF has failed to adequately, test, monitor, supervise, and remediate the diesel fuel and petroleum released incident to the Collision, and thereby failed to prevent diesel fuel, petroleum and contamination from migrating onto and through the Indian Creek Property.

27. In response to the spill of diesel fuel and petroleum after the Collision, BNSF designed a defective and inadequate remediation, containment and monitoring system. This defective design has allowed diesel fuel, petroleum and contamination to migrate from the BNSF railroad tracks and right-of-way to and under the Indian Creek Property.

28. BNSF has failed, and continues to fail, to properly implement an adequate or reasonable remediation, containment and monitoring system in a manner that would prevent the diesel fuel, petroleum, and contamination from migrating or traveling to the Indian Creek Property from the BNSF property.

29. BNSF has failed to provide, and continues to fail to provide, conduct or implement adequate environmental testing or sampling of soil and groundwater, designed to properly detect, predict and prevent diesel fuel, petroleum, and contamination from migrating or traveling to the Indian Creek Property from the BNSF property.

Count I – Negligence

30. Plaintiffs adopt and re-allege paragraphs 1 through 29 as paragraph 30 of this Count I.

31. At the time of the Collision, and at all times since, BNSF had a duty to Plaintiffs and others to direct and control the movement of trains along its railroad tracks in such a way as to prevent a collision between trains and prevent damage, loss and injury.

32. BNSF breached its duty to Plaintiffs by failing to direct and control the movement of trains along its railroad tracks, resulting in the Collision on January 20, 1993, which Collision is the proximate cause of Plaintiffs' injuries, losses and damages.

33. BNSF had a duty to Plaintiffs and others to train its employees in such a way as to prevent collisions between trains.

34. BNSF breached its duty to Plaintiffs and others by failing to adequately train employees, whose errors were the cause of the Collision that occurred on January 20, 1993 and caused the damages, losses and injuries incurred by Plaintiff.

35. At the time of the Collision through the date of this Amended Complaint, BNSF has had a duty to Plaintiffs and others to prevent the migration of the diesel fuel and petroleum incident to the Collision from migrating from the BNSF property onto and through the Indian Creek Property.

36. BNSF breached its duty to Plaintiffs by failing to contain the diesel fuel and petroleum that had been released at its railroad tracks and right-of-way incident to the Collision, and by allowing that material to migrate south from the BNSF property onto, under and through the Indian Creek Property.

37. As a direct and proximate result of BNSF's acts and omissions in failing to control its railroad tracks and train its employees and to contain current and historic diesel fuel and other petroleum compounds at the BNSF property from migrating onto, under and through the Indian Creek Property, BNSF proximately caused Plaintiffs:

(i) to incur damages and reasonable and necessary costs to investigate and respond to the presence and migration of diesel fuel and other

petroleum product released at the BNSF property as a result of the Collision to the Indian Creek Property, and

(ii) to incur property damage and significant diminution in value of the Indian Creek Property.

38. As a direct and proximate result of BNSF's acts and omissions in failing to control its railroad tracks, train its employees, and control diesel fuel and petroleum migrating to the Indian Creek Property, the marketability, use, value and worth of the Indian Creek Property has been substantially decreased and diminished by BNSF's diesel fuel, petroleum, and contamination.

39. Plaintiffs' remedy at law is inadequate and will not restore the Indian Creek Property, and BNSF must remove its diesel fuel, petroleum, and contamination from the Indian Creek Property immediately.

WHEREFORE, Plaintiffs respectfully pray for judgment in their favor against BNSF as follows:

A. For injunctive relief restraining and enjoining BNSF from allowing continued migration of diesel fuel, petroleum, and contamination onto the Indian Creek Property and requiring BNSF to take all actions necessary to remove its diesel fuel, petroleum, and contamination on the Indian Creek Property.

B. For an award of any compensatory and other appropriate damages in amounts to be determined by the evidence at trial and allowed by law.

C. For any other relief which the Court deems just and equitable under the circumstances.

Count II – Negligence per se

40. Plaintiffs adopt and re-allege paragraphs 1 through 29 as paragraph 40 of this Count II.

41. Under the Illinois Environmental Protection Act (the "Act"), "waste" includes "discarded material, including solid, liquid, semi-solid, or contained gaseous material resulting from industrial, commercial, mining and agricultural operations." 415 ILCS 5/3.535.

42. . The diesel fuel and petroleum that was released as a result of the Collision is a "waste" under the Act.

43. Section 21(a) of the Act prohibits persons and entities in Illinois from "caus[ing] or allow[ing] the open dumping of any waste." 415 ILCS 5/21(a).

44. "Open dumping" refers to the "consolidation of refuse from one or more sources at a disposal site that does not fulfill the requirements of a sanitary landfill." 415 ILCS 5/3.305.

45. Section 21(e) of the Act prohibits persons and entities in Illinois from "[d]ispos[ing], treat[ing], stor[ing] or abandon[ing] any waste ... except at a site or facility which meets the requirements of this Act and of regulations and standards thereunder." 415 ILCS 5/21(e).

46. Under the Act, "contaminant" refers to "any solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source." 415 ILCS 5/3.165.

47. "Water pollution" includes the "discharge of any contaminant into any waters of the State, as will or is likely to create a nuisance or render such waters

harmful or detrimental or injurious to public health, safety or welfare...." 415 ILCS 5/3.545.

48. Section 12(a) of the Act prohibits persons and entities in Illinois from "[c]aus[ing] or threaten[ing] or allow[ing] the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution." 415 ILCS 5/12(a).

49. Section 12(a) of the Act prohibits person and entities in Illinois from "[d]eposit[ing] any contaminants upon the land in such place and manner so as to create a water pollution hazard." 415 ILCS 5/12(d).

50. BNSF has committed the following acts and omissions:

a. caused or allowed diesel fuel and petroleum to be released, consolidated and dumped on the BNSF railroad tracks and right-of-way and caused or allowed that diesel fuel and petroleum to migrate to the Indian Creek Property, neither of which are sanitary landfills.

b. abandoned diesel fuel and petroleum on the BNSF railroad tracks and right-of-way and at the Indian Creek Property, none of which are sites or facilities meeting the requirements of the Act.

c. caused or allowed the discharge of diesel fuel and petroleum into groundwater underneath the BNSF railroad tracks and right-of-way and at the Indian Creek Property in such a way as to create a nuisance and render such waters harmful or detrimental or injurious to public health, safety or welfare.

d. deposited diesel fuel and petroleum upon on the BNSF railroad tracks and right-of-way and the Indian Creek Property in such a way as to create

a nuisance and render such waters harmful or detrimental or injurious to public health, safety or welfare.

51. In committing the acts and omissions outlined above, BNSF has violated Sections 12(a) of the Act.

52. In committing the acts and omissions outlined above, BNSF has violated Sections 12(d) of the Act.

53. In committing the acts and omissions outlined above, BNSF has violated Sections 21(a) of the Act.

54. In committing the acts and omissions outlined above, BNSF has violated Sections 21(e) of the Act.

55. The Act was enacted for among other reasons, to protect and restore the environment and to protect Plaintiffs and persons similarly situated. 415 ILCS 5/2(b).

56. The Indian Creek Property, and the soil and groundwater contained thereon and thereunder, are part of the environment.

57. The Act, in part, serves the purpose of protecting the Indian Creek Property and the Plaintiffs from the diesel fuel, petroleum and contamination released by BNSF incident to the Collision, and the Act mandates the restoration of the Indian Creek Property that has been contaminated by BNSF.

58. Plaintiffs' remedy at law is inadequate and will not restore the Indian Creek Property, and BNSF must remove its diesel fuel, petroleum, and contamination from the Indian Creek Property immediately.

WHEREFORE, Plaintiffs respectfully pray for judgment in their favor against BNSF as follows:

A. For injunctive relief restraining and enjoining BNSF from allowing continued migration of diesel fuel, petroleum, and contamination onto the Indian Creek Property and requiring BNSF to take all actions necessary to remove its the diesel fuel, petroleum, and contamination on the Indian Creek Property.

B. For an award of any compensatory and other appropriate damages in amounts to be determined by the evidence at trial and allowed by law.

C. For any other relief which the Court deems just and equitable under the circumstances.

Count III – Nuisance

59. Plaintiffs adopt and re-allege paragraphs 1 through 29 as paragraph 59 of this Count III.

60. BNSF's actions and omissions associated with the release of diesel fuel and petroleum caused by the Collision on BNSF's railroad tracks, the failure to control or properly respond to the migration of that material to the Indian Creek Property, and the failure to properly and adequately investigate and remedy the release of diesel fuel and petroleum caused by the Collision, have caused a substantial and unreasonable invasion of Plaintiffs' use and enjoyment of the Indian Creek Property, which substantial and unreasonable invasion is continuing up through the filing of this Second Amended Complaint.

61. The contamination of the Indian Creek Property continues unabated, as diesel fuel, petroleum, and contamination continue to migrate from the BNSF railroad tracks and right-of-way onto and under the Indian Creek Property.

62. The migration of BNSF's diesel fuel, petroleum and contamination onto and under the Indian Creek Property has substantially interfered with Plaintiffs' use and enjoyment of the Indian Creek Property, and is the actual and proximate cause of damage to Plaintiffs and the Indian Creek Property, negatively impacting and diminishing the marketability, use, value and worth of the Indian Creek Property.

63. Plaintiffs' remedy at law is inadequate and will not restore the Indian Creek Property, and BNSF's diesel fuel, petroleum, and contamination must be removed from the Indian Creek Property immediately.

WHEREFORE, Plaintiffs respectfully pray for judgment in their favor against BNSF as follows:

A. For injunctive relief restraining and enjoining BNSF from allowing the continued migration of diesel fuel, petroleum, and contamination from the BNSF property onto and through the Indian Creek Property and mandating that BNSF immediately take all actions necessary to remove the diesel fuel, petroleum, and contamination on the Indian Creek Property.

B. For an award of any compensatory and other appropriate damages in amounts to be determined by the evidence at trial and allowed by law.

C. For any other relief which the Court deems just and equitable under the circumstances.

Count IV – Trespass

64. Plaintiffs adopt and re-allege paragraphs 1 through 29 as paragraph 64 of this Count IV.

65. By knowingly allowing its diesel fuel, petroleum, and contamination to migrate from the BNSF railroad tracks and right-of-way to the Indian Creek Property, BNSF unlawfully entered Plaintiffs' property and invaded Plaintiffs' possessory right to the Indian Creek Property.

66. The migration of diesel fuel, petroleum, and contamination from the BNSF railroad tracks and right-of-way to the Indian Creek Property continues through the time of the filing of this amended complaint.

67. BNSF's trespass onto the Indian Creek Property is unlawful and unpermitted and constitutes a wrongful interference with Plaintiffs' possessory rights associated with the Indian Creek Property.

68. The Indian Creek Property has been damaged by BNSF's unlawful and unpermitted trespass, in that BNSF's diesel fuel, petroleum, and related contamination have imposed costs upon Plaintiffs and have negatively impacted and diminished the marketability, use, value and worth of the Indian Creek Property.

69. Plaintiffs' remedy at law is inadequate and will not restore the Indian Creek Property, and BNSF must immediately remove the diesel fuel, petroleum, and contamination from the Indian Creek Property.

WHEREFORE, Plaintiffs respectfully pray for judgment in their favor against BNSF as follows:

A. For injunctive relief restraining and enjoining BNSF from allowing continued migration of diesel fuel, petroleum, and contamination onto the Indian Creek Property and requiring BNSF immediately to take all actions necessary to remove its the diesel fuel, petroleum, and contamination on the Indian Creek Property.

B. For an award of any compensatory and other appropriate damages in amounts to be determined by the evidence at trial and allowed by law.

C. For any other relief which the Court deems just and equitable under the circumstances.

Respectfully submitted,

INDIAN CREEK DEVELOPMENT COMPANY, INDABA PROPERTIES, LLC and CHICAGO TITLE and TRUST COMPANY, as Land Trustee under Land Trust No. 3291, dated December 15, 1981

By: _____
One Of Their Attorneys

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EXHIBIT A

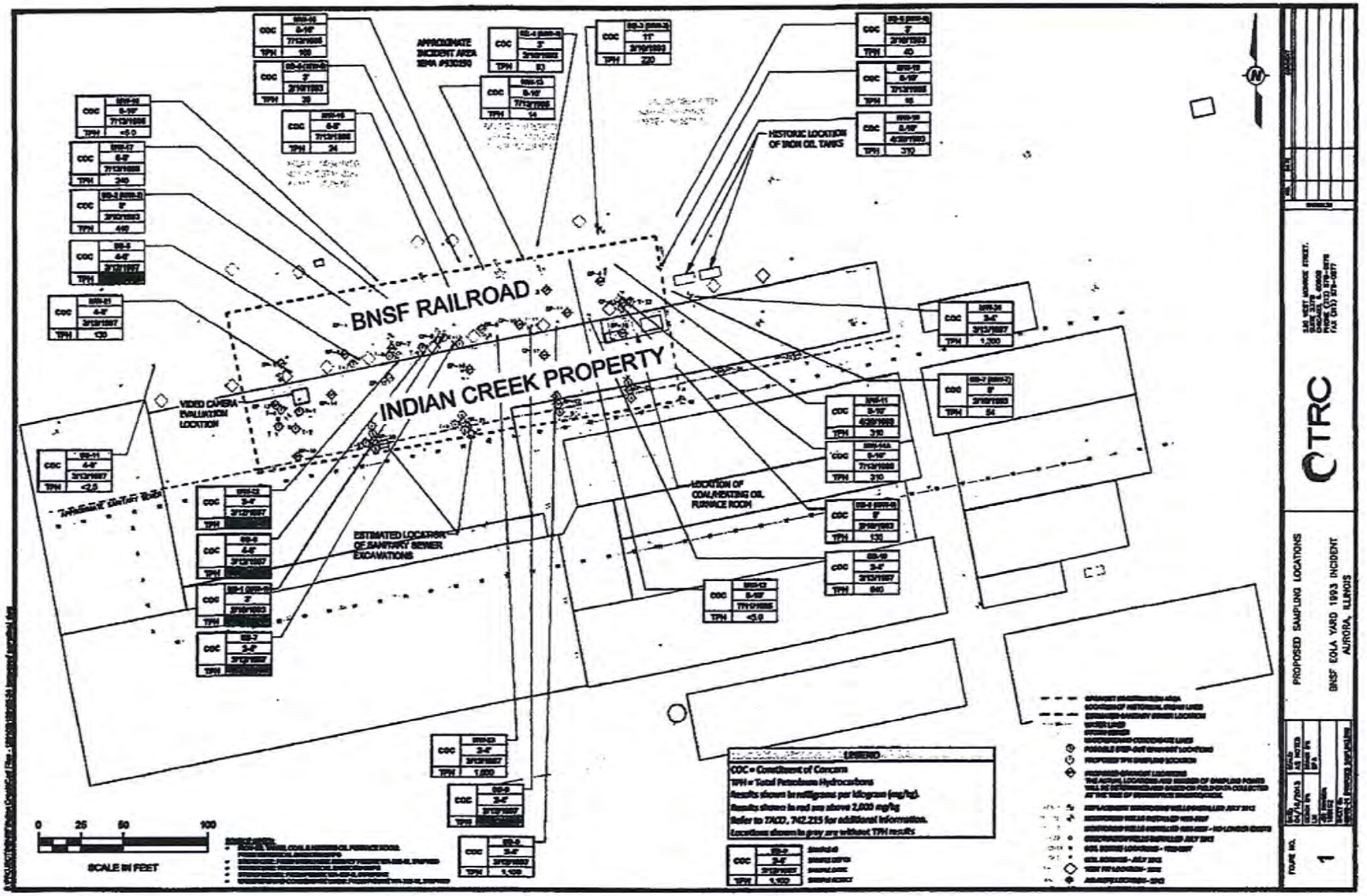
BNSF RAILROAD
INDIAN CREEK PROPERTY
APPROXIMATE INCIDENT AREA 1993
HISTORIC LOCATION OF IRON OIL TANKS
VIDEO CAMERA EVALUATION LOCATION
LOCATION OF COAL/HEATING OIL FURNACE ROOM
ESTIMATED LOCATION OF SANITARY SEWER EXCAVATIONS
LEGEND
COC = Constituent of Concern
TPH = Total Petroleum Hydrocarbons
Results shown in milligrams per kilogram (mg/kg).
Results shown in red are above 2,000 mg/kg
Refer to TACO, 742.215 for additional information.
Locations shown in gray are without TPH results
0 25 50 100
SCALE IN FEET
TRC
PROPOSED SAMPLING LOCATIONS
BNSF EOLA YARD 1993 INCIDENT
AURORA, ILLINOIS
FIGURE NO.
1

EXHIBIT F

IN THE CIRCUIT FOR THE SIXTEENTH JUDICIAL CIRCUIT
KANE COUNTY, ILLINOIS

INDIAN CREEK DEVELOPMENT COMPANY, et al.,	)	
Plaintiff/Counterclaim Defendant,	)	Case No.: 07 LK 604
vs.	)	
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, et al.	)	
Defendant/Counterclaim Plaintiff.	)	

COUNTERCLAIM

Defendant, BNSF Railway Company, f/k/a The Burlington Northern and Santa Fe Railway Company ("BNSF"), by its attorneys, Daley Mohan Groble, P.C., as and for its Counterclaim against Plaintiff Indian Creek Development Company, an Illinois Partnership, individually and as beneficiary under trust 3291 of the Chicago Title and Trust Company dated December 15, 1981 and the Chicago Title & Trust Company, as trustee under trust 3291, dated December 15, 1981 ("ICDC"), alleges as follows:

FACTS

Background

1. On February 9, 1996, BNSF entered into a Consent Decree with the People of the State of Illinois, the Illinois Attorney General and the Illinois Environmental Protection Agency ("IEPA") to provide for further investigation and remediation of locomotive diesel fuel that spilled on BNSF's property from a train collision occurring on January 20, 1993.

2. In or about November 2000, ICDC completed excavations through the concrete floor of one of its buildings located on its property located to the south of BNSF's right-of-way near to the area of the 1993 train collision (the "ICDC Site"). ICDC claims that when so doing, it discovered the presence of petroleum constituents which it alleges to be diesel fuel that migrated to its property from the original 1993 train collision and spill.

3. On November 18, 2009, BNSF entered into an Amendment to the Consent Order.

4. Under the Amendment to the Consent Order, the defined "site" for investigation and remediation was expanded to include "all properties and media . . . not owned or under the control of [BNSF] impacted by the diesel fuel release that resulted from the January 20, 1993 collision, including but not limited to, the property owned by (ICDC) which is on the southern boundary of the [BNSF railroad tracks] and the sediments of Indian Creek, but only to the extent such properties or media are impacted by diesel fuel contamination resulting from the January 20, 1993 collision."

5. Indian Creek runs in a generally east to west direction through the ICDC property, and eventually flows into the Fox River in Aurora, Illinois.

6. In February 2013, ICDC excavated a sanitary sewer line on the ICDC Site. ICDC claims that when so doing, it discovered the presence of petroleum constituents which it alleges to be diesel fuel that migrated to its property from the original 1993 train collision and spill.

ICDC's Pollution Control Board Complaint and Civil Lawsuit

7. On December 4, 2006, ICDC filed a complaint against BNSF before the Illinois Pollution Control Board ("PCB") (the "PCB Complaint") in which it alleged that – as a result of the 1993 train collision and diesel release – BNSF violated §§ 12(a), 12(d) and 12(e) of the Illinois Environmental Protection Act (the "Act"). The PCB Complaint remains pending.

8. In the PCB Complaint, ICDC requests, among other things: (1) that BNSF be required to remediate the ICDC Site "to background levels" and to a level not less than "applicable residential standards;" (2) that ICDC and its consultants be permitted to monitor the remediation of the BNSF property and the ICDC Site; and (3) that BNSF be required to reimburse ICDC for all costs and expenses incurred related to investigation and remediation of the BNSF property and the ICDC Site, including the fees of consultants and experts.

9. On November 9, 2007, ICDC filed the complaint against BNSF in this lawsuit, in which it seeks damages and injunctive relief related to the 1993 train collision and diesel spill (the "State Court Lawsuit").

10. JB Industries, Inc. ("JB Industries") is an affiliate or related entity to ICDC (with common or overlapping ownership and control), and has been a principal tenant and occupier of the ICDC Site since 1982. Upon information and belief, some or all of the petroleum contaminants for which ICDC seeks recovery in this State Court Lawsuit are located on portions of the ICDC Site under the use and control of JB Industries.

Costs Incurred by BNSF

11. Pursuant to the Consent Order and the Amendment to the Consent Order, BNSF has spent large sums of money to investigate the presence of locomotive diesel fuel resulting from the January 20, 1993 train collision on ICDC's property and remediate it. BNSF has paid large sums of money to obtain access to ICDC's property to do so; and it has paid or incurred large sums of money to consultants retained by ICDC to monitor BNSF's investigation. BNSF has also paid large sums of money to IEPA to reimburse IEPA for the costs of work it has performed as part of the investigation and remediation efforts. BNSF will be required to

continue, well in to the future, to pay large sums of money for investigation and remediation activities under the Consent Order and the Amendment to the Consent Order.

12. ICDC, through demands to IEPA, has imposed upon BNSF additional testing, sampling, analysis and remediation of conditions at the ICDC Site, for which BNSF has incurred additional costs and expenses.

13. On information and belief, to the extent that there have been, or will be, petroleum constituents present in excess of IEPA standards found on the ICDC Site, they are likely to be from sources other than the January 20, 1993 collision and diesel fuel spill on BNSF's property, including sources for which ICDC and/or JB Industries are responsible.

14. BNSF seeks recovery of the costs and expenses it has incurred that are attributable to environmental conditions or releases that are not related to the 1993 train collision and spill, or otherwise attributable to BNSF, including environmental conditions and releases caused or contributed to by ICDC and/or JB Industries.

History and Environmental Events at ICDC Site

15. Pursuant to the Consent Order and the Amendment to the Consent Order, BNSF continues to investigate the presence and sources of petroleum constituents and other contaminants at the ICDC Site, and has thereby gained knowledge concerning certain present and historical uses of the ICDC Site, as well as records of environmental releases or events occurring on the site.

16. The ICDC property has a history of heavy industrial activity for over a century that included blacksmithing, machine shops, wood working, grinding, polishing, a coal house, steaming, bonding, lumber storage and dry kiln, warehouses, erecting houses, pump house paint shops, tool shops, various staging and storage areas, sand blasting, welding, dust collection,

assembly and shipping buildings. Recent historical investigations of the property reveal the presence of oil tanks, gas tanks and oil reservoirs over the years.

17. The ICDC Site is currently occupied by tenants engaged in light to heavy industrial activities including, but not limited to, auto repair and service centers, metal fabrication, welding, car detailing, painting, resin and plastics manufacturing including color additive technology, lawn and garden equipment service center, warehousing and assembly.

18. Various petroleum products (predominantly lubricating oils) are present at the ICDC Site. Hazardous materials present at the site include: Mono Ethanol Amine; Derakane Momentum 411-350 Epoxy (Vinal Ester Resin); Industrial Purple Cleaner and Degreaser; Mobil DTE Oil (lubricating oil); Mobil Velocite Oil (lubricating oil); Leahy-Wolf AW Hydraulic Lubricants #32, 46, 68, 100, 150 and 220; Styrene; Methyl methacrylate; Phosphoric acid; Hydroflouric acid; Sodium hydroxide; Wallover Oil Company WS7350 (coolant/lubricant) and ECOBase Waterproofing membrane.

19. Tenants at the ICDC Site include, or recently included, the following:

(a) JB Industries manufactures equipment used in the installation of air conditioning equipment. Its processes include machining, paint, brazing, assembly, caustic cleaning and screw machine operations.

(b) Craftsman Tool manufactures injection molding dies, molds and equipment. Its processes include metal working, polishing, EDM, welding and finishing.

(c) Action Metals is a custom metal cutting shop. Its processes include flame cutting, abrasive cutting, metal working and various finishing processes.

(d) Hevco MFG manufactures aftermarket mower decks. Its processes include metal working, grinding, abrasive finishing, paint and assembly.

(e) Barnco fabricates metal sheds for farms and industry. Its processes include metal cutting, iron working, assembly and finishing.

(f) R&R Iron Works is an iron fabricator. Its processes include cutting, abrasive blasting, welding, brazing, soldering and painting.

20. Historical records available to date disclose numerous environmental releases at the ICDC Site including, but not limited to, the following:

(a) Mid-States Express Trucking Company, March 2006: release of diesel fuel;

(b) Universal Equipment, February 1988: blue waste paint or solvent leak;

(c) Best Blast Corporation, September 1990: improper handling of paint wastes and hazardous materials.

(d) Clark Equipment, May 1974: air emissions for 10,000-gallon diesel fuel tank and 15,000-gallon hydraulic oil tank.

(e) JB Industries, April 1982: spill of PCBs.

21. BNSF or its consultants have observed widespread staining and numerous pools of what appeared to be petroleum products and/or hazardous substances throughout several of the tenant spaces of the ICDC Site. Heavy staining was observed throughout the concrete surface in the main manufacturing area along the northern portion of the ICDC Site. The concrete ground surface in those areas displayed various patches and cracks and "Oil Absorbent" was placed on the concrete surface surrounding equipment, drums, totes and tanks in the areas.

Petroleum Constituents at the ICDC Site Did Not Come From the 1993 Collision

22. BNSF's investigation pursuant to the Consent Order and the Amendment to the Consent Order has established that petroleum constituents and other contaminants present at the ICDC Site are not diesel fuel and/or otherwise did not come from the 1993 train collision.

23. On July 11, 2011, as part of its investigation under the Amendment to the Consent Order, consultants retained by BNSF recovered samples of sediment from Indian Creek at four locations on ICDC property (labeled S-7, S-8, S-9 and S-10), and at locations both upstream and downstream from ICDC's property. Three of the four samples taken on ICID property contained concentrations of polynuclear aromatic hydrocarbons (PAHs) in excess of the of IEPA's Baseline Sediment Clean-up Objectives for Petroleum Products. In particular, sediment sample S-07, located at the east end of ICDC's property across from an industrial building, and S-09, located near the exit points of four culverts from two different ICDC buildings, contained concentrations of PAHs of up to 11 and 17 PAHs in excess of Baseline Remediation Objectives.

24. The PAHs found in the sediment samples taken from Indian Creek on ICDC property could not have migrated from the January 20, 1993 diesel fuel spill on BNSF's property. The locations where the sediment samples were taken are up-gradient and/or cross-gradient from the location of the January 20, 1993 diesel fuel spill. Additionally, numerous soil samples have been taken from the ground, and numerous groundwater monitoring wells have been installed, at locations between the area of the January 20, 1993 diesel fuel spill and the location of the sediment samples from Indian Creek on ICDC's property; but none of those locations have revealed concentrations of PAHs that exceed applicable IEPA environmental clean-up objectives.

25. Forensic chemical analysis of liquid and soil samples from the ICDC Site indicates that the petroleum constituents found at the site are heavy fuel oil, not diesel fuel. For example:

(a) Liquid samples taken from monitoring wells over various periods exhibit biomarkers that are found in heavy fuel oil, but do not exist in diesel fuel because they are removed from diesel during distillation.

(b) Liquid samples taken from monitoring wells over various periods exhibit hydrocarbon ranges consistent with heavy fuel oil and not diesel fuel.

(c) Variations in the heavy fuel oil constituents found in soil samples taken from various locations on the site indicate that they come from different releases.

(d) Soil samples taken from the sanitary sewer line excavation exhibit compositions that are consistent with heavy fuel oil and not diesel fuel.

26. Upon review of the forensic chemical analysis submitted by BNSF, IEPA has acknowledged that "it is clear there is a heavy fuel oil present at the site." IEPA, however, has required BNSF to conduct further investigation because of the possibility that a fraction of the petroleum constituents at the site could be "weathered diesel fuel."

ICDC's Contamination of the ICDC Site

27. Upon information and belief, ICDC at all relevant times has had control of portions of the ICDC Site at which contaminants have been found, and of the source of the contaminants.

28. Upon information and belief, ICDC has caused or allowed contaminants as described previously in the sediments of Indian Creek and on the ICDC Site.

29. Upon information and belief, ICDC has caused or allowed other contaminants into the ground, soil and ground water on the ICDC Site alone or in combinations with contaminants from other sources.

30. BNSF has been wrongfully required by IEPA to investigate and remediate contaminants on the ICDC Site when, in fact, ICDC and/or JB Industries are the parties responsible for the presence of those contaminants; and, BNSF has expended substantial sums of money to do so.

COUNTERCLAIM

(Against ICDC for Restitution/Unjust Enrichment)

31. BNSF repeats and incorporates paragraphs 1 through 30, above, as and for paragraph 31.

32. In the PCB Complaint, and through other requests to IEPA, ICDC seeks an order requiring that BNSF remediate the ICDC Site "to background levels" and to a level not less than "applicable residential standards."

33. Upon information and belief, environmental conditions at the ICDC Site may not meet "applicable residential standards" even in the absence of any diesel fuel contamination that may have occurred as a result of the 1993 train collision.

34. BNSF has incurred substantial costs to investigate and/or remediate conditions and contaminants at the ICDC Site. IEPA has required BNSF to continue investigation of the ICDC Site, and may require BNSF to perform additional remediation at the ICDC Site. BNSF will incur additional substantial costs for any continuing investigation and remediation required by IEPA.

35. Without limiting the foregoing allegations, BNSF will incur enormous additional costs if it is required to remediate the ICDC Site to a level not less than "applicable residential standards."

36. Upon information and belief, most or all of the conditions and contaminants BNSF has been or will be required to investigate or remediate at the ICDC Site were caused or allowed by ICDC, and were not a result of the 1993 train collision or otherwise caused by BNSF.

37. The investigation and remediation performed by BNSF at the ICDC Site has conferred a substantial benefit upon ICDC in that the environmental condition of the ICDC Site has been made better than would have existed in the absence of any diesel fuel contamination that may have occurred as a result of the 1993 train collision.

38. BNSF's investigation, testing, sampling, analysis and modeling of the ICDC Site, the results of which BNSF has been required to share with ICDC, have provided ICDC with a comprehensive knowledge of environmental conditions at the ICDC Site. That knowledge is of significant monetary value to ICDC because, among other things, ICDC will not have to repeat such investigation if and when it remediates the ICDC Site, either voluntarily or through enforcement action by a governmental authority.

39. If BNSF is required to remediate the ICDC Site to a level not less than "applicable residential standards," it will confer substantial additional benefit upon ICDC in that the environmental condition of the ICDC Site will be made better than would have existed in the absence of any diesel fuel contamination that may have occurred as a result of the 1993 train collision.

40. ICDC has obtained and retained a benefit to the detriment of BNSF as a result of the above described investigation and remediation of the ICDC Site.

41. ICDC's retention of the above described benefit without reimbursement to BNSF violates fundamental principles of justice, equity and good conscience.

42. Under principles of restitution and unjust enrichment, BNSF is entitled to a judgment in its favor and against ICDC in an amount equal to costs and expenses that BNSF has incurred or will incur to investigate and remediate the ICDC Site, to the extent that: (i) such investigation and/or remediation has or will render conditions of the ICDC Site better than would have existed in the absence of any diesel fuel contamination that may have occurred as a result of the 1993 train collision: or (ii) the conditions at the ICDC Site are not related to the 1993 train collision and spill or otherwise attributable to BNSF.

WHEREFORE, BNSF Railway Company prays for entry of judgment in its favor and against Indian Creek Development Company, in an amount to be determined at trial, for all costs and expenses that BNSF has incurred or will incur to investigate and remediate the ICDC Site, in an amount commensurate with ICDC's comparative responsibility for the presence of contaminants on the ICDC Site.

BNSF RAILWAY COMPANY

By: _____
One of its Attorneys

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Sean M. Sullivan
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CERTIFICATE OF SERVICE

I, Sean M. Sullivan, an attorney, certify that I caused a true copy of the foregoing **BNSF's Counterclaim** to be served upon the attorneys listed below, by electronic mail and U.S. mail, on November 13, 2013:

Stuart A. Petersen
Stuart A. Petersen Law Offices
601 North Farnsworth Avenue
Aurora, IL 60505

William J. Anaya
Matthew E. Cohn
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120 South Riverside Plaza
Suite 1200
Chicago, IL 60606

Sean M. Sullivan

EXHIBIT G

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT
COUNTY OF KANE

INDIAN CREEK DEVELOPMENT COMPANY, an Illinois Partnership, INDABA PROPERTIES, LLC and CHICAGO TITLE and TRUST COMPANY, as Land Trustee Under Land Trust No. 3291, dated December 15, 1981,	)	Case No.: 07 LK 604
Plaintiffs,	)	
v.	)	
BNSF RAILWAY COMPANY, a Delaware Corporation.	)	
Defendant.	)	

NOTICE OF MOTION

To: See Attached Service List

PLEASE TAKE NOTICE that on **February 11, 2014**, at **9:00 a.m.**, the undersigned will appear before the Honorable Judge James Murphy or any judge sitting in his stead, in Courtroom 350, of the Kane County Courthouse, located at 100 South Third Street, Geneva, Illinois, and shall then and there present **Plaintiff's Section 2-615 Motion To Dismiss**, a copy of which is attached hereto and is herewith served upon you.

Respectfully submitted,

Indian Creek Development Company

By: _____
One of Its Attorneys

William J. Anaya (ARDC No. 6180020)
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Case No.: 07 LK 604

CERTIFICATE OF SERVICE

William J. Anaya, an attorney, certifies that a true and correct copy of the foregoing **Notice and Plaintiff's Section 2-615 Motion to Dismiss** was served upon the following counsel of record:

Sean Sullivan
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by depositing a copy thereof, enclosed in an envelope, in the United States Mail at 120 South Riverside Plaza, Chicago, Illinois, proper postage prepaid, at or about the hour of 5:00 p.m. on December 10, 2013.

William J. Anaya

11370654.1

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT
COUNTY OF KANE

INDIAN CREEK DEVELOPMENT COMPANY, an Illinois Partnership, INDABA PROPERTIES, LLC and CHICAGO TITLE and TRUST COMPANY, as Land Trustee Under Land Trust No. 3291, dated December 15, 1981,	)	Case No.: 07 LK 604
Plaintiffs,	)	
v.	)	
BNSF RAILWAY COMPANY, a Delaware Corporation.	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF SECTION 2-615 MOTION TO DISMISS

BNSF Railway Company's ("BNSF") counterclaim against Plaintiffs[1] should be dismissed pursuant to Section 2-615 of the Illinois Code of Civil Procedure for three reasons. First, the environmental response work that BNSF has performed and is performing is in response to an existing legal duty that BNSF has to the State of Illinois. Even if that environmental response work benefitted Plaintiffs, which it does not, BNSF would still not be able to make a claim for unjust enrichment. A party that incidentally benefits another party as a result of performing an already existing legal duty cannot claim unjust enrichment against the party incidentally benefitted. Second, unjust enrichment is not a proper independent cause of action under Illinois law. Third, BNSF's apparent and related restitution claim is likewise not an independent cause of action under Illinois law.

[1] At the time that BNSF filed its Counterclaim, leave had not yet been granted for the filing of Plaintiffs' Second Amended Complaint. BNSF's counterclaim therefore identifies the Illinois Land Trust and Indian Creek Development Company. Indian Creek Development Company is the owner of the beneficial interest and power of direction of the Illinois Land Trust. In the Second Amended Complaint, an additional plaintiff, Indaba Properties, LLC, is identified. Indaba Properties, LLC is purchasing the beneficial interest and power of direction of the Illinois Land Trust.

I. BACKGROUND

This litigation concerns diesel fuel and petroleum contamination located on property at 601 North Farnsworth Avenue and 1500 Dearborn Avenue in Aurora, Illinois (hereinafter referred to as the "Indian Creek Property"). The Indian Creek Property is located directly south of BNSF's railroad tracks. On January 20, 1993, a locomotive collision took place on BNSF's railroad tracks, resulting the rupture of fuel tanks and a release of locomotive diesel fuel.[2]

In response to the release of diesel fuel and petroleum, the State of Illinois initiated an enforcement action against BNSF.[3] BNSF and the State of Illinois entered into a Consent Order in 1996. That Consent Order was amended in 2009, to among other things, specifically include the Indian Creek Property as part of the "Site" to be remediated. Pursuant to the Consent Order, BNSF is required to investigate and clean up the diesel fuel and petroleum that was released as a result of the collision. The Illinois Environmental Protection Agency ("IEPA") is the agency tasked with overseeing the work performed under the Consent Order. Plaintiffs are not parties to the Consent Order.

In the most general sense, BNSF maintains as a defense that the contamination that it has during on the Indian Creek Property to date is not associated the 1993 locomotive collision. Rather, BNSF claims, the contamination it has found on the Indian Creek Property was caused by the historical and contemporary industrial uses of the Plaintiffs' property. Plaintiffs maintain that any non-BNSF contamination, if present, should simply be a factor to consider in the assessment of damages or the determination of the site remedy. Such non-BNSF contamination, if present, should not be the basis for an independent cause of action that BNSF may have

[2] While the released material was overwhelmingly locomotive diesel fuel, with an estimated release volume of 7,000 gallons reported by BNSF to the state authority, there were other petroleum products on the locomotives, and there are indications in the environmental data that smaller quantities of other petroleum products were released as a result of the locomotive collision as well.

[3] People of the State of Illinois v. Burlington Northern Railroad Company, et al., No. CH KA 95 0527, in the Circuit Court for the Sixteenth Judicial Circuit, Kane County, Illinois.

against Plaintiffs. Regardless, BNSF has asserted that Plaintiffs have actually benefitted from its environmental work because Plaintiffs do not have to perform their own investigation and remediation work, ignoring the fact that Plaintiffs never asked for, wanted, or needed BNSF's environmental work in order to address any non-BNSF contamination, if even present, on their property.

For the reasons below, and pursuant to Section 2-615 of the Illinois Code of Civil Procedure, Plaintiffs seek the dismissal of BNSF's counterclaim.

II. SECTION 2-615 STANDARD

A motion pursuant Section 2-615 of the Illinois Code of Civil Procedure tests the legal sufficiency of the complaint by alleging that the pleading is deficient on its face. Performance Elec., Inc. v. CIB Bank, 371 Ill. App. 3d 1037, 1039 (2007). A cause of action should be dismissed pursuant to a Section 2-615 motion if it is clearly apparent that there are no set of facts that can be proved that would entitle the plaintiff to relief. Pooh-Bah Enterprises, Inc. v. County of Cook, 232 Ill.2d 463, 473 (2009).

III. ARGUMENT

A. BNSF'S COSTS AND EXPENSES WERE INCURRED AS A RESULT OF AN INDEPENDENT LEGAL DUTY IT HAS TO THE STATE OF ILLINOIS, AND ACCORDINGLY BNSF MAY NOT MAKE A CLAIM FOR UNJUST ENRICHMENT.

BNSF has a legal duty, vis-à-vis the settlement of an enforcement action brought by the State of Illinois against BNSF, to investigate and clean up its contamination, and consequently BNSF cannot make a claim for unjust enrichment against Plaintiffs who simply own contaminated property that is associated with that enforcement action. A rule that can be inferred from the relevant case law, which is discussed below, is that a polluter of a property cannot make an unjust enrichment claim against the owner of the property it polluted for the cost of the work that the polluter performed on the property pursuant to a government-imposed

obligation, even if there was some incidental benefit to the property owner. Section 106 of the Restatement of Restitution (1937) speaks to the very circumstance of BNSF's counterclaim, providing:

> A person who, incidentally to the performance of his own duty or to the protection or the improvement of his own things, has conferred a benefit upon another, is not thereby entitled to contribution.

This section of the Restatement of Restitution has been recognized by Illinois courts. See Griffith Wrecking Co., Inc. v. Greminger, 65 Ill.App.3d 962 (1978). Moreover, in Season Comfort Corp. v. Ben A. Borenstein Co., 281 Ill. App. 3d 648, 657 (1995), the Appellate Court explained that "one is not unjustly enriched by retaining benefits involuntarily acquired which law and equity give to him absolutely without any obligation on his part to make restitution." If BNSF's environmental response work can even be considered a benefit, Plaintiffs receipt of that work has certainly been involuntary.[4]

Courts addressing environmental cleanup disputes have consistently held that unjust enrichment claims may not be brought by a responsible party against another party when the responsible party has a legal obligation to the government to investigate and remediate its own contamination at a site. The incidental benefit to another party or other contamination does not give rise to an unjust enrichment claim. In re Energy Co-op., Inc., 1995 WL 330876 (N.D. Ill. May 30, 1995) concerned environmental contamination associated with a refinery in East Chicago and Hammond, Indiana. Both Atlantic Richfield Company ("ARCO") and the Chapter 7 Estate of Energy Cooperative, Inc. ("ECI") were under a legal obligation to the State of Indiana to respond to the contamination. ECI asserted a claim against ARCO that it was unjustly enriched by the costs and expenses it incurred addressing ARCO's contamination. Yet because

[4] Even if BNSF was providing environmental services on the Indian Creek Property for Plaintiffs' benefit, Plaintiffs would consider themselves very poorly served. BNSF's environmental response work has been quite ineffective. Twenty years after the incident, the IEPA still has not closed the site and still does not consider the nature and extent of contamination to have been fully investigated.

ECI had a duty pursuant to a settlement that it reached with the State of Indiana, ECI could not make a claim for unjust enrichment against ARCO. The District Court explained, "[c]ourts addressing common law claims for restitution based on unjust enrichment in the context of [the federal environmental cleanup statute] CERCLA[5] have consistently held that where the plaintiff has a legal duty to clean up waste on a contaminated site, recovery based on unjust enrichment is foreclosed." Id. at *8.

Other courts reached similar conclusions. Chem-Nuclear Sys., Inc. v. Arivec Chemicals, Inc., 978 F. Supp. 1105, 1111 (N.D. Ga. 1997) addressed an unjust enrichment claim related to a remediation site referred as the Basket Creek Road site in Georgia. Plaintiff Chem-Nuclear Sys., Inc. performed remediation pursuant to an Environmental Protection Agency ("EPA") order, and thus could not pursue an unjust enrichment claim against defendant Lockheed Corp. ("Lockheed") since the alleged benefit accrued by Lockheed was pursuant to Plaintiff's own legal duty created by the EPA's administrative order. See also Ford Motor Co. v. Edgewood Properties, Inc., 2008 WL 4559770 (D.N.J. Oct. 8, 2008) (recognizing that the plaintiff had an independent legal duty to remediate the defendant's damaged property pursuant to an administrative order and thus could not recover for unjust enrichment); Mayor & Council of Borough of Rockaway v. Klockner & Klockner, 811 F. Supp. 1039, 1059 (D.N.J. 1993) (holding that the defendant's counterclaim for unjust enrichment failed when it had an obligation under the New Jersey environmental statute ECRA[6] to clean up damaged property previously occupied by the plaintiff).

Here, BNSF is the only party with the legal duty to the State of Illinois to investigate and clean up contamination on the Indian Creek Property. Because of the migration of

[5] CERCLA is the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601, et seq., a federal environmental cleanup statute that is sometimes referred to as the "Superfund" law.

[6] ECRA is the Environmental Cleanup Responsibility Act, a New Jersey environmental statute.

contamination from BNSF's railroad tracks to the Indian Creek Property, it is the State of Illinois, through the oversight of the IEPA, and not Plaintiffs, who have required BNSF to investigate and remediate contamination on the Indian Creek Property. Plaintiffs are an innocent party in this matter. BNSF cannot be said to have unjustly enriched Plaintiffs by virtue of simply doing the work that is required of it by the State of Illinois.

Furthermore, for a cause of action based on unjust enrichment, a complainant must allege that the benefit retained violates the fundamental principles of justice, equity, and good conscience. HPI Health Care Servs., Inc. v. Mt. Vernon Hosp., Inc., 131 Ill. 2d 145, 160, (1989). No such circumstance exists in this litigation, as all of BNSF's environmental investigation and remediation work was performed for and required by the State of Illinois. Investigating and cleaning up one's contamination, no matter where released, is what is required of BNSF. BNSF never sought to give a benefit to Plaintiffs, and Plaintiffs never sought to receive any benefit from BNSF. (Nor did Plaintiffs actually receive any benefit.) The fundamental principles of justice, equity, and good conscience are not violated when BNSF is merely doing what it is legally required to do. The train accident was not the fault of Plaintiffs. Had the train accident not occurred, BNSF would not be in this situation. BNSF should simply be held responsible for the environmental impact of its locomotive accident. BNSF should not view its locomotive accident as an opportunity to make a claim against the victims of its accident.

Because BNSF has an independent legal to duty to investigate and remediate its contamination on the Indian Creek Property, pursuant to an enforcement action initiated by the State of Illinois and a cleanup process administered the IEPA, BNSF cannot claim that the owners of the Indian Creek Property are unjustly enriched. Consequently, pursuant to Section 2-615 of the Illinois Code of Civil Procedure, BNSF's counterclaim should be dismissed.

B. UNDER ILLINOIS LAW, UNJUST ENRICHMENT IS NOT AN INDEPENTENT CAUSE OF ACTION, AND ACCORDINGLY, BNSF'S COUNTERCLAIM SHOULD BE DISMISSED.

BNSF has also improperly pled unjust enrichment as an independent cause of action. As explained recently by the Appellate Court in Gagnon v. Schickel, 2012 IL App (1st) 120645:

> **Unjust enrichment is not an independent cause of action.** Rather, "it is a condition that may be brought about by unlawful or improper conduct as defined by law, such as fraud, duress, or undue influence," or alternatively, it may be based on contracts which are implied by law. This theory is inapplicable where an express contract, oral or written, governs the parties' relationship. A plaintiff is permitted to plead breach of contract claims in addition to unjust enrichment. Thus, although a plaintiff may plead claims alternatively based on express contract and unjust enrichment, the unjust enrichment claim cannot include allegations of an express contract. (emphasis added, internal citations omitted, and cited cases identified below)

Citing, Martis v. Grinnell Mutual Reinsurance Co., 388 Ill.App.3d 1017, 1024 (2009); Mulligan v. QVC, Inc., 382 Ill.App.3d 620, 631, (1989); Alliance Acceptance Co. v. Yale Ins. Agency, Inc., 271 Ill. App. 3d 483, 492, (Ill. App. Ct. 1995); Perez v. Citicorp Mortgage, Inc. 301 Ill.App.3d 413, 425 (1998); Bureau Service Co. v. King, 308 Ill.App.3d 835 (1999); and Guinn v. Hoskins Chevrolet, 361 Ill.App.3d 575, 604 (2005).

Thus, for BNSF to pursue an unjust enrichment claim, it must do so in one of three ways: (1) BNSF must tie its unjust enrichment claim into an allegation of improper conduct, such as fraud, duress, or undue influence, (2) BNSF must tie its unjust enrichment claim into an allegation that there is a contract implied by law, or (3) BNSF must allege that there was an express contract, oral or written, and then plead unjust enrichment in the alternative to a breach of contract claim. BNSF's counterclaim makes no unjust enrichment claim in a way that comports with the requirements of Illinois law, as explained by the Gagnon court. BNSF simply pleads an independent unjust enrichment claim, based solely on its position that its

contamination, caused by the locomotive collision, has allegedly been confused by the State of Illinois with other industrial contamination on the Indian Creek Property.[7]

Addressing the first type of action in which unjust enrichment can be claimed, Plaintiffs certainly have not engaged in any improper conduct. Plaintiffs have done nothing to BNSF. Plaintiffs have never sought to enrich themselves. See Charles Hester Enterprises, Inc. v. Illinois Founders Ins. Co., 137 Ill. App. 3d 84, 91 (1985) ("if defendants had unjustly enriched themselves by fraud or by breach of a fiduciary relationship, then plaintiffs could seek redress ....") Rather, Plaintiffs simply own property next to BNSF's railroad tracks. Plaintiffs would have preferred that BNSF's locomotive collision never happened and the related environmental response work was never needed.

As to the second basis for an unjust enrichment claim, there is no contract implied by law. For there to be a contract implied by law, which BNSF never even alleged, Plaintiffs would have had to voluntarily accept a benefit from BNSF, and it would be inequitable for Plaintiffs to retain that benefit without payment to BNSF. See People ex rel. Hartigan v. E & E Hauling, Inc., 153 Ill. 2d 473, 497 (1992). Plaintiffs never voluntary accepted any benefit, and there has been no benefit. Plaintiffs never wanted to be in a situation where BNSF is required to perform investigation and remediation work on their property. Plaintiffs never viewed BNSF's train accident as a fortuitous opportunity to get some free environmental investigation and remediation work, and Plaintiffs have never treated it that way. And BNSF never initiated its investigation and remediation effort with an expectation of repayment from Plaintiffs. Finally, BNSF never alleged that an express contract exists, and in fact there is no such contract.

[7] BNSF's counterclaim further implies that both a separate action brought by Plaintiffs before the Illinois Pollution Control Board and Plaintiffs' *demands* to the IEPA have resulted in BNSF incurring additional costs and expenses. BNSF's obligation to the State of Illinois is an independent legal obligation, irrespective of Plaintiffs' actions in another forum and Plaintiffs' alleged influence with the IEPA. BNSF has only done what is required of it by the State of Illinois, and its incurred costs and expenses are directly attributable to its independent legal obligation to the State of Illinois.

Therefore, because the counterclaim for unjust enrichment is improperly brought as an independent cause of action, in a way that does not conform to the pleading requirements as articulated by the Appellate Court in Gagnon v. Schickel, BNSF's counterclaim for unjust enrichment should be dismissed pursuant to Section 2-615 of the Illinois Code of Civil Procedure.

C. UNDER ILLINOIS LAW, RESTITUTION IS NOT AN INDEPENTENT CAUSE OF ACTION, AND ACCORDINGLY, BNSF'S COUNTERCLAIM SHOULD BE DISMISSED.

BNSF's counterclaim pleads restitution and unjust enrichment together. BNSF apparently though treats its restitution claim as a separate, although integrally related, cause of action. Restitution is an equitable remedy, not a cause of action. The basis of upon which restitution can be obtained is unjust enrichment. Steadfast Ins. Co. v. Caremark Rx, Inc., 373 Ill. App. 3d 895, 900 (2007) (citing Independent Voters of Illinois v. Illinois Commerce Comm'n, 117 Ill.2d 90, 98 (1987). Restitution, therefore, is a measure of the damages for an unjust enrichment claim. Bd. of Managers of Hidden Lake Townhome Owners Ass'n v. Green Trails Imp. Ass'n, 404 Ill. App. 3d 184, 193 (2010). BNSF has confused the remedy of restitution with its claim for unjust enrichment. And, as discussed *infra*, BNSF may not plead unjust enrichment as an independent cause of action.

Accordingly, BNSF's counterclaim for restitution should be dismissed pursuant to Section 2-615 of the Illinois Code of Civil Procedure.

IV. CONCLUSION

Perhaps there is one other way to look at BNSF's counterclaim, peripheral to the legal framework provided above. BNSF is effectively arguing that locomotive collisions next to industrial properties are better than locomotive collisions next to other types of properties such as parks and farms, as the former are opportunities for a railroad companies to sue their victims, and

the latter are simply losses railroad companies must incur. BNSF makes the case that industrial properties fortuitously benefit from railroad accidents, because the owners of such properties, which may be otherwise contaminated, will benefit from the cleanups necessitated by environmental releases associated with railroad accidents. Simply put, polluters should not be suing the polluted, and polluters should not acquire a cause of action when they pollute. Railroad companies need to clean up and pay for the environmental contamination caused by their accidents, no matter where those accidents occur – period.

BNSF's counterclaim is really just its defense in another form. A counterclaim should be able to stand on its own. BNSF is seeking revenge on Plaintiffs for their aggressive advocacy of their own interests. If Plaintiffs never discussed their concerns with the IEPA, and if the Plaintiffs never brought their own private litigation against BNSF, it is difficult to believe that BNSF would ever independently assert a claim for unjust enrichment against Plaintiffs.

BNSF's counterclaim should be dismissed in its entirety pursuant to Section 2-615 of the Illinois Code of Civil Procedure because: (1) BNSF has an independent legal duty to the State of Illinois to investigate and remediate environmental contamination on the Indian Creek Property, and consequently BNSF may not claim that Plaintiffs were unjustly enriched, (2) unjust enrichment is not an independent cause of action, and (3) restitution is not an independent cause of action.

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Respectfully submitted,

INDIAN CREEK DEVELOPMENT COMPANY, an Illinois Partnership, INDABA PROPERTIES, LLC and CHICAGO TITLE And TRUST COMPANY, as Land Trustee Under Land Trust No. 3291, dated December 15, 1981

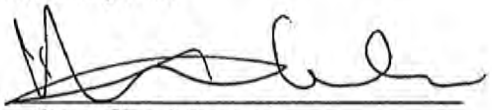
By: 
One of Its Attorneys

EXHIBIT H

IN THE CIRCUIT FOR THE SIXTEENTH JUDICIAL CIRCUIT
KANE COUNTY, ILLINOIS

INDIAN CREEK DEVELOPMENT COMPANY, et al.,	)	
Plaintiff/Counterclaim Defendant,	)	Case No.: 07 LK 604
vs.	)	
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, et al.	)	
Defendant/Counterclaim Plaintiff.	)	

BNSF'S MEMORANDUM IN RESPONSE TO
INDIAN CREEK'S § 2-615 MOTION TO DISMISS COUNTERCLAIM

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INTRODUCTION

The dispute in this case is over the source of environmental contamination present on Indian Creek's property and who bears responsibility for its remediation. Indian Creek alleges that BNSF caused environmental contamination on the property, and seeks recovery of damages and an order requiring BNSF to remediate the property. In the counterclaim, BNSF alleges that the contamination was caused in whole or in part by Indian Creek or its tenants, and seeks restitution – under a theory of unjust enrichment – for environmental investigation and remediation costs BNSF has incurred or will incur related to contamination for which BNSF is not responsible.

This case arises out of a 1993 collision between two trains on BNSF railroad tracks located near Indian Creek's property. The collision caused a release of diesel fuel which Indian Creek alleges migrated to Indian Creek's property. To facilitate the investigation and cleanup of the diesel fuel, BNSF and the Illinois Environmental Protection Agency ("IEPA") entered into a Consent Order in 1996, as amended in 2009, which requires BNSF to investigate and remediate, as necessary, the release of diesel fuel from the 1993 incident, including diesel fuel which migrated onto Indian Creek's property, if any. The Consent Order establishes a detailed and extensive investigation, reporting and cleanup protocol that BNSF must follow with respect to the site. BNSF and IEPA are continuing to operate under the investigation and remediation provisions of the Consent Order, including site work scheduled for February and March 2014. Indian Creek has sought to dictate the terms of the remediation and investigation in numerous ways, notwithstanding the IEPA's statutory oversight authority. Further, Indian Creek seeks to impose an unwarranted and expensive residential cleanup standard to its industrial property. These demands confer an undeserved benefit to Indian Creek because the property would be in a

better and improved condition than would have existed if the derailment had never happened, BNSF alleges, however, that most or all of the environmental contamination on Indian Creek's property is unrelated to the 1993 train collision or any conduct of BNSF.

By its actions, Indian Creek has caused and seeks to cause substantial additional costs and expense to BNSF which, in equity and fairness, ought to be borne by Indian Creek. That is the basis of BNSF's counterclaim for unjust enrichment.

LEGAL STANDARDS APPLICABLE TO INDIAN CREEK'S MOTION

A § 2-615 motion to dismiss challenges the legal sufficiency of a complaint. Haddick v. Valor Insurance, 198 Ill.2d 409, 414 (2001). A § 2-615 motion alleges only defects on the face of the complaint and does not raise affirmative factual defenses. Vernon v. Schuster, 179 Ill.2d 338, 344 (1997). All well-pleaded facts in the complaint are taken as true and the court must determine whether the complaint's allegations, when interpreted in the light most favorable to plaintiff, are sufficient to establish a cause of action upon which relief may be granted. Hirsch v. Feuer, 299 Ill. App. 3d 1076, 1081 (1st Dist. 1998). A complaint should only be dismissed where there are absolutely no set of facts which would permit a recovery. Mitchell v. Skubiak, 248 Ill. App. 3d 1000, 1004 (1st Dist. 1993).

The doctrine of unjust enrichment underlies a number of legal and equitable actions and remedies, including the remedy of restitution. To state a cause of action based on a theory of unjust enrichment, a plaintiff must allege that the defendant has unjustly retained a benefit to the plaintiff's detriment, and that the defendant's retention of the benefit violates the fundamental principles of justice, equity and good conscience. HPI Health Care Services, Inc. v. Mt. Vernon Hospital, Inc., 131 Ill. 2d 145, 160 (1989). See, also, Drury v. County of McLean, 89 Ill. 2d 417, 425-26 (1982). The injustice of retention of the benefit can be based on wrongful conduct of the

defendant or on other facts demonstrating that the plaintiff has a better claim to the benefit than the defendant. HIP Health Care Services, 131 Ill. 2d at 163. For the reasons discussed below, BNSF has alleged sufficient facts to state a cause of action for unjust enrichment and Indian Creek's motion to dismiss should be denied.

FACTS ALLEGED IN THE COUNTERCLAIM

1. The Consent Order and Environmental Condition of the Property

On February 9, 1996, BNSF entered into a Consent Order with the IEPA concerning investigation and remediation of diesel fuel that spilled on BNSF's property from a 1993 train collision. (Counterclaim, ¶ 1). On November 18, 2009, BNSF and IEPA entered into an Amendment to the Consent Order under which the defined "site" for investigation and remediation was expanded to include Indian Creek's property, "but only to the extent such properties or media are impacted by diesel fuel contamination resulting from the January 20, 1993 collision." (Counterclaim, ¶¶ 3-4).

The Indian Creek property has a history of heavy industrial activity for over a century, and investigation of the property revealed the presence over the years of oil tanks, gas tanks, oil reservoirs and various petroleum products. (Counterclaim, ¶¶ 16-19). BNSF alleges that Indian Creek has caused or allowed contamination of the subject property. (Counterclaim, ¶¶ 20-21, 27-29). To the extent that there are contaminants on the Indian Creek property, BNSF alleges that they are from sources other than the 1993 diesel fuel spill, including sources on Indian Creek property, for which Indian Creek and/or its tenants are responsible. (Counterclaim, ¶ 13).

2. Indian Creek's Lawsuits

In 2006, Indian Creek filed a complaint against BNSF before the Illinois Pollution Control Board ("PCB") (the "PCB Complaint") in which it alleged that BNSF violated the

Illinois Environmental Protection Act. In the PCB Complaint, Indian Creek requests, among other things, that BNSF be required to remediate the Indian Creek property "to background levels" and to a level not less than "applicable residential standards. (Counterclaim, ¶¶ 7-8, 32).[1] The PCB Complaint remains pending. BNSF recently filed a complaint for allocation of response costs against Indian Creek before the PCB.

In 2007, Indian Creek filed the complaint against BNSF in this lawsuit, seeking damages and injunctive relief related to the 1993 diesel spill. (Counterclaim, ¶ 9).

3. Unjust Benefits Conferred Upon Indian Creek

Pursuant to the Consent Order, BNSF has spent large sums of money to investigate and remediate Indian Creek's property, including paying for access to the property. (Counterclaim, ¶ 11). Indian Creek, through demands to IEPA, has imposed upon BNSF additional testing, sampling, analysis and remediation of conditions at the Indian Creek property, for which BNSF has incurred additional costs and expenses. (Counterclaim, ¶ 12).[2]

BNSF alleges that contaminants present at the Indian Creek property are not diesel fuel and/or otherwise did not come from the 1993 train collision. (Counterclaim, ¶¶ 22-26, 36). BNSF therefore has been wrongfully required to investigate and remediate contaminants on the Indian Creek property when, in fact, Indian Creek and/or its tenants are the parties responsible for the presence of those contaminants. (Counterclaim, ¶¶ 30, 34). BNSF's investigation,

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1 BNSF alleges that environmental conditions at the Indian Creek property may not have met "applicable residential standards" even in the absence of any diesel fuel contamination that may have occurred as a result of the 1993 train collision. (Counterclaim, ¶ 33).

2 In February 2013, Indian Creek excavated a sanitary sewer line on the Indian Creek property. Indian Creek claims that when so doing, it discovered the presence of petroleum constituents which it alleges to be diesel fuel that migrated to its property from the original 1993 train collision and spill. (Counterclaim, ¶ 6). BNSF alleges that the contaminants found in 2013 are not diesel fuel.

testing, sampling, and analysis of the Indian Creek property has conferred a significant benefit to Indian Creek because, among other things, Indian Creek will not have to repeat such investigation if and when it remediates the Indian Creek property. (Counterclaim, ¶¶ 37-38). If BNSF is required to remediate the Indian Creek property to "applicable residential standards," it will confer additional benefit upon Indian Creek in that the condition of the Indian Creek property will be made better than would have existed in the absence of any diesel contamination that may have occurred as a result of the 1993 train collision. (Counterclaim, ¶¶ 35, 39-41).[3]

BNSF therefore seeks restitution of the benefit its work has conferred upon Indian Creek, under a theory of unjust enrichment. (Counterclaim, ¶¶ 14, 42).

ARGUMENT

The facts alleged in the counterclaim state a cause of action for unjust enrichment. Indian Creek's arguments – that BNSF is required to allege a separate tort or contract claim in order to assert a claim for unjust enrichment and that the existence of the Consent Order precludes recovery for unjust enrichment – are baseless.[4] The motion to dismiss should be denied.

A. UNJUST ENRICHMENT DOES NOT REQUIRE A SEPARATE TORT OR CONTRACT CLAIM

The argument that an unjust enrichment claim must be "tied" to a separate tort or breach of contract claim is simply wrong. The Illinois Supreme Court has articulated the elements of

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3 IEPA has not imposed a "residential" standard to remediation of the property. Indian Creek, however, may try to force that standard by refusing to accept a deed restriction as part of final closeout of the remediation.

4 Indian Creek's third argument – that BNSF cannot assert separate "restitution" and "unjust enrichment" claims – is a misreading of the counterclaim. (Indian Creek Memorandum, at 9). Restitution is a remedy for the unjust enrichment cause of action. Independent Voters of Illinois v. Illinois Commerce Commission, 117 Ill. 2d 90, 98 (1987). Thus, in the counterclaim BNSF requests restitution as a remedy (Counterclaim, ¶ 42) for the unjust enrichment conferred upon Indian Creek (Counterclaim, ¶¶ 37-41). BNSF has not asserted separate claims for restitution and unjust enrichment.

unjust enrichment without reference to a separate underlying claim in tort, contract or statute. HPI Health Care Services, Inc., 131 Ill. 2d at 160 ("[A] plaintiff must allege that the defendant has unjustly retained a benefit to the plaintiff's detriment, and that the defendant's retention of the benefit violates the fundamental principles of justice, equity and good conscience."). See, also, Michael Reese Hospital and Medical Center v. Chicago HMO, Ltd., 196 Ill. App. 3d 832, 836 (1st Dist. 1990) (reversing dismissal of complaint which alleged only a cause of action for unjust enrichment) ("We find that these allegations sufficiently allege that CHMO has received a benefit, and that the retention of the benefit would be unjust and to the detriment of Reese."); Cleary v. Philip Morris Incorporated, 656 F.3d 511, 516 (7th Cir. 2011) ("The Illinois Supreme Court appears to recognize unjust enrichment as an independent cause of action.").

In Raintree Homes, Inc. v. Village of Long Grove, 209 Ill. 2d 248, 258 (2004), the plaintiffs were seeking the refund of overpaid fees under an unjust enrichment theory. No other underlying cause of action was alleged. The court wrote:

> Here, plaintiffs have no substantive claim grounded in tort, contract or statute; therefore the only substantive basis for the claim is restitution to prevent unjust enrichment. Hence, plaintiffs' requested relief is more properly characterized as restitution rather than damages. Plaintiffs' cause of action, therefore, is excluded from the Tort Immunity Act.

Thus, the Illinois Supreme Court does not require that an unjust enrichment claim be tied to any other substantive cause of action – whether sounding in tort or contract. Indian Creek's reliance on Gagnon v. Schickel, 2012 Ill App (1st) 120645, is misplaced. In Gagnon, the plaintiff's 15-count complaint included a claim for unjust enrichment arising out of an alleged agreement to purchase a 50% ownership in certain real estate. Plaintiff alleged that defendant was unjustly enriched by a $147,000 gift from plaintiff, which was conditional upon conveyance of the real estate interest. Based on the allegations and exhibits of the complaint, however, the

court concluded that the gift was unconditional. Id. ¶ 7. Therefore, there was no basis to argue that retention of the gift resulted in an "unjust" enrichment of defendant. The court wrote:

> Here, the basis of the plaintiff's claim of unjust enrichment relating to the Tinley Park Property is that he and Schickel had a quasi-contractual agreement that obligated her to grant him an interest in the property in exchange for his contribution to its purchase. However, as with the first two counts of the complaint, this allegation is rebutted by the gift letter the plaintiff attached to his complaint. . . . Because the gift letter contradicts and effectively nullifies the "conditional gift" assertion, the plaintiff cannot sustain a claim for unjust enrichment. Id. ¶ 26.

Neither Gagnon nor the appellate cases cited in Gagnon purport to modify the elements of unjust enrichment as articulated by the Supreme Court in HPI Health Care Services and Raintree Homes.[5] In those cases the appellate courts simply found that there were no circumstances rendering the defendant's retention of the benefit "unjust." The Seventh Circuit explained the distinction in Cleary:

> Unjust enrichment is a common-law theory of recovery or restitution that arises when the defendant is retaining a benefit to the plaintiff's detriment, and this retention is unjust. What makes the retention of the benefit unjust is often due to some improper conduct by the defendant. And usually this improper conduct will form the basis of another claim against the defendant in tort, contract, or statute. So, if an unjust enrichment claim rests on the same improper conduct alleged in another claim, then the unjust enrichment claim will be tied to this related claim – and, of course, unjust enrichment will stand or fall with the related claim. (footnote and citations omitted).

656 F.3d at 517.

There is no requirement, however, that the unjust enrichment claim be based on wrongful conduct of the defendant, or that the circumstances making retention of the benefit "unjust" also support a separate claim in tort, contract or statute. BNSF has alleged facts showing that Indian Creek is retaining a benefit to BNSF's detriment, and that Indian Creek's retention is unjust. That is sufficient to state a claim for restitution under the theory of unjust enrichment.

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[5] In Gagnon, the trial court did award the plaintiff a refund of the money he had contributed to the purchase of the property, plus one-half of the property's increase in value, based on a theory of promissory estoppel. Gagnon, ¶ 15.

B. THE CONSENT ORDER DOES NOT PRECLUDE THE UNJUST ENRICHMENT CLAIM

Indian Creek's remaining argument – that an unjust enrichment claim is not available because the Consent Order requires BNSF to investigate and remediate contamination from the diesel spill – is also wrong. Indian Creek ignores critical facts: (i) that the Consent Order requires BNSF to remediate the Indian Creek property "only to the extent such properties or media are impacted by diesel fuel contamination resulting from the January 20, 1993 collision" (Counterclaim, ¶¶ 3-4); and (ii) that in the counterclaim BNSF seeks restitution for benefit to Indian Creek related to contamination which did not result from the BNSF diesel fuel spill. (Counterclaim, ¶¶ 14, 42). Indian Creek's argument is based entirely on the assumption that it bears no responsibility for environmental conditions on the property and that "BNSF is the only party with the legal duty to the State of Illinois to investigate and clean up contamination on the Indian Creek Property." (Indian Creek Memorandum, at 5). That is patently untrue because Indian Creek has an independent duty to comply with the Illinois Environmental Protection Act. (See, 415 ILCS 5/12(a), 12(d), 21(e)). If, as alleged in the counterclaim, Indian Creek caused contamination to the property unrelated to the BNSF diesel spill, it is Indian Creek that bears legal responsibility for remediating that contamination to the extent required under the Act. The nature, extent and source of contamination on the property are the factual issues raised by the complaint and the counterclaim, and resolution of those factual questions will determine the parties' respective rights and obligations. The court cannot decide those facts on a motion to dismiss.

Griffith Wrecking Company, Inc. v. Greminger, 65 Ill. App. 3d 962 (4th Dist. 1978), upon which Indian Creek relies, does not support dismissal of BNSF's counterclaim. In Griffith, the judgment against the "unjust enrichment" claimant was not entered on a motion to dismiss, but

after a trial on the merits and evaluation of the purpose, scope and nature of each party's work and legal obligations. In affirming the judgment, the appellate court wrote:

> We conclude that the evidence of the purpose of Griffith's work during the four days is uncertain enough that the trial judge could have concluded that the principal reason for the work was the removal of bodies. . . . The trial court's decision denying recovery was not contrary to the manifest weight of the evidence.

65 Ill. App. 3d at 965.

Section 106 of the Restatement of Restitution does not preclude an unjust enrichment claim where, as here, the defendant had independent duties related to the subject services. Compare, Michael Reese Hospital, 196 Ill. App. 3d at 837-38 (reversing dismissal of unjust enrichment claim because defendant had independent duty to perform the services); County of Cook v. City of Chicago, 229 Ill. App. 3d 173, 177 (1st Dist. 1992) (applying § 106 where applicable regulations "in no way indicate that [defendant] is financially responsible" for the subject services). Where the claimant, in discharging its own obligation, also discharges the obligation of the defendant, the claimant is entitled to restitution under a theory of unjust enrichment. See, e.g., CMC Heartland Partners v. General Motors Corp., 1995 WL 228946 (N.D. Ill. 1995) (denying defendant's motion for summary judgment on unjust enrichment claim); Restatement (First) of Restitution, § 76 ("A person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity from the other, unless the payor is barred by the wrongful nature of his conduct."); Restatement (Third) of Restitution, § 24 ("If the claimant renders to a third person a performance for which the defendant would have been independently liable to the third person, the claimant is entitled to restitution from the defendant as necessary to prevent unjust enrichment.").

The federal CERCLA cases cited by Indian Creek do not support dismissal of BNSF's counterclaim. CERCLA contains statutory cost recovery and contribution mechanisms for determining and allocating parties' relative liability. 42 U.S.C. §§ 9607, 9613. In those CERCLA cases, the claimant's statutory contribution rights were already being litigated in the same action. See, In re Energy Cooperative, Inc., 1995 WL 330876 (N.D. Ill. 1995); Chem-Nuclear Systems, Inc. v. Arivec Chemicals, Inc., 978 F. Supp. 1105 (N.D. Ga. 1997); Ford Motor Company v. Edgewood Properties, Inc., 2008 WL 4559770 (D. N.J. 2008) (CERCLA contribution claim dismissed without prejudice as premature); Mayor & Council of Rockaway v. Klockner & Klockner, 811 F. Supp. 1039, 1058 (D. N.J. 1993) (because claimant incurred the environmental costs voluntarily in order to allow sale of the property, the costs "were the result of [claimant's] own decision" and did not confer any benefit on defendant). No such circumstances exist here, and BNSF has stated a claim for unjust enrichment regardless of whether the work was performed, in the first instance, in compliance with the Consent Order.

CONCLUSION

For the foregoing reasons, Indian Creek's motion to dismiss the counterclaim should be denied.

Respectfully submitted,

BNSF RAILWAY COMPANY

By: _____
One of its Attorneys

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CERTIFICATE OF SERVICE

I, Sean M. Sullivan, an attorney, certify that I caused a true copy of the foregoing **BNSF's Memorandum in Response to Indian Creek's § 2-615 Motion to Dismiss Counterclaim** to be served upon the attorneys listed below, by electronic mail on January 20, 2014, and by U.S. mail on January 21, 2014:

Stuart A. Petersen
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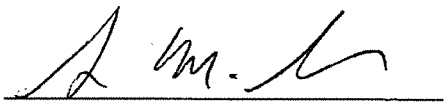

Sean M. Sullivan

EXHIBIT I

Case No.: 07 LK 604

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT
COUNTY OF KANE

INDIAN CREEK DEVELOPMENT COMPANY, an Illinois Partnership, INDABA PROPERTIES, LLC and CHICAGO TITLE and TRUST COMPANY, as Land Trustee Under Land Trust No. 3291, dated December 15, 1981,	)	Case No.: 07 LK 604
Plaintiffs,	)	
v.	)	
BNSF RAILWAY COMPANY, a Delaware Corporation.	)	
Defendant.	)	

NOTICE OF FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on **February 3, 2014** we caused to be filed with the Clerk of the Circuit Court of the Sixteenth Judicial Circuit, Kane County Courthouse, located at 100 South Third Street, Geneva, Illinois, the attached **Plaintiffs' Memorandum Replying to BNSF Railway Company's Response to Plaintiffs' § 2-615 Motion to Dismiss Counterclaim**, a copy of which is herewith served upon you.

Respectfully submitted,

William J. Anaya (ARDC No. 6180020)
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INDIAN CREEK DEVELOPMENT COMPANY, an Illinois Partnership, INDABA PROPERTIES, LLC and CHICAGO TITLE And TRUST COMPANY, as Land Trustee Under Land Trust No. 3291, dated December 15, 1981

By: _____
One of Their Attorneys

Case No.: 07 LK 604

CERTIFICATE OF SERVICE

Matthew E. Cohn, an attorney, certifies that a true and correct copy of the foregoing **Plaintiffs' Memorandum Replying to BNSF Railway Company's Response to Plaintiffs' § 2-615 Motion to Dismiss Counterclaim** was served upon the following counsel of record:

Sean Sullivan
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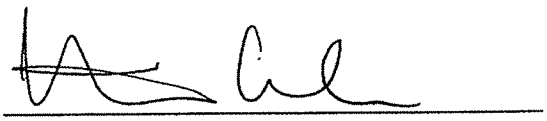
by depositing a copy thereof, enclosed in an envelope, in the United States Mail at 120 South Riverside Plaza, Chicago, Illinois, proper postage prepaid, at or about the hour of 5:00 p.m., on February 3, 2014.



Matthew E. Cohn

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT
COUNTY OF KANE

INDIAN CREEK DEVELOPMENT COMPANY, an Illinois Partnership, INDABA PROPERTIES, LLC and CHICAGO TITLE and TRUST COMPANY, as Land Trustee Under Land Trust No. 3291, dated December 15, 1981,	)	Case No.: 07 LK 604
Plaintiffs,	)	
v.	)	
BNSF RAILWAY COMPANY, a Delaware Corporation.	)	
Defendant.	)	

PLAINTIFFS' MEMORANDUM REPLYING TO BNSF RAILWAY COMPANY'S RESPONSE TO PLAINTIFFS' § 2-615 MOTION TO DISMISS COUNTERCLAIM

BNSF Railway Company ("BNSF") begins its Memorandum in Response to Plaintiffs' Motion to Dismiss with a gross misstatement. This case is not about "the source of environmental contamination present on Indian Creek's property and who bears responsibility for its remediation." This case is about Plaintiffs' simple desire that BNSF remove BNSF's pollution from Plaintiffs' property, and BNSF's unwillingness to do that, even though BNSF has privately, but not publicly, concluded that it has contaminated Plaintiffs' property.

I. BACKGROUND

More than 20 years after its train crash, in which thousands of gallons of locomotive diesel fuel were released, BNSF still will not publicly admit that it contaminated the Indian Creek property adjacent to its tracks.[1] Three years after the crash, in 1996, BNSF and the State of Illinois entered into a Consent Order in this Court requiring BNSF to perform a full

[1] Besides locomotive diesel fuel, Plaintiffs have alleged that other petroleum products on the locomotives were released at the time of the train crash.

environmental investigation and cleanup.[2] Thirteen years after that, in 2009, because BNSF had still not adequately responded to its pollution, the Consent Order was amended to, among other things, specifically require BNSF to investigate and remediate the Indian Creek property.

BNSF is seeking to outmaneuver and outlast the victims of its pollution. To this day, BNSF continues to invent new technical arguments, cloaked in science, to avoid liability, and assert new legal theories to blame everyone but itself. BNSF will not act on its own, or even as directed by the IEPA, and this private litigation brought by Plaintiffs to protect their interests is essential. Because Plaintiffs, the victims of BNSF's pollution, expressed their displeasure and asserted their rights, BNSF chose to sue them in return. By bringing a counterclaim for "unjust enrichment" against Plaintiffs, BNSF has revealed that environmental protection, concern for community, and basic citizenship are not its priorities. Money and profit, and winning at all costs, apparently matter more.

After over twenty years, BNSF has not made a measurable dent in remedying its contamination on the Indian Creek property. BNSF has turned much of its attention and effort toward looking for any molecule of residual contamination from the historic and current industrial operations at the Indian Creek property, in order to attempt to shift blame for contamination to others. BNSF cannot see what is so obviously in front of it – its own locomotive diesel fuel. Plaintiffs simply want BNSF to clean up the mess BNSF created on the Indian Creek property and make them whole.[3] That is what this case is about.

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[2] People of the State of Illinois v. BNSF, Case No. CH KA 95 0527. Consent Order and Consent Order Amendment are Exhibits B and C of Plaintiffs' Second Amended Complaint.

[3] BNSF's concern about residential verses industrial/commercial standards described in its Response is a misleading distraction. Locomotive diesel fuel, not just petroleum constituents dissolved in groundwater but actual "free product" (that is, pure diesel fuel floating above the water table) is beneath the Indian Creek property. Regardless of the numerical standards associated with residential or industrial/commercial types of cleanups, the IEPA will not close the site with free product still present. BNSF has also never quantified an actual differential in cleanup cost or effort associated with the different standard cleanups. Most importantly, Plaintiffs are entitled to demand that BNSF

II. ARGUMENT

There is not a single case that supports BNSF's proposition that Indian Creek can be unjustly enriched by BNSF's investigation and remediation of BNSF's own contamination on the Indian Creek property. First, unjust enrichment is not an independent cause of action under Illinois law. Second, BNSF's environmental response work is mandated by a Consent Order issued by this Court with the State of Illinois. Under the Consent Order, BNSF is required to investigate and remediate BNSF's own pollution caused by the train crash, wherever present. Work performed pursuant to an existing legal duty, documented in a court order, does not give rise to an unjust enrichment claim.

A. UNJUST ENRICHMENT IS NOT AN INDEPENDENT CAUSE OF ACTION

An unjust enrichment claim in Illinois must be (1) tied to an allegation of improper or wrongful conduct; (2) tied to a quasi-contractual agreement; or (3) pled in the alternative to a breach of an express contract claim. Gagnon v. Schickel, 2012 IL App (1st) 120645. BNSF has not cited any case in which unjust enrichment, pled as an independent cause of action, survived a motion to dismiss. BNSF does not adequately distinguish or address the reasoning underlying the Gagnon decision. In Gagnon, the plaintiff and defendant agreed to purchase a house together, and the defendant promised to record a quit-claim deed transferring one-half interest in the property to the plaintiff. Id. at ¶ 2. The plaintiff alleged unjust enrichment based on the fact that the defendant "conditionally gifted" a portion of the purchase price for the property in exchange for a one-half interest. Yet the defendant never did convey the one-half interest in the property to the plaintiff. Id. at ¶¶ 3-7. The Gagnon court concluded that the defendant's gift was

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simply remove its contamination from their property, regardless of any numerical standard in the Illinois' environmental cleanup regulations, and make Plaintiffs whole, and that is what Plaintiffs seek.

just that, a gift, not a "conditional gift," and therefore there was no quasi-contractual basis for the plaintiff to assert his unjust enrichment claim. Id. at ¶ 26.

In assessing the plaintiff's unjust enrichment claim based on the above-stated facts, the Appellate Court expressly stated that unjust enrichment is not an independent cause of action. Id. at ¶ 25. The claim for unjust enrichment did not turn on the substantive issue as to whether the gift was "unjust," as BNSF incorrectly contends, but rather the claim failed solely for the reason that it was not predicated on a claim based on contract, tort, or wrongful conduct.

BNSF is also unable to reconcile other Illinois case law that reaches the same conclusion as Gagnon. See Martis v. Grinnell Mut. Reinsurance Co., 388 Ill.App.3d 1017, 1025 (2009) ("[u]njust enrichment is not a separate cause of action that, standing alone, will justify an action for recovery"); Mulligan v. QVC, Inc., 382 Ill.App.3d 620, 631 (1989) ("[unjust enrichment] is not separate cause of action . . . [r]ather it is a condition that may be brought about by unlawful or improper conduct such as fraud, and may be redressed by a cause of action based upon that improper conduct") (internal quotations omitted).

BNSF relies heavily on HPI Heath Care Servs., Inc. v. Mt. Vernon Hosp., Inc.,131 Ill.2d 145 (1989), a case that was actually cited by the Gagnon court in the same paragraph in which that court stated that unjust enrichment is not an independent cause of action. Gagnon at ¶ 25. BNSF did correctly discuss the elements of unjust enrichment articulated in HPI Health. "[A] plaintiff must allege that the defendant has unjustly retained a benefit to the plaintiff's detriment, and that defendant's retention of the benefit violates the fundamental principles of justice, equity, and good conscience." 131 Ill.App.2d at 360. Clearly, whether or not unjust enrichment is an independent cause of action was not at issue in HPI Health. The court in HPI Health understood that the unjust enrichment claim was predicated on a breach of a quasi-contractual agreement.

Merely because the HPI Health Court was silent on the viability of unjust enrichment as an independent cause of action, a matter it was not asked to decide, does not mean that the Court advocated or would allow the unjust enrichment claim to proceed as an independent cause of action. And importantly, the Court in HPI Health did address unjust enrichment in terms of wrongful conduct, which BNSF failed to mention in its Response. "[T]o state a cause of action under an unjust enrichment theory, [the plaintiff] was required to set out specific factual allegations which would support the conclusion that the [defendant hospital management company's] conduct in procuring payments from [the defendant hospital] was wrongful." Id. at 162.

Other cases cited by BNSF also do not support the ability to bring an unjust enrichment as an independent cause of action. In Michael Reese Hosp. & Med. Ctr v. Chicago HMO, Ltd., 196 Ill.App.3d 832, 836 (1990), the unjust enrichment claim was premised on a quasi-contractual agreement requiring the hospital to provide emergency medical services to public aid recipients. Not applicable here. In Drury v. McLean County, 89 Ill.2d 417 (1982), the cause of action was assumpsit. Also, not applicable here. Raintree Homes, Inc. v. Vill. of Long Grove, 209 Ill.2d 248 (2004) was a declaratory judgment action related to the constitutionality of a village ordinance in which restitution was sought. Again not applicable. Cleary v. Philip Morris Inc., 656 F.3d 511, 516 (7th Cir. 2011) was a federal decision, discussing Illinois law, which recognized first, that the Illinois Supreme Court had not directly addressed the unjust enrichment as an independent cause of action issue, and second, that a claim for unjust enrichment is usually tied to a claim in tort, contract, or statute, or arises from improper conduct. Id. at 517. BNSF also never addressed People ex rel. Hartigan v. E & E Hauling, Inc., 153 Ill.3d 473, 497 (1992), an Illinois Supreme Court case cited by Plaintiffs in which the unjust enrichment claim was also not pled as independent cause of action, but rather was based on a contract implied at law.

BNSF's unjust enrichment cause of action must fail. Plaintiffs never engaged in any improper conduct or contractual breach that would give rise to an independent cause of action by BNSF. It is absurd to suggest otherwise. Contrary to BNSF's apparent beliefs, Plaintiffs have never viewed the 1993 train crash as a means by which they could manipulate the IEPA and take advantage of BNSF, so that non-BNSF contamination, if even present, on the Indian Creek property could be investigated and cleaned up at BNSF's expense.

Plaintiffs simply own property next to the location of BNSF's 1993 train crash, and Plaintiffs want BNSF to remove its locomotive diesel fuel and contamination from their property and make them whole. There is nothing unjust about that.

Because BNSF's counterclaim improperly alleges unjust enrichment as an independent cause of action, the counterclaim should be dismissed pursuant to Section 2-615 of the Illinois Code of Civil Procedure.

B. BNSF HAS AN INDEPENDENT LEGAL DUTY TO INVESTIGATE AND REMEDY CONTAMINATION ON THE INDIAN CREEK PROPERTY AND IS THEREFORE PRECLUDED FROM PLEADING AN UNJUST ENRICHMENT CLAIM

Pursuant to the Consent Order, as amended, between BNSF and the State of Illinois, BNSF has a legal obligation to remedy contamination caused by the 1993 train crash, wherever that contamination is located, including on the Indian Creek property. Plaintiffs on the other hand do not have an independent duty to remove any material – especially BNSF's material – on the Indian Creek property.

CMC Heartland Partners v. Gen. Motors Corp., 1995 WL 228946 (N.D. Ill. Apr. 14, 1995) is relied on by BNSF for the contention that it is entitled to restitution under a theory of unjust enrichment. BNSF misunderstands CMC Heartland. In CMC Heartland, the United States Environmental Protection Agency ("EPA") ordered both CMC Heartland Partners

("CMC") and General Motors Corporation ("GM") to remediate a contaminated site, holding them both jointly liable. Id. at *5. Because both CMC and GM were liable parties, neither could claim unjust enrichment against the other. In the instant litigation, it is one party, BNSF, that has been ordered by the IEPA and the State of Illinois to remedy the Indian Creek property, and the remediation ordered is only with respect to the locomotive diesel fuel and contamination from the 1993 train crash, not any other contamination. Plaintiffs are not subject to the Consent Order or required to remove any material under their property. Thus like CMC and GM, BNSF has an independent legal duty and cannot bring an unjust enrichment claim. Section 106 of the Restatement of Restitution (1937),

> A person who, incidentally to the performance of his own duty or to the protection or improvement of his own things, has conferred a benefit upon another, is not thereby entitled to contribution,

protects Plaintiffs, just as it would have protected GM and CMC from unjust enrichment claims brought against each other, if the EPA had only held one party liable.

BNSF also improperly characterizes Griffith Wrecking Company v. Greminger, 65 Ill.App.3d 962 (1978) as not supporting a dismissal of BNSF's counterclaim merely because that case was decided at a different procedural point in time. Although Griffith was decided after trial and not pursuant to a motion to dismiss, the Griffith court nevertheless validated Section 106 of the Restatement of Restitution by reasoning that if the facts of the case had played out differently, such that the plaintiff had in fact received an incidental benefit from the defendant, the plaintiff would have been relieved of any responsibility for contribution. Id.

Without discussion, BNSF cites Section 76 of the Restatement (First) of Restitution ("A person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity from the other, unless the payor is barred by the wrongful nature of his conduct.") and Section 24

of the Restatement (Third) of Restitution ("If the claimant renders to a third person a performance for which the defendant would have been independently liability to the third person, the claimant is entitled to restitution from the defendant as necessary to prevent unjust enrichment.").

These sections of the Restatement of Restitution do not apply. Plaintiffs have no duty to clean up any material, much less BNSF's contamination, on their property. BNSF is simply wrong that Plaintiffs are in violation of Section 12(a), 12(d), and 21(e) of Illinois' Environmental Protection Act (the "Act"). Because Plaintiffs are not required to clean up any material – including BNSF contamination – on the Indian Creek property, BNSF could not have discharged any of Plaintiffs' obligations and is thereby not entitled to any indemnity. Moreover, to the extent that BNSF is seeking equity, it is barred from recovery by the wrongful nature of its conduct and by its "unclean hands."

The CERCLA cases cited by Plaintiffs do provide a reasoning for the dismissal of BNSF's counterclaim.[4] BNSF focuses on the statutory and contribution mechanisms contained in CERCLA (see BNSF Memorandum in Response, p. 10), and yet ignores the general proposition in these cases – when one party has an independent legal duty to investigate and clean up its own contamination, the incidental benefit to another party for other contamination for which there is no duty to clean up does not give rise to an unjust enrichment claim.

BNSF's claim for unjust enrichment is baseless and without merit. The only "benefit" that Plaintiffs could possibly receive, is that perhaps one day, BNSF will restore Plaintiffs' property to its former condition before the 1993 train crash. Indeed, that is Plaintiffs' claim.

[4] CERCLA is the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601, et seq.

Such a result would hardly be unjust, and not truly a benefit but rather the fulfillment of a reasonable expectation.

It is entirely improper for BNSF to make a claim for unjust enrichment against the victims of its 1993 train crash, particularly when BNSF's environmental response activity, which has nevertheless been incomplete and ineffective, is driven only by BNSF's legal obligation to this Court and to the State of Illinois. Accordingly BNSF's unjust enrichment claim should be dismissed pursuant to Section 2-615 of the Illinois Code of Civil Procedure.

III. CONCLUSION

Despite overwhelming evidence to the contrary, BNSF will not publicly admit that its train accident, which occurred on its railroad tracks adjacent to the Indian Creek property, resulted in the contamination of the Indian Creek property. There has been over twenty years of litigation and administrative process between BNSF and the State of Illinois regarding BNSF's failure to clean up its pollution. BNSF will only act when forced to do so, and when BNSF acts, it only does less than the minimum, thereby extending the environmental investigation and remediation process indefinitely to Plaintiffs' detriment. Unending process, as opposed to once and for all finishing its work, may be a preferred or at least an acceptable outcome for BNSF, and unending process may be tolerated by the IEPA, but the situation is certainly unfair to Plaintiffs.

To add insult to injury, BNSF is not just avoiding its responsibility. It is actually suing the victims! With so many words in the English language, one is still at a loss to fully describe BNSF's behavior and strategy. The United States District Court for the Northern District of Illinois recently used the Yiddish word *chutzpah*, meaning "unmitigated gall," in one of its decisions. In re Trans. Union Corp. Privacy Litigation, 2012 WL 426744, *1 (N.D. Ill. 2012). In Engle Industries, Inc. v. First American Bank, et al., 798 F.Supp. 9, note 7 (D.C. Dist. 1992),

chutzpah has been described as "brazen nerve, effrontery, incredible 'guts,' presumption-plus-arrogance such as no other word, and no other language, can do justice to.... *Chutzpah* is a quality enshrined in a man who, having killed his mother and father, throws himself on the mercy of the court because he is an orphan." Citing The Joys of Yiddish (1968).

BNSF-controlled trains crashed into each other on BNSF's tracks and then BNSF botched the environmental investigation and cleanup of the resulting diesel fuel spill. In over twenty years of administrative and legal process related to the environmental response, BNSF has exhibited its incompetence, its indifference, its stinginess, and its simple unwillingness to do the right thing. After all that, BNSF has decided that now is the time for it to sue the victims on the theory that the victims should be grateful for the benefit of BNSF's negligence. That is *chutzpah.*

BNSF's counterclaim should be dismissed in its entirety pursuant to Section 2-615 of the Illinois Code of Civil Procedure because (1) unjust enrichment is not an independent cause of action, and (2) BNSF has an independent legal duty to the State of Illinois to investigate and remediation environmental contamination on the Indian Creek property, and consequently BNSF may not claim that Plaintiffs were unjustly enriched.

Respectfully submitted,

INDIAN CREEK DEVELOPMENT COMPANY, an Illinois Partnership, INDABA PROPERTIES, LLC and CHICAGO TITLE And TRUST COMPANY, as Land Trustee Under Land Trust No. 3291, dated December 15, 1981

By: _____
One of Their Attorneys

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EXHIBIT J

IN THE CIRCUIT COURT FOR THE 16TH JUDICIAL CIRCUIT
KANE COUNTY, ILLINOIS

INDIAN CREEK DEVELOPMENT COMPANY, an Illinois Partnership, INDABA PROPERTIES, LLC and CHICAGO TITLE AND TRUST COMPANY, as Land Trustee under LAND TRUST NO. 3291, dated December 15, 1981,
Plaintiffs,
vs.
BNSF RAILWAY COMPANY, a Delaware corporation,
Defendant.

07 LK 604

TRANSCRIPT OF PROCEEDINGS had in the above-entitled matter on the 19th day of March, A.D. 2014, at 1:15 p.m.

BEFORE THE HONORABLE JAMES MURPHY.

Job No. CS1832621

APPEARANCES:

ARNSTEIN & LEHR,
(120 South Riverside Plaza, Suite 1200,
Chicago, Illinois 60606,
312-876-7188), by:
MR. MATTHEW E. COHN and
MR. JOHN C. GEKAS,
appeared on behalf of the Plaintiffs;

DALEY, MOHAN & GROBLE,
(55 West Monroe Street, Suite 1600,
Chicago, Illinois 60603,
312-422-9999), by:
MR. SEAN SULLIVAN and
MS. JENNIFER E. SCHUCH,
appeared on behalf of the Defendant.

REPORTED BY: LINDA S. IDRIZI, CSR No. 84-3704.

THE COURT: Good afternoon. This is in the Indian Creek Development Company and Burlington Northern and Santa Fe 07 LK 604.

Would counsel identify yourselves and the parties you represent, please, for the record.

MR. COHN: Good morning, your Honor. Matthew Cohn on behalf of the Plaintiffs. With me is John Gekas on behalf of the Plaintiffs.

And there are other attorneys for the Plaintiffs who are present, but not at the table. Mr. Bill Anaya and Mr. Stu Petersen and our client representative, Josh Cherif, is in between the two of them.

THE COURT: All right. For Defendant?

MR. SULLIVAN: Sean Sullivan for BNSF and with me is Jennifer Schuch, Daley, Mohan & Groble. Also present, but not at the table, is Pam Nehring with Daley Mohan and Brooke Gaede, in-house counsel with BNSF.

THE COURT: Thank you. Okay. From reviewing the numerous courtesy copies -- voluminous, I should say, courtesy copies in the court file as well is it looks like there are a number of things that are up today.

And I don't foresee getting through all of those today because I have a doctor appointment that I have to get to at 2:45. So that means leaving here by 2:15.

So it is now 1:15. So we have got an hour today. And I will take the attorneys -- I will take some summary arguments on various motions, but I think we should organize the hearing to go from -- this is my thought, first, is to go from pleading motions to discovery motions to case management motions or proposed orders on case management.

If you have any difference of opinion on taking it in that fashion, it's not in point of chronological order of the motions because, I don't know, some of these were filed in February or earlier.

Some of these were filed recently, but logically I think pleading and then discovery, because then we will know what pleadings we are talking about, and then case management. So we will know what we are doing on case management orders, as well.

MR. SULLIVAN: Actually, we came to the same

line-up suggestion, as well.

THE COURT: Okay. So that's agreed.

MR. SULLIVAN: The one thing that we had filed most recently was the Motion to Strike the reply brief on Plaintiff's Motion to Amend To Add Punitive Damages.

Alternatively we asked for leave to file, 14 days to file a sur-response, sur-reply to address the new matter raised in the reply.

THE COURT: Okay. I didn't see that one.

MR. SULLIVAN: I have a copy.

THE COURT: That might have just come in.

MR. SULLIVAN: It would have just been delivered, I believe, yesterday.

THE COURT: Okay.

MR. SULLIVAN: So, I don't know, if we are not going to get to all of the motions today whether that will be kind of a moot point or.

THE COURT: You can be seated, by the way, we will just speak from the counsel table on this if we remember to speak up and also speak in turn and don't speak over each other.

So is there any suggestion from Plaintiff as to the request for either sur-reply or

otherwise?
MR. COHN: We oppose the motion, your Honor. We think that the initial motion for the third amended complaint and punitive damages was sufficient as originally pled.
And the response raised the question of seeking that we produce evidence to support our motion. The third amended complaint and the requirement under 604.1 just requires that we allege facts that if proven true would be sufficient to support a claim for punitive damages. We did that.
Their response was that we should have produced all of the evidence that we would produce at trial in the pleadings stage, which what we did is we provided you with -- and you might have seen this, a three-ring binder with all of the various exhibits attached and deposition transcripts.
And that is what BNSF asked for in their response was something of that sort. And so we provided that to the court. And now that we have done that, they are asking to strike that.
We think we did more than enough at the initial motion. We think we have done even

more than enough in the reply. And now they are seeking to strike the reply. We would ask that their motion to strike be denied.
MR. SULLIVAN: Judge, if I may respond?
THE COURT: You may.
MR. SULLIVAN: I think we sent this out in the motion, but Counsel has either misunderstood or misquoted Section 2604.1.
It does not require that the Plaintiff allege facts that if proven would warrant punitive damages. It states that if Plaintiff at a hearing establishes a reasonable likelihood of proving facts at trial, then the motion may be granted.
We cited cases in our response to the motion, the original motion, which described at least the type of evidentiary matters which the Court can accept as giving the Court a reasonable basis for allowing a punitive damages amendment.
What Plaintiffs submitted in their original motion was argument in the proposed third amended complaint and nothing else. No testimony. No exhibits. No evidence of any kind.
So we cited cases and we correctly quoted the statute, which doesn't say they must

allege facts. It says they must establish a reasonable likelihood of proving facts. And that requires some form of evidence. Not all of the evidence that they will present at trial, not evidence to prevail on a summary judgment or a directed verdict standard, but evidence sufficient to establish a reasonable likelihood to proving facts at trial.
In their reply they first argued that they didn't need to do that. All they had to do was attach the complaint.
And that's fine if they want to argue the motion on that basis. They can, but the law is that they have to do more.
And so if they are not willing to have the evidence that they have now submitted stricken, then we are entitled to an opportunity to respond to that in the way that we would have been able to respond to it if they would have submitted it with their motion.
The schedule gave us 14 days to respond to that motion. We are asking for 14 days to respond to what we suggest really is the motion itself, which came in the reply, and that's the

basis of the motion.
MR. COHN: Your Honor, if I may?
THE COURT: Go ahead.
MR. COHN: The rule 604 does not require the submission of evidence. It requires enough support that if facts proven at trial would support claims for punitive damages.
And then the rule says that there shall be a hearing on the evidence, an evidentiary hearing. This is a hearing.
And we could have simply shown up with documents and deposition testimony and explained to your Honor how we support the third amended complaint, which was highly detailed. It was 29 or 28 additional allegations of fact covering eight pages.
It was not a mere adding punitive damages, but we did it with great detail and we did it following significant discovery, two days of depositions, 99 exhibits examined and we provided an explanation of all of that.
The purpose of the trial is to weigh the evidence. The purpose of the pleading is to make allegations.

We have shown that there is enough evidence to justify the pleadings. And we would like the opportunity to prove the facts at trial, which we think we have done more than enough to show that we have earned our right to have a trial on facts.

THE COURT: I'm not sure that the 604.1 says evidentiary hearing. It says after a hearing, but in past cases or other cases, personal injury or otherwise, Counsel have brought in excerpts of depositions and other things as tending to prove the reasonable -- tending to show the reasonable likelihood that these matters may be proved at trial, these facts, that would allow for punitive damages or willful and wanton counts.

I'm going to deny the motion to strike, but I am going to allow a reply because I think that in the -- I'm sorry, a sur-reply because in Plaintiff's reply there were additional attached matters, deposition transcripts, and other evidentiary matter that is trying to show that there will be a reasonable likelihood.

I don't contemplate having an evidentiary hearing or anything other than what we

have already seen as far as testimony attached from discovery depositions.

So I will give 14 days to BNSF to file a sur-reply to the Motion For Leave to file a Third Amended Complaint on seeking punitive damages and then we will continue that, consideration of that motion to after the 14 days when I have that sur-reply.

So that is one pleading motion, at least, taken care of for now, but it's not getting us any closer to getting rulings on these.

So let's go with the next pleadings motion, which I think is either Plaintiff's Motion For Leave to Dismiss a Counter-Claim of BNSF or BNSF's Motion To Dismiss Count II on negligence per se and strike claims for injunctive relief.

MR. COHN: Can we start with the counsel-claim?

THE COURT: If that's okay with BNSF?

MR. SULLIVAN: That's fine.

THE COURT: Then let's do that. Summarize your position on that. And I have read the briefs or sometimes re-read them. So you may assume that I have seen it and have at least passing

familiarity with the arguments.

MR. COHN: Your Honor, since you have read the majority of what I would say is what you have read, I will try to be as brief as possible.

The main thing I would say is that the audacity of Counsel's counter-claim is truly breathtaking.

BNSF in their response said that this case is about the contamination that is on the Indian Creek property and who is responsible for that contamination.

That is not what this case is about. What this case is about is a train wreck that occurred in 1993 where 7,000 gallons of diesel fuel were lost and 600 gallons were recovered. And BNSF has not cleaned up the contamination.

And it is beyond dispute, in our view, and in many views including those of the IEPA, that diesel fuel has migrated and crossed boundaries and is on the Plaintiff's property.

The fact that BNSF is now suing the victim on the theory that maybe it investigated and maybe it cleaned up some petroleum that was there before the spill on the Indian Creek property, that

is really not the point.

The point is is that all Plaintiff has ever wanted and all Plaintiff continues to want is for BNSF to clean up their contamination, their diesel fuel and remove it from the Plaintiff's property and to make the Plaintiff's whole and give them their damages that they are due.

BNSF in this case is the polluter. And BNSF is not allowed to make its own unjust enrichment claim against the owners of the Indian Creek property who are the pollutees, for lack of a better word.

The law does not allow them. There is nothing unjust that is going on here against Burlington Northern.

BNSF has a legal duty. Their legal duty to the state of Illinois is to clean up the property and to investigate it.

And when a party is acting pursuant to a legal duty, then that party cannot be unjustly enriched. And this is supported in the law, in Illinois case law and in Rule 106 which says that it's incidental to the performance of a legal duty, one cannot confer a benefit onto another and it

does not entitle one to contribution. And one can't be unjustly enriched by a benefit that one involuntarily obtained.

Now, arguably the Plaintiffs haven't really obtained any benefit here, but BNSF has alleged that they obtained a benefit.

And if they did, which they didn't, then it certainly would be involuntary obtained.

The federal case law that we cited further supports the idea that one who contaminated property is not allowed to claim unjust enrichment.

And, in sum, BNSF has a legal duty to do an environmental investigation and clean up the property. And that does not give rise to unjust enrichment against somebody whose property BNSF contaminated.

The other hole in their counter-claim is the fact that they have pled unjust enrichment as an independent cause of action. And it is not an independent cause of action.

The Gagnon versus Schickel case is the right case. It is the standard. And it says that unjust enrichment may not be pled as an independent cause of action.

BNSF has relied on the HBI Health case which says that Plaintiff must allege that the Defendant has unjustly retained a benefit to the Plaintiff's detriment and the Defendant's retention of that benefit violates the fundamental principles of justice, equity and good conscious.

Now, the requirement under Gagnon versus Schickel is that there be some connection to the tort, some kind of wrongful conduct or some kind of contract law, some type of implied contract.

And neither of those apply here. And that's where the unjust element comes in. If there is no wrongful conduct by the Plaintiff, if there is no implied contract, there could be nothing unjust about any benefit that the Plaintiffs would have received in this case.

The Plaintiffs never saw this train wreck, this pollution event, as an opportunity for them to make BNSF clean up their property beyond the mess that BNSF made. And that's all they are seeking.

I use the word audacity and it is really appropriate. The polluters are not allowed

to sue the pollutees. In my pleadings I took some liberties and I used the word kletsba to describe really how audacious this complaint is.

And if you really step back and think about it BNSF allowed trains to go into each other on the same track, two trains driving in opposite directions crashing into each other on the tracks. It spilled 7,000 gallons of diesel fuel. They recovered almost 600 gallons. They did nothing to protect the Plaintiff's property.

They tried to persuade the state many, many times that the site should be closed when it shouldn't be closed, solicited experts to find any way to blame others for the contaminations that they know they caused.

And now after all of that, after 21 years now of all of that and not solving the problem, instead of just cleaning up their contamination and just investigating, the best thing they decided to do is 21 years later now let's sue the Plaintiffs. Let's sue the owners of this property for our mess.

This counter-claim should be dismissed. It is an outrageous counter-claim and

we ask for it to be dismissed.

THE COURT: Response.

MR. SULLIVAN: Briefly, Judge. And I will try to stick to the allegations in the counter-claim and the applicable law.

And I think we cited it out well in the briefs and the Court has what is necessary to rule on the motions.

We would just highlight one aspect related to factual allegations and that has to do with the undetermined fact as to whether what has been located, is being located on the Indian Creek's property, in fact, comes from the BNSF's derailment or otherwise from something that BNSF did.

And that is a fact that is in issue in the case. It is the allegations contained in the counter-claim establish how it is in issue. The unjustness, the allegations relating to unjustness center around a couple of things.

Number one has to do with the standard to which Indian Creek wants and may be able to require to force its property to be remediated to and that is a residential standard.

They have asked for that in their complaint. They have asked for it in other pleadings. They have asked for that standard to be used in their complaint before the Pollution Control Board.

They have demanded. They have submitted prayers for a leave that BNSF be required to remediate their property to background levels and applicable to residential standards.

This is not residential property. There certainly is an issue as to whether the residential or industrial commercial standards are the appropriate standards to be used under the Illinois Environmental Protection Act and the regulations that go along with that.

The problem, the potential unjustness is that in order for remediation to be done to industrial commercial standards as opposed to residential, may be a requirement that a land use restriction be placed on the deed, that the property now going forward be used in residential ways.

There is also the very real possibility that Indian Creek can refuse to -- it's

the owner -- can refuse to agree to land use restrictions be placed on its deed. And, thereby, potentially put the IEPA in a position of requiring that BNSF remediate the property to a residential standard even though that would not be the applicable standard. That's one element of the potential unjustness as alleged in the counter-claim.

The other factual allegations relating to showing the unjustness, the potential unjustness, which is all we have to show at the pleading stage, is that there is more than one occasion where Indian Creek is finding something on its property that is a contaminant, maybe petroleum, but not necessarily diesel or something that came from BNSF's derailment.

And they call IEPA and tell IEPA this is diesel from BNSF. And IEPA imposes a requirement on BNSF to further investigate and potentially to remediate those contaminants under the terms of the consent order that BNSF and IEPA are party to in the 1995 case pending in this court downstairs whereas with the testing that is going on currently, and has gone on in BNSF's view

and the views of its consulting experts, show that those contaminants are not diesel, did not come from the BNSF's accident or otherwise from BNSF's conduct.

Now, that is going to be a factual question at the trial or on summary judgment or further down the road depending on what the ultimate evidence shows, but to the extent that BNSF is being or will be required to remediate materials that are not its doing, to investigate contaminants without a showing by Indian Creek that, in fact, they are part of the derailment contamination causes BNSF to confer this benefit on Indian Creek and it is unjust within the terms of that -- of the restitution principle for Indian Creek to retain that benefit at BNSF's cost. And that's the substance of the claim.

So then we get to on this 2-615 motion, well what does the law require that BNSF allege? And the case law is set out in the briefs.

We would just direct the Court's attention to the Raintree Homes case which is the Supreme Court case where the Court said here Plaintiffs have no substantive claim grounded in

tort, contract or statute; therefore, the only substantive basis for the claim is restitution to prevent unjust enrichment. Hence Plaintiff requested relief is more properly characterized as restitution rather than damages. The Court then found that the Tort Immunity Act, therefore, did not apply.

The Raintree and some other Illinois Supreme Court decisions are discussed in the Cleary case, the Seventh Circuit, which underscores that you can state a claim for unjust enrichment without having -- necessarily having facts that also set forth a separate claim in tort and contract or statute.

Now, I don't think there is any question that BNSF, if the Court believes and concludes that there needs to be some other tort or quasi contract claim alleged, that even on the facts alleged in this counter-claim, we could state a claim for quasi contract, implied contract that if Indian Creek having brought IEPA on to require BNSF to remediate things on its property, impliedly agreeing to pay the costs for that, if it turns out that it is Indian Creek's contaminant and not BNSF.

I don't think there is any question we could allege facts to state that additional claim. The point on this motion is that the law as we set out in our view does not require there be that separate additional tort or contract claim.

So for that reason the counter-claim, we believe, states a cause of action. Whether it will be proven at trial, of course, as in every case, every complaint, every counter-claim remains to be seen. We have alleged facts sufficient to state them.

MR. COHN: May I respond?

THE COURT: Just briefly a reply, yes.

MR. COHN: First of all, BNSF seems to suggest that the Plaintiffs have some great power over the IEPA in the state of Illinois, which they don't.

It is the state of Illinois and the IEPA that is making BNSF investigate the property. It is not the Plaintiffs. If the Plaintiffs were in control, more would have been done by now.

It is the IEPA that says the diesel is found on the Indian Creek property. And Counsel was present at the six IEPA depositions last week.

We deposed three project managers, one from 1996 to 2006, one from 2010 to 2013 and the current project manager and they are all -- the deposition testimony was convincingly showing that the IEPA was completely persuaded that the contamination on the Indian Creek property originated from the train wreck. They lost 6,000 gallons of diesel fuel.

And the residential standard is a distraction. There is fuel, free-phased diesel fuel flowing under the Indian Creek property. And the Plaintiffs want BNSF to clean that up. And the residential or the industrial commercial standard is not relevant to that. They need to clean up their contamination.

They have shown no way that this residential standard has changed or increased the work that they would have done if there was an industrial commercial standard.

And I suspect that if Plaintiffs agreed to an industrial commercial clean-up standard on their property, they would still be getting a counter-claim regardless. It's not the issue.

None of what BNSF has argued in their

briefs or here in court today justifies a counter-claim. This is their defense. And they can raise it at trial as a defense, but they don't have a right to make a counter-claim. It's audacious.

THE COURT: Let me defer for a few minutes the ruling on that because it looks like there is only one more pleading motion to summarize or argue orally and that's a Motion to Dismiss Count II For Negligence Per Se, that's BNSF's motion.

And then I will make a ruling on the two pleadings motions. And we have already deferred one pleadings motion on to file a third amended complaint.

I am assuming that Count II, depending how I rule, is the same in the third amended complaint as the second amended complaint other than the new allegations regarding punitive.

MR. COHN: Correct, your Honor.

THE COURT: Or seeking punitive damages, that are all common allegations, Paragraphs 30 to 50 or something like that?

MR. COHN: That's correct, your Honor.

THE COURT: Okay. So if we are not wasting

our time arguing this BNSF Motion to Dismiss Count II because it will apply even if I let them file the amended complaint.

MR. SULLIVAN: Count II is the same in both or the principles are the same.

THE COURT: Okay. Let's have Mr. Sullivan first summarize the Motion to Dismiss and then we will have Mr. Cohn respond.

MR. SULLIVAN: Judge, there is kind of two elements to the motion as shown by the title, the caption.

And the first has to do with Count II itself which is pled as a claim for negligence per se. And the only allegations in Count II different or in addition to what is in Count 1 for negligence are allegations that the conduct or the actions alleged in Count I constitute violations of the Illinois Environmental Protection Act.

So that's really the only legal question in play for Count II is does that stay the cause of action.

And I won't belabor -- the cases we cited, we cited cases that say there is no private right of action under the Act, which Plaintiffs

agree with. So that doesn't seem to be in issue.
We have also cited numerous cases that state that violation of this statute or violation of a statute in Illinois is not negligence per se. It is prima facie evidence of negligence which can be rebutted by evidence of acting in a reasonable way or otherwise you can rebut evidence of negligence.
There are no cases that the Plaintiffs have cited that say anything different than that. They cite one case and sort of -- maybe in boiling it down it got jumbled, but they do cite the case suggesting that violation of the statute is negligence per se. And if you read the case, it says exactly the opposite.
It says in Illinois violation of the statute is not negligence per se. It is evidence of negligence.
I don't truly claim to understand exactly what Plaintiffs understand negligence per se to be or to mean. At times they refer to it in their briefs as imposing strict liability, which is the correct understanding of what negligence per se is. Other times they talk about it as being

evidence of negligence.
So I'm not sure exactly where they come down on that, but the law in Illinois is that negligence per se refers to strict liability without regard to reasonableness of the Defendant's conduct.
And the law is equally clear that violation of the statute does not constitute negligence per se. So that has to do with Count II.
The other aspect of the motion is more generally directed to the request for equitable relief in the two amended complaints.
And the relief sought in the motion with respect to these prayers for equitable relief are that they should be stricken or stayed in light of the environmental regulatory system requirements under the statute that a party exhaust their administrative remedies before seeking this type of injunctive relief in an environmental case.
And the exhaustion of administrative remedies comes primarily from the preservation of Section 45B of the Act which says that a person adversely affected by violations of the Act may sue

for injunctive relief against the violation; however, no action shall be brought under this section until 30 days after they have been denied relief by the Pollution Control Board.
In this case the Plaintiffs have filed a complaint with the Pollution Control Board seeking injunctive relief remediation to standards that they have sought in their complaint.
And that case is pending. It is not stayed. It's not at a standstill. The discovery is being done in that case. It is the same discovery.
And that's what the parties have agreed with before the Pollution Control Board is that the discovery will be the same. And when the discovery is completed in this case, it would be completed in the Pollution Control Board case.
We have -- I think next week we have to submit an order to the Pollution Control Board with a case management schedule.
So that case is ongoing. They are seeking injunctive relief that they can seek under the statute in that proceeding. And the statute is clear that they have to exhaust that before they

can come to the circuit court seeking injunctive.
And there is a reason for that because when a citizen sues before the Pollution Control Board, the Board has the ability to require the IEPA to act in response to the alleged violation.
The IEPA has the right to take action. So that's why the statute requires the private party to go to the Pollution Control Board before being allowed to seek injunctive relief from the circuit court.
The risk of not requiring that is that you have two trials going on with two different bodies who could impose completely different injunctive orders. That's a risk in this case.
It's particularly, I would say, unwarranted and inappropriate to be pursuing injunctive relief in this lawsuit not only because of the Pollution Control Board case that the Plaintiffs are pursuing, but the state itself is already initiating an action and enforcement that is pending in the circuit court.
A consent order has been entered in that case. And the IEPA and BNSF are operating under that consent order.

It is not a definitive list of everything that shall be done. There may be things -- there is a dispute resolution provision in the consent order if the IEPA and BNSF cannot agree on an issue in their case, be it the remediation standard, whether the contaminants come from BNSF, any of those factual matters, they go to the circuit court and they hold a hearing and the Court decides that issue.

So there are already two proceedings, one by the state and one by the Plaintiffs in which a body with jurisdiction is being asked to or potentially enter an injunctive order relating to investigation, remediation of Indian Creek.

So I apologize. I went on longer than I thought and probably repeated more from the briefs than I intended to.

I think the arguments are well set out in both party's briefs. And we think that the Motion to Dismiss Count II is well rounded as well as the motion to strike or stay the injunctive relief.

THE COURT: Okay. Response.

MR. COHN: Your Honor, as to injunctive

relief, Plaintiffs have no role in the consent order in the IEPA process. It is their property, but they have no voice.

There is an administrative evidentiary hearing as to disagreements between BNSF and the IEPA does not involve me -- Indian Creek.

In fact, BNSF does everything they can to make sure that the Plaintiffs don't have a voice to either the IEPA or the consent order process. Indeed, it actually had a motion for Plaintiffs to not intervene in that process and they have successfully won that motion.

As to the Pollution Control Board, there is parallel authority and parallel jurisdiction, that is, an enforcement of the Act, but this Court has the authority to award injunctive relief.

And what BNSF, while they pointed out Section 45B of the Act, they failed to discuss Section 45A of the Act, which I think is even more important.

And Section 45A of the Act says no existing civil or criminal remedy for any wrongful action shall be excluded or impaired by this Act.

This is a case based on negligence and trespassing and negligence per se.

And the remedy at law, which is inadequate, which is money damages is inadequate because we don't know the extent of the contamination because BNSF has not defined it.

There is no remedial action plan in place that quantifies how much it costs and how long it would take to clean up the site.

And so what Plaintiffs are entitled to and what they seek in this case is an order demanding that BNSF do what it should do.

And if this Court doesn't do it, who is going to do it? It has been 21 years. The IEPA is not doing that and BNSF is doing everything it can to make sure that the IEPA doesn't make them clean up the contamination that they knowingly caused.

So we think that injunctive relief is appropriate here. This Court actually has the authority and the expertise, the power, the ability to resolve all of the disputes between these parties.

And there has been litigation in

multiple places going on for many years, but this Court can handle everything at once and actually give the Plaintiffs all of the relief that they seek, clean up the site and award us the damages that we are entitled to.

As to negligence per se, negligence per se in the response brief or in the reply -- in BNSF's motion, what they asked for or what they argued was that we have alleged violations of the statute and that we can't enforce the Illinois Environmental Protection Act in state court.

That is true, but we have not alleged violations of the statute. What we have alleged is that there has been negligence established by violations of the statute and that is evidence of what is negligence and what negligence per se is.

There are three elements to negligence per se: Violation of the statute, proximate cause of the injury related to that violation of the statute, and that the Plaintiffs are part of the class that are protected by the statute.

The Plaintiffs are certainly part of the class that are protected by the statute which is to prevent somebody like BNSF from spilling

diesel fuel and contaminating other properties. That is included. So the negligence per se is appropriate.

The injunctive relief is an award that is appropriate and the Court should award. And we would ask that even if the Court is not convinced right now that injunctive relief is appropriate, there is no reason to discard that option later after a full trial on the facts.

If after a trial on the facts the Court believes that there is no reason to award injunctive relief, the Court can make that decision after a trial. There is no reason to take that out of the options right now.

So we ask that we be given the opportunity to prove at trial the facts that support the award of injunctive relief and that the counts that we have alleged all be maintained.

THE COURT: Reply.

MR. SULLIVAN: Just briefly, Judge. The arguments about negligence per se that Counsel makes are just -- they are just wrong. The law is just not what the Plaintiff says it is.

As to Section 45A providing that

remedies will not be impaired, the remedy of injunctive relief is not being impaired by requiring that Plaintiffs abide by Section 45B and exhaust their administrative remedies.

They will, if they get an adverse judgment from the Pollution Control Board and the action that they filed, 45B allows them, then, access to the court.

So 45A is sort of a red herring in that nothing is being impaired. They are being required to pursue their remedy in a way dictated by the statute.

And, finally, Counsel's question of if this Court doesn't address the request for injunctive relief, who will? The Pollution Control Board in the case that Plaintiffs have filed asking for injunctive relief. And that's what the statute provides for.

THE COURT: I will need a couple minutes and I will rule on those just argued motions.

(WHEREUPON, a recess was had.)

THE COURT: Okay. We are back on the record and I am going to rule on those two motions. And then we are going to go off the record so we can

set the continuation of this hearing on other matters that are up today, like, the discovery motions.

So at this point I will rule on what we have so far and what we haven't reserved for another sur-reply.

First is the Motion to Dismiss Count II as a per se count on negligence per se. I agree with Defendant that there is no private right of action under the statute and that there is not a per se negligence count available; however, the violation of the statute can be prima facie evidence of negligence such that it would establish a prima facie case of negligence that could then be countervailed by Defendant's case.

However, it does not appear that Count I has that specific language or violation of the statute included. So, therefore, I am going to grant the motion, but allow leave to replead Count II to only state an alternative count of negligence that would be based on the evidence of the violation of the statute so that it could be repled without the conclusions that this equals negligence per se, just the violation, but it would be an

alternate count on Count II for negligence with pleading the violation of the statute. So that's first.

And then second as to injunctive relief, on the injunctive relief I am going to grant the motion because of the need of Plaintiff as a claimant at the PCB to exhaust that remedy before asking for injunctive relief in the court; however, I am going to just stay that request so there doesn't have to be any repleading of this without the request for injunctive relief.

So the injunctive relief can stand, but it will be considered stayed for the present without prejudice and subject to the disposition of the Plaintiff's claim in the Pollution Control Board.

So I am going -- I guess I am going backwards. That was BNSF's Motion to Dismiss Count II and to Dismiss or Strike Claims For Injunctive Relief.

What was argued first was Plaintiff's Motion to Dismiss Counter-Claim of BNSF. And based on my understanding of the cases and the law on that and the facts as they stand, I'm going to

grant that motion.
I agree with Plaintiff that there is no right or claim for restitution or unjust enrichment on the facts as they stand.
And there was a reference by Mr. Sullivan to the possibility that he could state a cause of action or he could replead it to state something in the nature of an implied contract to get to the restitution and unjust enrichment; however, I don't see that as a possibility under these facts.
And I think it is just a -- what it is is more of a defense that someone else was the potentially responsible party or some others were potentially responsible. So, therefore, we can't be totally responsible or maybe we are zero responsible, but I think that's more of a defense to the action and it's -- or it's a proximate cause argument analysis or maybe they are saying that there is a different proximate cause and it's not us. So that's the defense. That is not a counter-claim. So I am going to grant that motion.
MR. SULLIVAN: Is that a -- I'm sorry, a denial of our request for leave to amend?

THE COURT: Yes. Okay. I have to take a short break here to call the doctor's office and then we will talk about scheduling for the rest of this discovery hearing. Okay. Off the record.
(WHICH WERE ALL THE PROCEEDINGS HAD IN THE ABOVE-ENTITLED CAUSE ON THIS DATE.)

I, LINDA S. IDRIZI, a Certified Shorthand Reporter of the State of Illinois, CSR No. 84-3704, do hereby certify that I reported in shorthand the proceedings had in the aforesaid matter, and that the foregoing is a true, complete and correct transcript of the proceedings had as appears from my stenographic notes so taken and transcribed under my personal direction.
IN WITNESS WHEREOF, I do hereunto set my hand this 26th day of March, 2014.

LINDA S. IDRIZI, CSR
CSR No. 84-3704.

EXHIBIT K

IN THE CIRCUIT FOR THE SIXTEENTH JUDICIAL CIRCUIT
KANE COUNTY, ILLINOIS

INDIAN CREEK DEVELOPMENT COMPANY, et al.,	)	
Plaintiff,	)	Case No.: 07 LK 604
vs.	)	
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, et al.	)	
Defendant.	)	

Thomas M. Kartsonis
Clerk of the Circuit Court
Kane County, IL

MAR 25 2014

FILED 055
ENTERED

ORDER

This cause coming to be heard on March 19, 2014 for argument of the motions referenced below, all parties having due notice and being present in court, and the Court having heard the arguments of counsel,

IT IS HEREBY ORDERED, for the reasons stated in open court at the March 19, 2014 hearing, that:

1. Defendant's Motion to Strike Plaintiff's Reply in Support of Motion for Leave to File Third Amended Complaint is denied. Defendant's alternative Motion for Leave to File a Sur-Reply is granted. Defendant is granted fourteen days (to April 2, 2014) to file a Sur-Reply in opposition to Plaintiff's Motion for Leave to File Third Amended Complaint. The hearing on Plaintiffs' Motion for Leave to File Third Amended Complaint is continued to a date to be set by the Court with agreement of the parties.

2. Defendant's Motion to Dismiss Count II of the Second Amended Complaint is granted. Count II of the Second Amended Complaint for negligence *per se* is dismissed.

Plaintiffs are granted leave to re-plead Count II as an alternative claim for negligence instead of negligence *per se*. Defendant's Motion to Stay Claims for Injunctive Relief is granted. Plaintiffs' claims for injunctive relief are stayed pending disposition of Plaintiffs' suit before the Illinois Pollution Control Board. Defendant's alternative Motion to Strike Claims for Injunctive Relief is denied.

3. Plaintiffs' Motion to Dismiss Defendant's Counterclaim is granted. Defendant's oral motion for leave to amend the Counterclaim is denied.

4. The hearing on the following motions and matters is continued to March 26, 2014 at 1:15 p.m., without further notice:

(a) Plaintiffs' Motion to Compel and to Reproduce Witnesses;

(b) Plaintiffs' Motion to Compel Production of Non-Privileged Documents;

(c) Defendant's Motion for Protective Order;

(d) Defendant's Motion to Quash Record Subpoenas; and

(e) all arguments, submissions and issues concerning the proposed Case Management Order.

ENTERED: March 25, 2014

Circuit Court Judge