

ILLINOIS POLLUTION CONTROL BOARD  
March 28, 2019

PEOPLE OF THE STATE OF ILLINOIS, )  
)  
Complainant, )  
)  
v. ) PCB 12-35  
) (Enforcement - Water)  
SIX M. CORPORATION, INC., an Illinois )  
corporation, and THOMAS MAXWELL, )  
)  
Respondents, )  
)  
and )  
)  
JAMES MCILVAINE, )  
)  
Necessary Party – Respondent. )

ORDER OF THE BOARD (by C.K. Zalewski):

On September 20, 2018, the Board accepted a four-count amended complaint filed by the Office of Attorney General, on behalf of the People of the State of Illinois (People), against Six M. Corp., Inc. and Thomas Maxwell (respondents), and James McIlvaine as a necessary party. The amended complaint concerns leaking petroleum underground storage tanks at the Walker Service Station in Farmer City, Dewitt County.

The People move the Board to strike the claimed affirmative defense of “impossibility” and 20 affirmative statements pled in respondents’ answer to the People’s amended complaint. As detailed below, the Board denies the motion to strike because, first, the People waived the right to move to strike the affirmative defense and, second, none of the 20 affirmative statements is an improperly pled affirmative defense.

In this order, the Board provides an abbreviated procedural background of this case. The Board next discusses the People’s motion to strike the affirmative defense and then the affirmative statements made in respondents’ answer.

**PROCEDURAL BACKGROUND**

On August 25, 2011, the People filed a complaint. On July 2, 2018, the People filed a motion to amend the complaint. Shortly thereafter, the Board granted the People’s motion and accepted the amended complaint for hearing. The amendments replaced William Maxwell with Thomas Maxwell as respondent and alleged violations occurring after the 2011 filing of the original complaint. See People v. Six M. Corp., PCB 12-35, slip op. at 1-2 (Sept. 20, 2018).

On November 26, 2018, respondents filed an answer to the amended complaint (Ans.). On January 8, 2019, the People filed a motion to strike parts of the answer (Mot.). Respondents filed a response to the motion (Resp.) on February 7, 2019. The People then filed a motion to immediately file a reply to respondents' response, attaching their reply (Rep.). The Board grants the People's motion to file a reply and accepts the reply.

### **DISCUSSION**

The People argue that respondents' affirmative defense of impossibility—the claimed denial of access by James McIlvaine to his neighboring property—should be stricken because it is legally insufficient and inadequately pled. Mot. at 4-7. In addition, the People request the Board strike allegations in 20 paragraphs of the answer that use the phrase “affirmatively state.” Mot. at 10. The People argue these affirmative statements are prejudicial because they do not clearly identify any affirmative defenses, as required by the Illinois Code of Civil Procedure (*see* 735 ILCS 5/2-603, 2-613 (2016)), leaving the People guessing whether they are waiving objections to unidentified affirmative defenses. Mot. at 7-8. Before turning to these affirmative statements, the Board addresses the motion to strike the claimed affirmative defense of impossibility.

#### **The People Waived the Right to Move to Strike the Affirmative Defense of Impossibility**

Respondents argue that the People should be precluded from revisiting the affirmative defense of impossibility by way of motion to strike. The Board agrees.

In a footnote, the People acknowledge that their former counsel in this case had represented to the Board their desire to litigate the impossibility defense. Mot. at 2 n.1. But, the People explain, because six years have passed without the parties resolving “the effect of the affirmative defense,” it should now be struck. *Id.*

Under the Board's procedural rules, any motion attacking the sufficiency of any pleading must be filed within 30 days after service of the challenged document. 35 Ill. Adm. Code 101.506. All defects in a pleading, either in form or in substance, not objected to are waived. *See* 735 ILCS 5/2-612(c) (2016); *see also* 35 Ill. Adm. Code 101.100(b) (“Board may look to the Code of Civil Procedure . . . for guidance when the Board's procedural rules are silent.”).

When the People filed their original complaint respondents Six M. Corp., Inc. and William Maxwell filed an answer on December 2, 2011, claiming the affirmative defense of impossibility. Resp. at 6. The Board issued an order striking the affirmative defense after the People, in response to the answer, objected to the affirmative defense. Six M. Corp., PCB 12-35 (Feb. 16, 2012). The People subsequently filed a public comment explaining that their response to the answer “was not intended as a motion to strike nor [did] it request that the alleged affirmative defense ‘be stricken as improper.’” PC #1 (quoting Six M. Corp., PCB 12-35, slip op. at 2 (Feb. 16, 2012)). Rather, the People's response “objected to the affirmative defense of ‘impossibility’ being asserted in this enforcement matter.” Six M. Corp., PCB 12-35, Resp. to Mot. for Reconsideration at 1 (Mar. 27, 2012). The People made clear their intent to litigate the affirmative defense when they requested that the Board reconsider and correct its February 12,

2012 order striking the affirmative defense of impossibility, which the Board did by vacating the order. Six M. Corp., PCB 12-35, slip op. at 1 (May 17, 2012).

The People concede that the affirmative defense pled in the November 26, 2018 answer is “substantively identical” to the one pled in the December 2, 2011 answer. Mot. at 2 n.1. Moreover, the People do not claim that the grounds on which they now move to strike—impossibility is a contract law doctrine and was inadequately pled—are based on differences between the original complaint and the amended complaint. The Board finds that the People waived their right to move to strike the affirmative defense in the answer to the amended complaint because they not only failed to timely file a motion to strike the same affirmative defense six years ago, but also represented they were not seeking that it be stricken. The Board therefore denies the People’s motion to strike the affirmative defense of impossibility. The People are free to object to the claimed affirmative defense of impossibility as they did under the original complaint.

### **The “Affirmative Statements” are Not Pled as Affirmative Defenses**

The People also move the Board to strike specified affirmative statements made throughout respondents’ answer. The People state that the answer must explicitly admit, deny, or claim insufficient of knowledge of each allegation of the pleading and not be evasive. Mot. at 9 (citing 735 ILCS 5/2-610(a), (c) (2016)). The People argue that respondents raise affirmative matters throughout their answer with their properly pled responses. *Id.* The People assert this obfuscates the otherwise properly pled responses, which prejudices the People because they are left guessing whether there is an affirmative defense that they must respond to. *Id.* The People also argue that many of the affirmative statements do not raise proper affirmative matters. *Id.*

The Board’s procedural rules identify the available responses in an answer to a complaint. 35 Ill. Adm. Code 103.204(d). An answer must either admit, deny, or state insufficient knowledge of the complaint’s allegations. *Id.* If a respondent intends to assert an affirmative defense, the defense and supporting facts must be plainly stated. *Id.* An affirmative matter raised in the answer that is not properly pled as an affirmative defense cannot later be asserted as an affirmative defense. *See* 35 Ill. Adm. Code 103.204(d) (“*must be plainly set forth before hearing in the answer or in a supplemental answer, unless the affirmative defense could not have been known before hearing*” (emphasis added)); *see also* Fillmore v. Walker, 2013 IL App (4th) 120533, ¶ 28 (“Generally, it is true that, if a defendant has an affirmative defense, the defendant must plead it as an affirmative defense [ ] on pain of forfeiting it.” (citations omitted)); Int’l Ass’n of Firefighters Local No. 23 v. City of Chicago, 213 Ill. App. 3d 91, 95 (5th Dist. 1991). Properly pleading affirmative defenses provides notice to the other parties of their claims and position. *See* Handelman v. London time, Ltd., 124 Ill. App. 3d 318, 320 (1st Dist. 1984). Therefore, an affirmative defense must be pled to put the complainant on notice of the affirmative defense, and include facts supporting the affirmative defense so the complainant is not unfairly precluded from moving to strike, or otherwise objecting to, the affirmative defense. *See* 35 Ill. Adm. Code 101.506.

Here, respondents have clearly identified a claimed affirmative defense of impossibility and pled facts in support. Ans. at 18-23. This is the only affirmative defense identified in the

answer. The 20 affirmative statements the People seek to strike are not properly pled affirmative defenses and respondents do not claim otherwise. Rather, respondents label none of these affirmative statements as an affirmative defense.

Making “affirmative statements” like these in a pleading following an admission, denial, or claim of insufficient knowledge is a regular practice before the Board. *See e.g.*, People v. Alpena Vision Resources, LLC, PCB 13-16, Answer at 2, ¶¶ 2, 4, 5, 6; 3, ¶¶ 7, 9 (Dec. 26, 2012); People v. Incobrasa Industries, Ltd., PCB 15-112, Answer at 13-14, ¶¶ 24, 25; 27, ¶ 42; 28, ¶ 44; 29, ¶ 46; 33, ¶ 52; 34, ¶ 54; 37, ¶ 23; 40-41, ¶ 26; 42, ¶ 30 (Dec. 8, 2015); People v. Cranbrook Farms, LLC, PCB 17-19, Answer at 2, ¶ 5; 5, ¶ 13; 15, ¶ 39 (May 5, 2017); James Fiser v. James L. Meador & Henry’s Double K, LLC, PCB 18-84, Answer at ¶¶ 5, 8, 9, 11 (Nov. 2, 2018). They provide additional information about a respondent’s position to the complainant, other parties, and the Board. The affirmative statements targeted by the People’s motion are consistent with this practice.

Because respondents’ affirmative statements are not pled as affirmative defenses, the Board declines to strike them as improperly pled affirmative defenses. Accordingly, the Board denies the People’s motion to strike the affirmative statements in the answer to the amended complaint’s count I, ¶¶ 4, 17, 19, 21, 26, 27, and 33; count II, ¶¶ 33 and 36; count III, ¶¶ 21, 22, 23, and 24; and count IV, ¶¶ 24, 25, 26, 27, 32, 33, and 34.

### CONCLUSION

For the reasons articulated above, the Board denies the Peoples’ motion to strike respondents’ claimed affirmative defense and the specified affirmative statements.

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on March 28, 2019, by a vote of 5-0.



Don A. Brown, Clerk  
Illinois Pollution Control Board