

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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STATE OF 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 AND PROOF OF SERVICE

TO: See Attached Service List

PLEASE TAKE NOTICE that on July 19, 2007, the attached document, **Complainant's Reply Brief In Support of Its Motion to Strike Burlington Northern and Santa Fe's Affirmative Defenses**, was filed with the Clerk of the Pollution Control Board and is hereby served upon the person(s) referenced above by placing a copy of the same in the U.S. mail at 222 N. LaSalle Street, Chicago, Illinois on or before 4:00 p.m. on the 19<sup>th</sup> day of July, 2007, with proper postage affixed.

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

By Glenn C. Sechen  
One of Its Attorneys

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**COMPLAINANT'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO STRIKE  
BURLINGTON NORTHERN AND SANTA FE'S AFFIRMATIVE DEFENSES**

Complainant, Indian Creek Development Company, and the Chicago Title and Trust Company as trustee under trust 3291, dated December 15, 1981, (collectively "Indian Creek"), files this reply brief in support of its motion to strike the affirmative defenses of Respondent, Burlington Northern and Santa Railway Company ("BNSF").

**INTRODUCTION**

The response brief of the BNSF amply demonstrates how, over 14 years later and despite a consent decree with State authorities, it is possible to be dealing with the cleanup of the BNSF's release of diesel fuel on January 20, 1993. Despite an answer denying facts which rightly should have been admitted (such as the source of the diesel fuel contamination) and the loss of its prior motion claiming that this case is duplicative of the prior consent decree, the BNSF marches on. It now urges the Board to let stand wholly conclusory affirmative defenses lacking any particularity which fail to even

identify to which count they apply. Such pleading is no accident. It is intended to unduly broaden discovery, the scope of the hearing, keep Indian Creek in the dark and increase the time as well as the expense of these proceedings. Based on what is pled it is not entirely possible to assess whether all of the alleged affirmative defenses are actually affirmative defenses at all! Not even the elements of the alleged affirmative defenses have been pled. Indian Creek urges the Board to put an end to the gamesmanship.

### **ARGUMENT**

Indian Creek denies the implication in the BNSF's brief that Indian Creek "does not claim that it is not informed of the substance of the defense." Significantly, it is beyond dispute that Illinois is a fact pleading and not a notice pleading jurisdiction, where pleading the substance is adequate. In order to set forth a good and sufficient claim or defense, a pleading must allege ultimate facts sufficient to satisfy each element of the cause of action or affirmative defense pled. Knox College v. Celotex Corp., 88 Ill.2d 407, 430 N.E.2d 976 (1981); Richco Plastic Co. v. IMS Co., 288 Ill. App. 3d 782, 681 N.E.2d 56 (1<sup>st</sup> Dist. 1997). It is likewise beyond dispute that as to the pleading of affirmative defenses, Section 2-613(d) of the Code of Civil Procedure specifically provides that the facts constituting any affirmative defense must be plainly set forth in the defendants' answer. 735 ILCS 5/2-613(d).

Further, the facts establishing an affirmative defense must be pled with the same degree of specificity as required by a plaintiff to establish a cause of action. International Insurance Co. v. Sargent and Lundy, 242 Ill. App. 3d 614, 630, 609 N.E.2d 842, 853 (1st Dist. 1993), citing Kermeen v. City of Peoria, 65 Ill. App. 3d 969, 973, 382 N.E.2d

1374 (3rd Dist. 1978). Yet further, the Board's procedural rules provide that "any facts constituting an affirmative defense must be plainly set forth before hearing in the answer or in a supplemental answer, unless the affirmative defense could not have been known before hearing." 35 Ill. Adm. Code 103.204(d).

There is good reason for the pleading requirements regarding affirmative defenses. Indian Creek is entitled to know what is claimed and prepare a defense to the BNSF's claims. Not only is that effort substantially hampered by the lack of factual allegations, the facts can be shifted to whatever suits the BNSF at whatever point in time it ultimately chooses to state those facts. Accordingly, the scope of discovery is pretty much whatever the BNSF wants it to be at any point in time. The affirmative defenses are likewise virtually immune from motions such as summary judgment.

The BNSF has pled six (6) counts of affirmative defenses as follows:

**First Affirmative Defense.** Complainant knew or reasonably should have known of the alleged contamination on its property more than five years prior to filing the complaint. Accordingly, complainant's claims must be dismissed pursuant to the applicable statute of limitations. 735 ILCS 5/13-205.

**Second Affirmative Defense.** Complainant has failed to mitigate its damages.

**Third Affirmative Defense.** Complainant knew or reasonably should have known of the alleged contamination on its property many years ago. Complainant chose not to bring this lawsuit for many years after having such knowledge. As such, Complainant has waived its rights to make claims against BNSF based on the alleged contamination.

**Fourth Affirmative Defense.** Complainant knew or reasonably should have known of the alleged contamination on its property many years ago. Complainant chose not to bring this lawsuit for many years after having such knowledge. As such, Complainant is estopped from asserting claims against BNSF based on the alleged contamination.

**Fifth Affirmative Defense.** Complainant knew or reasonably should have known of the alleged contamination on its property many years ago. Complainant chose not to bring this lawsuit for many years after having such knowledge. As such, the doctrine of laches prohibits complainant from asserting claims against BNSF based on the alleged contamination.

**Sixth Affirmative Defense.** Complainant's purported damages have not been identified with sufficient particularity, to the extent such damages even exist.

The BNSF claims that its affirmative defenses are "based, in part, on the extensive allegations made in the Complaint". It is unstated what constitutes the "other part" upon which the BNSF supposedly bases its affirmative defenses or even on what additional portions of the complaint the BNSF relies. Contrary to BNSF's claim, Indian Creek finds its allegations to be deliberately vague and unclear, making it impossible to mount a defense, conduct motion practice regarding the affirmative defense, or otherwise respond to the BNSF's affirmative defenses. Indian Creek is not required to guess.

Regarding the sixth affirmative, what damages "have not been identified with sufficient particularity"?<sup>1</sup> Indian Creek prayed that the Board order the BNSF to cease and desist from further violations, remediate the diesel fuel contamination it caused and reimburse Indian Creek for its costs and expenses which are continuing to accrue. Regarding the second affirmative defense, what exactly does the BNSF claim that Indian Creek claim should have been done to mitigate the damages? Remediate the , diesel fuel contamination which, despite the obvious, the BNSF now denies causing?

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<sup>1</sup> In a valid affirmative defense, the respondent alleges "new facts or arguments that, if true, will defeat . . . the government's claim even if all allegations in the complaint are true." Grand Pier Center LLC v. River East LLC, PCB No. 05-157, slip op. at 3 (January 5, 2006). Accordingly, the alleged failure to adequately specify damages is not an affirmative defense at all and should be stricken for this reason alone.

Even in its brief, the BNSF completely fails to specify all of the allegations of the Complaint upon which it relies for a factual basis regarding its affirmative defenses. The BNSF merely recites some general complaint allegations, without being bound to them, in an attempt to make it appear that there are facts that support its affirmative defenses even though it completely failed to allege or even reference such facts in actually pleading the alleged affirmative defenses. The BNSF is careful leave its references to Complaint allegations open ended.

Interestingly, the BNSF is disingenuous. In its brief the BNSF claims that Indian Creek should have reasonably known that the BNSF had contaminated its property more than 5 years before it brought "the claim", based on the allegation in the complaint that the direction of groundwater flow is from the BNSF Property to the Indian Creek Property. BNSF Brief at 2. In its answer, however, the BNSF denied the allegation regarding the direction of groundwater flow and stated as follows regarding that allegation in the Complaint:

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

**ANSWER:** BNSF admits that a portion of Indian Creek runs through the Premises. **BNSF states that groundwater flow is complex and denies the remaining allegations contained in this paragraph. *Emphasis added.***

Now, the BNSF now also claims to rely on the allegations in the complaint regarding the discharge of contaminants to Indian Creek's property being ongoing. However, the BNSF has denied those allegations in its answer as follows:

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.

**ANSWER:** BNSF denies the allegations contained in this paragraph.

As we have seen above, ultimate facts sufficient to satisfy each element of each affirmative defense must be pled. BNSF has done no such thing. The BNSF has completely failed to plead the elements of its claimed affirmative defenses. For example, there are six elements of equitable estoppel:

(1) there must be words or conduct by party against whom estoppel is alleged amounting to misrepresentation or concealment of material facts; (2) party against whom estoppel is alleged must have had knowledge at time representations were made that representations were untrue; (3) truth respecting representations must be unknown to party claiming benefit of estoppel at time that representations were made and acted on by him; (4) party estopped must intend or reasonably expect that his conduct or representations will be acted upon by party asserting estoppel; (5) party claiming benefit of estoppel must have in good faith relied upon misrepresentation to his detriment; and (6) the party claiming benefit of estoppel must have so acted because of representations that he would be prejudiced if first party is permitted to deny truth thereof. City of Rockford v. Suski, 307 Ill.App.3d 233, 718 N.E.2d 269

As the elements have not been pled [anywhere], the affirmative defenses must be stricken.

### CONCLUSION

The BNSF's method of pleading is no accident. If allowed, it would unduly broaden discovery, broaden the scope of evidence admitted at hearing and increase the time as well as the expense of these proceedings and deprive Indian Creek of preparing its case knowing the identity of the facts at issue. The Board and Indian Creek are entitled to hold BNSF to a set of facts. If the BNSF is unable to plead such facts in good faith it should have no affirmative defenses. The BNSF is not allowed to proceed with some undefined facts to be revealed at the hearing for the first time. The BNSF is not allowed to preclude motions directed against the affirmative defenses -- motions such as

whether the BNSF is allowed a statute of limitations or other defenses (even if the BNSF had a basis for such defense(s), which it does not) where the BNSF is obligated to identify and remediate the contamination (which the BNSF now denies having caused) by the terms of the Consent Decree, and whether any affirmative defenses are proper as a result of the BNSF's unclean hands resulting from its dishonest attempt to close out its obligations under the Consent Decree by requesting IEPA to close the matter without informing IEPA of the contamination found on the Indian Creek property – contamination which the BNSF knew of first hand. The BNSF's closeout report is contained in Exhibit B to the Complaint. It is no wonder that the BNSF does not wish to be tied down to any particular set of facts. Nonetheless that is what is required. The BNSF's gamesmanship must stop. Its affirmative defenses must be stricken and this matter must proceed in an orderly manner.

Respectfully submitted,

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