BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

SUSAN M. BRUCE, Complainant, v. HIGHLAND HILLS SANITARY DISTRICT, Respondent.	))))))	PCB # 2015-139 (Citizens - Water Enforcement)

NOTICE OF FILING

To: Lawrence A. Stein
Aronberg Goldgehn Davis & Garmisa
330 N. Wabash Avenue
Suite 1700
Chicago, Illinois 60611

PLEASE TAKE NOTICE that I have today filed with the Pollution Control Board the following document:

HIGHLAND HILLS SANITARY DISTRICT'S RESPONSE TO MOTION TO STRIKE AFFIRMATIVE DEFENSES

A copy of which is hereby served upon you.

Respectfully submitted,

Heidi E. Hanson

Dated: April 19, 2016

Joseph R. Podlewski Jr.
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

SUSAN M. BRUCE,	)	
	)	
Complainant,	)	PCB # 2015-139
v.	)	(Citizens - Water Enforcement)
	)	
HIGHLAND HILLS SANITARY DISTRICT,	)	
	)	
	)	
Respondent.	)	

HIGHLAND HILLS SANITARY DISTRICT'S RESPONSE TO MOTION TO STRIKE AFFIRMATIVE DEFENSES

Respondent, HIGHLAND HILLS SANITARY DISTRICT ("District"), by and through its attorneys PODLEWSKI & HANSON P.C., hereby responds to Complainant, Susan M. Bruce's ("Bruce") MOTION TO STRIKE AFFIRMATIVE DEFENSES.

For its Response, the District states as follows:

The District filed its Answer and Affirmative Defenses on November 3, 2015. The Board's hearing officer extended the date for filing a response to the affirmative defenses to December 10, 2015 (December 3, 2015 H.O. Order). Bruce replied to the affirmative defenses, but did not at that time object to any of the affirmative defenses or move to strike them.

Bruce's answer generally denied all eight affirmative defenses. The District objected and the Board deemed the defenses to be admitted and struck Bruce's general reply.

> …Highland Hills' factual allegations are taken as admitted if not specifically denied (unless Ms. Bruce asserts a lack of knowledge). Ms. Bruce's broad, general reply does not specifically deny or assert lack of knowledge of anything, so instead the Board would deem all the allegations as admitted.
>
> March 17, 2016 Board Order, at 2.

The Board gave Bruce until March 31, 2016 to file an amended reply (Board Order, at 1 and 4) which presumably would have superseded the admissions. Bruce opted not to take

advantage of the Board's permission to amend its reply. The Board also allowed Bruce to file a motion to strike the affirmative defenses (Board Order, page 3) if she "wishes to argue that the defenses are insufficiently pled," although Bruce had not moved for leave to file such a motion and had apparently waived any such arguments by not timely raising them. The District received Bruce's Motion to Strike Affirmative Defenses ("Motion to Strike") on April 6, 2016.

STANDARD

Illinois Pollution Control Board Procedural Rule 103.204(d) (35 Ill. Adm. Code 103.204(d)) states 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.

The Code of Civil Procedure Section 2-613(d) (735 ILCS 5/2-613(d)) defines an affirmative defense. The Board has looked to this section of the Code because its own rules are silent on that point. See *People v. Inverse Investments L. L. C.,* PCB 11-79 (June 21, 2012) at 6.

> … [list of specific affirmative defenses]… and any defense which by other affirmative matter seeks to avoid the legal effect of or defeat the cause of action set forth in the complaint, counterclaim, or third-party complaint, in whole or in part, and any ground or defense, whether affirmative or not, which, if not expressly stated in the pleading, would be likely to take the opposite party by surprise, must be plainly set forth in the answer or reply.

The Board articulated the standard for a motion to strike an affirmative defense in *Inverse Investments, Id at 6.*

> A motion to strike an affirmative defense admits the well-pled facts constituting the defense, as well as all reasonable inferences that may be drawn therefrom, and attacks only the legal sufficiency of the facts. Raprager v. Allstate Insurance Co., 183 Ill. App. 3d 847, 854, 539 N.E.2d 787, 791 (2nd Dist. 1989). An affirmative defense should not be stricken "[w]here the well-pled facts [of an affirmative defense] . . . raise the possibility that the party asserting the defense will prevail …."

The Illinois Code of Civil Procedure (735 ILCS 5/2-612(b)) adds that:

> [N]o pleading is bad in substance which contains such information as reasonably informs the opposite party of the nature of the claim or defense which he or she is called upon to meet.

An affirmative defense is a pleading - analogous to a complaint. The District "need not prove the merits of its defense at the time of the answer, but only needed to reasonably inform… of the nature of its defense." *Inverse Investments,* at 5.

> At this point in the proceeding, the Board is ruling on a motion to strike an affirmative defense, not deciding the parties' ultimate dispute….the Board is not considering a motion for summary judgment or other final disposition of this legal question on the merits after full briefing.

People v. Q. C. Finishers, PCB 01-07 (July 8, 2014) at 12 and 16.

The mere fact that opposing counsel does not agree with an affirmative defense does not make it insufficient. The mere fact that opposing counsel asserts contradictory facts does not make an affirmative defense insufficient. The affirmative defenses offered by the District were fully and properly pled. The Motion to Strike should be denied in its entirety.

INDIVIDUAL AFFIRMATIVE DEFENSES

Affirmative Defense #1 – Act of God

Paragraph 3 of the Motion to Strike (quoted accurately below) attempts to address the "act of God" defense.

> Respondent's allege a significant rain event while only held more emergency type events constitute acts of God, such as events like a 250- or 500 year flood or a heavy rainfall, combined with rapid snow melt, causing extreme stress and requiring emergency discharges to avoid structural failures.

Paragraph 3 is so badly garbled that Respondent (and the Board) are forced to guess at the intended argument. Respondent (and the Board) should not be put in that position and this section of the motion should be denied on that basis alone

The most likely reading of this section of the motion would be an exhortation to the Board to find as a matter of law that an "act of God" defense is insufficient unless accompanied by an allegation that there has been a "250- or 500-year flood or a heavy rainfall, combined with rapid snow melt, causing extreme stress and requiring emergency discharges to avoid structural failures." The Board has never articulated a specific rainfall standard that defines an "act of God." Indeed it would be difficult to do so because the intensity of a flooding event is not just determined by the amount of rain, but includes the period of rainfall, the intensity of the rain and weather conditions prior to the event.

> ...the Board has recognized that whether a claimed "act of God" defense is an affirmative defense cannot be divorced from the particular pleadings at issue. On a case-by-case basis, the Board has both granted and denied motions to strike weather-related affirmative defenses.

People v William Charles Real Estate Investment, PCB 10-108 (March 17, 2011) at 11.

Bruce is not the first person to seek to hold her local sanitary district responsible for sewer overflows and flooding due to heavy rainfall. The Town of Cicero filed, and lost (on a motion to dismiss), a suit against its local sanitary district for the July 2010 flooding event. "Cicero's sewage system reached capacity and then overflowed into the streets and homes in the area." *Town of Cicero v. Metropolitan Water Reclamation District,* 2012 IL App (1st) 112164 para. 8. The same heavy rainfall and flooding also occurred twelve miles away at the location of Highland Hills Sanitary District, in July of 2010. See Affirmative Defense #1 para. 19.

In *Cicero,* para. 28, the appellate court considered that same rainfall event and held that the "natural instances of heavy rainfall that caused Cicero's systems to back up until they

flooded parts of the town..." were not intended to serve as the basis for a suit against the local sanitary district.

> ...holding that the [Metropolitan Water Reclamation District] Act provides a right to be free from flooding and backup sewage and that the District can be sued under section 19 when its alleged failure to accurately anticipate instances of heavy rainfall causes flooding damage would effectively make the District an insurer of the public's real and personal property. In construing a statute, we presume that the General Assembly, in its enactment of legislation, did not intend absurd, inconvenient or unjust results. *Landis v. Marc Realty, L.L.C.*, 235 Ill. 2d 1, 12 (2009).
>
> *Cicero*, para. 33.

Bruce's motion also adds the boilerplate allegation that "the facts alleged in the affirmative defense do not support the defense," but does not explain why she believes that this is so. Section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615) states as follows:

> (a) All objections to pleadings shall be raised by motion. The motion shall point out specifically the defects complained of...
> (b) If a pleading or a division thereof is objected to by a motion to dismiss or for judgment or to strike out the pleading, because it is substantially insufficient in law, the motion must specify wherein the pleading or division thereof is insufficient.

Bruce's boilerplate objection fails to specify where and how the affirmative defense is factually insufficient and so should also be denied on the basis that it fails to comply with the Code of Civil Procedure.

Affirmative Defense #2 - Act of Third Party - Flagg Creek Water Reclamation District and Tributary Sources

"A motion to strike an affirmative defense admits the well-pled facts constituting the defense, as well as all reasonable inferences that may be drawn therefrom" (*Inverse Investments*, at 6) but Bruce's Motion to Strike fails to comply with that requirement. In her argument regarding the third party defense, Bruce speculates as to the existence of a contract, further speculates as to the terms of the contract, and argues principles of agency based on that

speculation. Here, as throughout the motion, Bruce cites no authority for her arguments. Finally Bruce reaches a conclusion about the District's ability to control third parties that directly contradicts facts pled in this affirmative defense. See Affirmative Defense #2, paragraphs 6-7, 11-13, 18-20, and 22-27.

The motion to strike as to the Second Affirmative Defense should be denied as the motion is based on a fictional contract and it fails to comply with the basic requirements for a motion to strike an affirmative defense.

Affirmative Defense #3 – Complainant and Mr. Bruce's Failure to Maintain the Private Sewer Line and Storm Sewer

The phrase "information and belief" appears in paragraphs 24, 28 and 30 of the Third Affirmative Defense. Bruce complains that "allegations made simply on information and belief are not a specific factual allegation to support a defense." She cites no authority for this and apparently she disagrees with the Illinois Code of Civil Procedure 2-605(a) (735 ILCS 5/2-605(a) which specifically recognizes that pleading on information and belief is acceptable.

> … In pleadings which are so verified, the several matters stated shall be stated positively or upon information and belief only, according to the fact.

Bruce also disagrees with the Illinois Supreme Court's ruling in *Green v. Rogers* 234 Ill.2d 478, 334 Ill. Dec. 624, 917 N.E.2d 450 (September 24, 2009). Although holding that given the heightened pleading standard in the defamation case before it, pleading on information and belief was not appropriate, the Court stated, on page 13 of its opinion, that "This does not mean that the facts constituting defamation *per se* may never be pled on information and belief. On the contrary, we recognize that pleading on information and belief will often be necessary."

The particular facts pled on information and belief; 1) that there is a storm sewer in her backyard, 2) that she has not replaced the check valve that failed on her private sewer line, and 3)

that she has been diverting sewage onto the ground since her check valve failed, are all peculiarly within her knowledge and possession. These facts should be known to Bruce and she had the opportunity to admit or deny them. Furthermore, the Third Affirmative Defense sets forth sufficient facts to meet the requirements of affirmative defense pleading even without those facts pled on information and belief.

The motion to strike the Third Affirmative Defense should be denied as Bruce's argument against it misstates the law and further Bruce's motion does not "admit the well-pled facts constituting the defense, as well as all reasonable inferences that may be drawn therefrom."

Affirmative Defense #4 – Travieso Residence

Bruce's response to the Fourth Affirmative Defense is that she disagrees with the District's interpretation. She gives no other reason or justification for striking this defense. She has not alleged that the affirmative defense is insufficiently pled. She will have the opportunity to argue her interpretation when the merits of this affirmative defense are decided. Meanwhile she has, as required in the Code of Civil Procedure and Board rules, been provided with advance knowledge of the defense. The motion to strike this affirmative defense should be denied.

Affirmative Defense #5 – General Equity

Bruce's argument in support of her motion to strike this defense is that "the complainant is not aware" of it. Nowhere in the Board's rules or the Code of Civil Procedure is the "awareness" of Mrs. Bruce (or for that matter, of her attorney, Mr. Stein) made a standard for the sufficiency of affirmative defenses.

Bruce bases her argument, such as it is, only on the section title (General Equity) and not on the facts or law alleged. She urges the Board to make its decision on the same basis. Illinois Code of Civil Procedure Section 2-613(d) (quoted above) lists specific affirmative

defenses and then provides two "generic" categories: 1) "any defense which by other affirmative matter seeks to avoid the legal effect of or defeat the cause of action," and 2) "any ground or defense, whether affirmative or not, which, if not expressly stated in the pleading, would be likely to take the opposite party by surprise." This affirmative defense meets the criteria for both generic categories and the Motion to Strike should be denied.

As she did in her motion to strike the First Affirmative Defense, Bruce raises the boilerplate allegation that the "allegations of the defense are not sufficient to support" it, without further illumination or argument. As such, her Motion to Strike fails to comply with Section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615) (quoted above) and should also be denied on that basis.

Affirmative Defense #6 – The 2003 Amendment to Section 31(d)(1) of the Illinois Environmental Protection Act is Not Retroactive

Bruce characterizes the Sixth Affirmative Defense as a legal argument and goes on to state, "this legal argument is not an affirmative defense but rather denial of the allegations of the amended complaint should be stricken." Again, this motion is garbled.

Forced to guess at its meaning; we assume that Bruce intended to assert that the District's defense was a denial rather than an affirmative defense. Addressing that argument, the District's Sixth Affirmative Defense meets the criteria of Code of Civil Procedure Section 2-613(d) (735 ILCS 5/2-613(d)) for an affirmative defense. It has asserted affirmative matter (the fact of the Illinois General Assembly's adoption of a change to the Illinois Environmental Protection Act allowing for the first time third parties to sue for violations of Board orders) which "seeks to avoid the legal effect of or defeat the cause of action set forth in the complaint." It also meets the criteria for a defense in that "if not expressly stated in the pleading, [it] would

be likely to take the opposite party by surprise." It does not deny any factual allegation of Bruce's Amended Complaint. It attacks Bruce's right to bring a cause of action in light of the statutory amendment, which Complainant did not address in her own pleadings. (See *Cole Taylor Bank v. Rowe Industries*, (June 6, 2002) at 7. "Lack of jurisdiction can be a valid affirmative defense." *People v. Peabody Coal,* PCB 99-134 (June 5, 2003) at 6.

The affirmative defense here is similar to an affirmative defense which was upheld in *People v. QC Finishers*, PCB 01-7 (June 19, 2003) at 9.

> In effect, the respondent argues that the Board cannot hear an alleged violation… The Board denies the complainant's motion to strike because, even accepting the complainant's allegation, QC Finishers asserts the Board lacks the authority to entertain an alleged violation ….

The Sixth Affirmative Defense asserts that the Board lacks the authority to entertain an alleged violation of the *Travieso* cease and desist order because the Board's authority to hear cases in which third parties allege violations of Board orders did not exist in 1979 at the time of the Travieso order. As in *QC Finishers* and *Peabody Coal* the affirmative defense attacks the legal sufficiency of the underlying cause of action and so is an appropriate affirmative defense. The Motion to Strike the Sixth Affirmative Defense should be denied.

Affirmative Defense #7 – Impossibility

Bruce characterized the Seventh Affirmative Defense as "essentially the same as" the act of God affirmative defense (First Affirmative Defense), and urges the Board to strike it for the "same reasons." Referring back to the garbled section of the Motion to Strike that related to the First Affirmative Defense, those "reasons" were at best a guess, and this section of the motion should be denied for that alone.

Again, guessing at the argument, Bruce appears to assert that only in the extreme circumstance of a 250 or 500 year flood with concomitant snow melt and structural damage, should the District be permitted to assert an act of God defense. In response, the District incorporates here, its response to the Motion to Strike the First Affirmative Defense, above.

Bruce is also incorrect in her characterization of the Seventh Affirmative Defense. Although both the First and Seventh Affirmative Defenses may be invoked during unusual rainfall events, they are not the same.

The First Affirmative Defense (act of God) raises the argument that it is not appropriate, or reasonable, to expect the District to act as an insurer or to be able to protect all of its residents against all possible weather related events.

The Seventh Affirmative Defense raises the argument that the District is caught in an untenable situation. It is not allowed to have a sewer overflow which could relieve the sewers and prevent backups, but it is also not allowed to cause backups. When its sewage flow overruns the sewer's or sewage treatment plant's capacity, either because of a severe storm or because Flagg Creek Water Reclamation District cannot accept it, or both, the Highland Hills Sanitary District literally has no legal options for preventing sewer backups. Ironically, it was placed in this situation by the Illinois Pollution Control Board when it was forced to tie into Flagg Creek's sewage treatment facilities. An even greater irony is that some portions of Flagg Creek's service area are on combined sewers and thus may be allowed to have overflows, and yet still send so much wastewater into the Flagg Creek facilities that, on rare occasions, there is no room left for the Highland Hills Sanitary District sewage.

The Board should deny the Motion to Strike as to the Seventh Affirmative Defense and permit the District to make its case that a combination of factual and regulatory circumstances

rendered it impossible for the District to comply with the Board's rules on some or all of the dates of Mrs. Bruce's alleged violations.

Affirmative Defense #8 – Statute of Limitations

Because the dates of the alleged sewer backups in 2010 were never pled or otherwise provided to the District, the District reserved the right to raise the affirmative defense of Statute of Limitations, as the first alleged backup date could be beyond the 5 year limitation period. Ironically, Bruce complains that the defense is pled conditionally (which it must be because the date is not known), but it is she that is solely responsible for that lack of information. She could easily cure it simply by revealing the date of the alleged backup. If she were to reveal the date on which she alleged the violation occurred, it would enable Respondent to either drop this affirmative defense or restate it without the conditional "may." Bruce wastes Respondent's time and the time of the Board by arguing the sufficiency of a reservation of right to assert an affirmative defense rather than simply revealing the "mystery date."

The Board has dealt with a reservation of right to assert an affirmative defense before in *People v. Cortland*, PCB 11-67 (November 3, 2011) page 7 and denied the motion to strike it. A reservation of rights puts the complainant on notice that respondent will defend on affirmative grounds if, and when, sufficient facts are available to support it. Therefore, it fulfills its function of avoiding "taking the other party by surprise." Pursuant to Board Procedural Rule 103.204(d) (35 Ill Adm. Code 103.204(d)) this defense could have been raised for the first time after the mystery date was revealed. However, raising it now serves administrative convenience in that it avoids another round of affirmative defenses and possible motions to strike.

In conclusion, all eight of the District's affirmative defenses meet the requirements of the Board's rules and the Code of Civil Procedure. They reasonably inform Bruce of the nature of the District's defense, are pled with the specificity equivalent to that of a complaint, and are legally cognizable. The Motion to Strike however is unsupported and misstates the law and should be denied in its entirety. If however, the Board grants Bruce's motion as to any of the affirmative defenses, the District requests leave to amend the affirmative defenses so as to address any insufficiencies of pleading the Board should find.

WHEREFORE Respondent respectfully requests that Complainant's Motion to Strike Affirmative Defenses be denied in its entirety.

Respectfully submitted,

Highland Hills Sanitary District
by its attorneys,
Podlewski & Hanson

Heidi E. Hanson

Dated: April 19, 2016

Joseph R. Podlewski Jr.
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CERTIFICATE OF SERVICE

I, the undersigned attorney, certify that I have served on April 19, 2016 the attached:

HIGHLAND HILLS SANITARY DISTRICT'S RESPONSE TO MOTION TO STRIKE AFFIRMATIVE DEFENSES

upon the Clerk's Office On-Line, Illinois Pollution Control Board by electronic filing before 4:30, and

upon the following, by email transmission before 4:30:

Bradley Halloran, Hearing Officer at the email address of Brad.Halloran@illinois.gov. (pursuant to 35 Ill Adm. Code 101.1060(d)),

Lawrence A. Stein at the email address of lstein@agdglaw.com (pursuant to April 5, 2016 consent).

The number of pages in the email transmission is fourteen (14) pages (including this Certificate).

My email address is heh70@hotmail.com.

Heidi E. Hanson

Dated: April 19, 2016

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