

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
) PCB No. 13-072
v.) (Water – Enforcement)
)
PETCO PETROLEUM CORPORATION,)
)
Respondent.)

**MOTION FOR PERMISSION TO FILE [1] SUR-SUR-REPLY TO COMPLAINANT’S
SUR-REPLY TO RESPONDENT’S REPLY TO COMPLAINANT’S RESPONSE IN
OPPOSITION TO RESPONDENT’S MOTION TO DISMISS COUNTS 62 THROUGH 73
OF THE FIRST AMENDED COMPLAINT AND [2] SUR-REPLY TO
COMPLAINANT’S REPLY TO RESPONDENT’S RESPONSE IN OPPOSITION TO
COMPLAINANT’S MOTION TO STRIKE RESPONDENT’S AFFIRMATIVE AND
ADDITIONAL DEFENSES TO THE FIRST AMENDED COMPLAINT AND
IMMATERIAL MATTER**

COMES NOW Respondent Petco Petroleum Corporation (“Petco”), by and through its undersigned counsel, and for its Motion For Permission to File [1] Sur-Sur-Reply to Complainant’s Sur-Reply to Respondent’s Reply to Complainant’s Response in Opposition to Respondent’s Motion to Dismiss Counts 62 Through 73 of the First Amended Complaint and [2] Sur-Reply to Complainant’s Reply to Respondent’s Response in Opposition to Complainant’s Motion to Strike Respondent’s Affirmative and Additional Defenses to the First Amended Complaint and Immaterial Matter, states as follows:

1. On October 20, 2022, the Board adopted for filing the People’s First Amended Complaint in this civil enforcement action brought pursuant to the Environmental Protection Act, 415 ILCS 5/1, *et seq.*

2. On January 18, 2023, Petco filed its Motion to Dismiss Counts 62 Through 73 of the First Amended Complaint and Answer, Affirmative and Additional Defenses to the First Amended Complaint (“Motion to Dismiss”).

3. On March 10, 2023, Complainant filed its: 1) Response in Opposition to Respondent's Motion to Dismiss Counts 62 Through 72 of the First Amended Complaint ("Response"); 2) Motion to Strike Respondent's Affirmative and Additional Defenses to the First Amended Complaint and Immaterial Matter ("Motion to Strike"); and 3) Reply to Respondent's Answer to the First Amended Complaint.

4. On April 19, 2023, Petco filed its: 1) Response in Opposition to Motion to Strike Respondent's Affirmative and Additional Defenses to the First Amended Complaint and Immaterial Matter; 2) Motion for Permission to File Reply to Complainant's Response in Opposition to Respondent's Motion to Dismiss Counts 62 Through 73 of the First Amended Complaint; and 3) Reply to Complainant's Response in Opposition to Respondent's Motion to Dismiss Counts 62 Through 73 of the First Amended Complaint.

5. On June 1, 2023, Complainant filed its: 1) Motion for Leave to File Sur-Reply to Respondent's Reply to Complainant's Response in Opposition to Respondent's Motion to Dismiss Counts 62 Through 73 of the First Amended Complaint; 2) Sur-Reply to Respondent's Reply to Complainant's Response in Opposition to Respondent's Motion to Dismiss Counts 62 through 73 of the First Amended Complaint ("Sur-Reply"); 3) Motion for Leave to File Reply to Respondent's Response in Opposition to Complainant's Motion to Strike Respondent's Affirmative and Additional Defenses to the First Amended Complaint and Immaterial Matter; and 4) Reply to Respondent's Response in Opposition to Complainant's Motion to Strike Respondent's Affirmative and Additional Defenses to the First Amended Complaint and Immaterial Matter ("Reply").

6. On June 8, 2023, the Hearing Officer and parties participated in a status conference. On that same date, the Hearing Officer issued an Order which set a unified deadline of July 10, 2023 for Petco to respond to Complainant's newest June 1, 2023 filings.

7. Pursuant to 35 Ill. Adm. Code 101.500(e), "[t]he moving person will not have the right to reply, except as the Board or the hearing officer permits to prevent material prejudice."

8. With respect to Petco's Motion to Dismiss, Complainant's Sur-Reply raises new and additional arguments that are not germane to the dispositive points of the Motion to Dismiss.

9. Contrary to the Sur-Reply's new contention, the public interest exception does not serve as the applicable "legal standard" on the statute of limitations issue. Instead, it can operate as an *exception* to the statute of limitations for common law claims as well as statutory causes of action where the General Assembly expressly adopts it. Here, neither the Environmental Protection Act nor Section 5/13-205 adopts the public interest exception. Instead, Section 5/13-205 provides that "*all* civil actions" not initiated within five years (unless a different statute of limitations applies, which here is not the case) are barred.

10. Additionally, the Sur-Reply now seeks a second bite at the apple regarding settlement communications and other cases between the parties that Complainant first raised in its initial Response. Complainant does not and cannot state that those discussions involved a tolling agreement or other mechanism through which the limitations period could be extended. Complainant now requests that the Board disregard Petco's responses to the State's mischaracterizations and injection of additional information into the briefs. Because they have no bearing on the legal analysis, resolving the application of the statute of limitations does not require an examination of settlement negotiations or collateral litigation. Consequently, the Board should not entertain Complainant's historical review of Petco's involvement in other matters.

11. With Respect to the Motion to Strike, Complainant's Reply improperly seeks to bolster its Motion with the addition of a table providing specificity that is not present in its Motion, and strays from applying the requisite pleading standards to embark on an extended policy discussion of the inordinately high pleading bar it seeks to impose on Petco and other respondents.

12. As such, Complainant's Sur-Reply and Reply raise new and additional issues that merit substantive and more detailed replies, which would assist the Board in rendering a ruling on this matter and prevent material prejudice to Petco.

13. Accordingly, Petco moves the Board to grant permission to file the Sur-Sur Reply and Sur-Reply, both of which Petco has attached to this Motion for Permission.

WHEREFORE, Respondent Petco Petroleum Corporation respectfully requests that the Board grant this motion and accept for filing Petco's [1] Sur-Sur-Reply to Complainant's Sur-Reply to Respondent's Reply to Complainant's Response in Opposition to Respondent's Motion to Dismiss Counts 62 Through 73 of the First Amended Complaint and [2] Sur-Reply to Complainant's Reply to Respondent's Response in Opposition to Complainant's Motion to Strike Respondent's Affirmative and Additional Defenses to the First Amended Complaint and Immaterial Matter.

Respectfully submitted,

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**SUR-REPLY TO COMPLAINANT’S REPLY TO RESPONDENT’S RESPONSE IN
OPPOSITION TO COMPLAINANT’S MOTION TO STRIKE RESPONDENT’S
AFFIRMATIVE AND ADDITIONAL DEFENSES TO THE FIRST AMENDED
COMPLAINT AND IMMATERIAL MATTER**

COMES NOW Respondent Petco Petroleum Corporation (“Petco”), by and through its undersigned counsel, and for its Sur-Reply to Complainant’s Reply to Respondent’s Response in Opposition to Complainant’s Motion to Strike Respondent’s Affirmative and Additional Defenses to the First Amended Complaint and Immaterial Matter, states as follows:

INTRODUCTION

In its Motion to Strike, Complainant asks the Board to make a draconian ruling—strike substantial portions of pleaded facts and defenses *with prejudice* from Petco’s Answer, Affirmative and Additional Defenses. The understanding of facts and memory of witnesses undoubtedly will have atrophied when discovery commences in this decade-long case. Yet, if Complainant’s request for relief is granted, Petco could be barred from repleading and updating the Answer and Affirmative and Additional defenses. As explained herein and in Petco’s Response in Opposition to the Motion to Strike (“Response”), the Motion misapplies the pleading standards under the Board’s rules and Illinois case law, and it fails on the merits. In its Reply, Complainant now improperly seeks to bolster its Motion by providing a table that purports to add specificity lacking in the Motion. Complainant also strays from the applicable pleading standards to embark on an

extended policy discussion of a new, inordinately high pleading bar that it seeks to impose on Petco as well as other defendants in enforcement actions. If left unanswered, these new arguments risk causing material prejudice to Petco.

ARGUMENT

I. Complainant's Reply Impermissibly Adds Table 1 in an Attempt to Cure The Motion's Failure to Identify With Particularly the Claimed "Immaterial Matter" Sought to be Stricken

Petco's Response showed that Complainant's argument regarding claimed "immaterial matter" ran afoul of 735 ILCS 5/2-615(a), which requires specific designation of the matter sought to be stricken. The Motion to Strike's vague language and string cite to a list of numbered paragraphs did not inform the Board or Petco of the matters challenged.

In its Reply, Complainant attempts to cure this issue by adding Table 1 with which Complainant for the first time provides 57 quotes from Petco's Answer (that Complainant incorrectly contends are immaterial). This action too runs afoul of Section 5/2-615, which requires that "[a]ll objections to pleadings shall be raised by *motion*. The *motion* shall point out specifically the defects complained of. . ." (emphasis added). "A claim raised for the first time in a reply brief is forfeited." *People v. Taylor*, 2019 IL App (1st) 160173, ¶ 41, 148 N.E.3d 708, 716 (1st Dist. 2019). Under the rules and principles of fundamental fairness, the Board should not consider Complainant's late presentation of this complained-of information.

Moreover, the information pleaded by Petco indeed is relevant to this case and satisfies the requisite pleading standards. Petco responded to the First Amended Complaint's allegations regarding water "tests" by pleading that the testing was on-site, preliminary, and at that time not confirmed or final. Whether the tests were preliminary or final lab-certified tests bear on their relevance, validity, and probative value to both the State's allegations and Petco's defenses. The

mere fact that certain of such “tests” were submitted to the State soon after the incidents does not immunize the First Amended Complaint’s pleaded facts from scrutiny. Similarly, the factual information pleaded by Petco regarding repairs and enhancements to equipment is relevant to assessing the duration, severity, and scope of the alleged violations, which is material to both liability and penalty issues. It is axiomatic that the number of days that a violation persists, the released volume, the steps taken to address and mitigate the incident, and swiftness and effectiveness of the environmental response are all material matters in a civil penalty case such as this. *See* 415 ILCS 5/42(h). Yet, Complainant tellingly is attempting to prevent Petco from raising facts and points that are statutory legal and factual defenses.

There is no prohibition against either party from pleading salient facts responsive to the others’ allegations based on the facts known today (nearly a decade later in this case) in the absence of any discovery. Again, Petco pleaded nearly all of these same facts in its Answer to the original Complaint in 2013. Only now does the State seek to remove substantial portions of responsive and sufficiently pleaded information from Petco’s Answer and to prevent discovery into these matters. Accordingly, Complainant’s request to strike this material should be denied.

II. The Pleading Burden Complainant Seeks to Impose on Respondents Is Inconsistent With Applicable Standards, Including 35 Ill. Adm. Code 103.204(d)

The Reply improperly embarks on a lengthy policy discourse about the relationship between the pleading and discovery phases that is untethered from case law or the text of 35 Ill. Adm. Code 103.204(d). *See* Reply at 3-5. Complainant seeks the imposition of a pleading standard that resembles a near complete recitation of the facts to be adjudicated at hearing and presented by Respondent at the initial stage of the claims. But, instead of proceeding to discovery, Complainant’s position is that, after atrophy from a decade of not having filed the claims, Petco must offer each and every fact at the outset of the enforcement matter. This is folly. Neither a

petitioner nor a respondent are required to prove their cases at the pleading stage. Rather, the parties must allege sufficient and ultimate facts stating a cause of action or defense and justifying further proceedings on the pleaded issues. *See People v. Serrano*, 2022 IL App (1st) 200622-U, ¶ 17, 2022 WL 910235, *3 (1st Dist. 2022). Moreover, in light of the Reply's repeated use of the term "evidence," it is rudimentary that "pleadings are not evidence." *Braunstein v. Shiner*, 2018 IL App (1st) 170062-U, ¶ 57, 2018 WL 2246185, at *10 (1st Dist. 2018) (internal citation omitted). Evidence acquired through discovery is used to prove or disprove allegations made in the pleadings. The issues of the case are initially presented at the pleading stage, and are subsequently refined and concentrated as the case progresses through discovery, evidentiary motion practice, and hearing or trial.

This basic progression from pleading to discovery through case disposition is entirely consistent with Illinois law. The purpose of discovery is "to facilitate the prosecution of cases and narrow the issues in order to expeditiously reach a disposition which fairly vindicates the rights of the parties." *Sander v. Dow Chem. Co.*, 166 Ill. 2d 48, 65, 651 N.E.2d 1071, 1079 (Ill. 1995); *accord Addo v. Aliloska*, 2015 IL App (1st) 140765-U, ¶ 85, 2015 WL 9594034, at *11 (1st Dist. 2015) ("the purpose of discovery is to facilitate disclosure of any matter relevant to the pending cause of action."); *Universal Metro Asian Servs. Ass'n v. Mahmood*, 457 Ill. Dec. 781, 195 N.E.3d 1197, 1210–11 (1st Dist. 2021) ("It is more than well established in Illinois that pretrial discovery is intended to enhance the truth-seeking process."). The elevated burden on respondents proposed by Complainant during the pleading stage contradicts these principles. *See Ainsworth Corp. v. Cenco Inc.*, 158 Ill. App. 3d 639, 645, 511 N.E.2d 1149, 1153 (Ill. App. 1987) ("The underlying reason for the liberalization of modern discovery rules is to replace the traditional 'combat' theory

of litigation with the more equitable principle that litigation should be a joint search for the truth.” (internal citation omitted)).

In addition, Complainant admits “[i]t is true that the Board in *Inverse Investments* allowed a respondent to bring a defense, rather than an affirmative defense, in response to a motion to strike.” Reply at 6. Yet, Complainant still contends that “[g]enerally speaking . . . if Respondent raises a mere defense at this stage in the pleadings, rather than an affirmative defense, it is properly stricken.” *Id.* That contention is just plain wrong. Section 5/2-613(d) specifically states: “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.” 735 ILCS 5/2-613 (emphasis added). It is noteworthy that Complainant does not address the governing rule for defenses in Section 5/2-613(d) at all. Petco can and must plead all of its defenses, whether affirmative or not, to properly apprise Complainant. Petco has done so and has met the standard.

Finally, Complainant’s wide-ranging Motion to Strike ignores the circumstances of this case. The original complaint was filed in June 2013. Nearly a decade later, in August 2022, the First Amended Complaint was filed. No discovery has been served, answered, or taken on any of the claims, let alone the eleven new counts. The case remains at the pleading stage after all this time, and yet Complainant seeks an order slicing through Petco’s answers and defenses at the outset. In effect, Complainant argues for the right to raise new causes of actions many years after their accrual and double the 5-year limitations period set forth in 735 ILCS 5/13-205 without allowing Respondent to assert defenses. Section 103.204(d) expressly permits pleading defenses “before hearing in the answer or in a supplemental answer.” Complainant’s request to strike with prejudice all of Petco’s affirmative defenses and other matter, which would erect a blanket

prohibition against pleading such affirmative defenses *before hearing* or in a supplemental answer, is plainly inconsistent with the text of Section 103.204(d), Petco's duty to apprise Complainant of all of its known defense, and with the customary progression of cases.

CONCLUSION

Based on the foregoing arguments and those set forth in its Response in Opposition to Motion to Strike Respondent's Affirmative and Additional Defenses to the First Amended Complaint and Immaterial Matter, Respondent Petco Petroleum Corporation has met the requisite pleading standards and therefore respectfully requests that the Board deny the Motion to Strike Respondent's Affirmative and Additional Defenses to the First Amended Complaint and Immaterial Matter. Petco alternatively requests that the Board grant leave to Petco to replead its Answer, Affirmative and Additional Defenses to cure any deficiencies that the Board should find.

Respectfully submitted,

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SUR-SUR-REPLY TO COMPLAINANT’S SUR-REPLY TO RESPONDENT’S REPLY TO COMPLAINANT’S RESPONSE IN OPPOSITION TO RESPONDENT’S MOTION TO DISMISS COUNTS 62 THROUGH 73 OF THE FIRST AMENDED COMPLAINT

COMES NOW Respondent Petco Petroleum Corporation (“Petco”), and for its Sur-Sur-Reply to Complainant’s Sur-Reply to Respondent’s Reply to Complainant’s Response in Opposition to Respondent’s Motion to Dismiss Counts 62 Through 73 of the First Amended Complaint, states as follows:

INTRODUCTION

Petco’s Motion to Dismiss presents the single legal issue of whether 735 ILCS 5/13-205 bars the twelve new counts in the First Amended Complaint, which the State raised for the first time eight to nine years after the occurrence of the underlying events. Now on the fifth round of briefing on this Motion, Petco seeks to focus the analysis back onto this single legal issue and the dispositive points.

First, the “public interest exception” is not the applicable “legal standard.” Rather, it is a judicial exception to the application of the statute of limitations, which has arisen from the common law and only is implicated when the General Assembly expressly adopts it into the statutes at issue. Here, Section 5/13-205 expressly includes *all* parties, including the State, when barring “*all civil*

actions” not commenced within five years and not otherwise subject to a different statute of limitations. Accordingly, Counts 62 through 73 of the First Amended Complaint are barred.

Second, the Sur-Reply seeks a second and different go at underlying settlement communications by requesting that the Board disregard Petco’s answers to the characterizations that that State itself raised in its Response in Opposition to the Motion to Dismiss. Resolving the legal issue of the statute of limitations does not require continued briefing on settlement negotiations or extraneous cases in other forums. The Board should therefore not consider the State’s multiple pages of oration on the history of matters in which Petco has been involved.

If left unanswered, these new arguments risk causing prejudice to Petco. The State is not entitled to the last word, especially when seeking to introduce new arguments and explanations in the latest round of briefing.

ARGUMENT

I. The “Public Interest Exception” or “Governmental Immunity” Are Not Legal Standards and Instead Are the Opposite—Exceptions or Defenses to the Rule When Courts Recognize Them For Common Law Claims and the General Assembly Codifies Them in a Statute

The text of Section 5/13-205 is clear and unambiguous, providing that “*all civil actions* not otherwise provided for, shall be commenced within 5 years next after the cause of action accrued.” 735 ILCS 5/13-205 (emphasis added). That is the applicable limitations standard in this case. The statute’s use of the term “all” means that *all* civil actions, whether initiated by a government entity or a private party, are subject to the five-year limitations period if there is no other express period. A claim to enforce the Environmental Protection Act, 415 ILCS 5/1, is a civil action. *See People ex rel. Madigan v. Stateline Recycling, LLC*, 2020 IL 124417, ¶ 1, 181 N.E.3d 887, 888–89 (Ill. 2020). Counts 62 through 73 are civil actions that occurred more than eight to nine years before the First Amended Complaint was filed, making those new counts untimely.

Complainant's Sur-Reply attempts to misdirect from the straightforward statutory analysis by arguing that the public interest exception or governmental immunity is the correct "legal standard" to apply, while Petco's reading of the statutory text is the "wrong legal standard." *See* Sur-Reply at 2-3. According to Complainant, "[t]he correct analysis examines governmental immunity, which exists when a governmental entity brings an enforcement action in the public interest." *Id.*

In so doing, Complainant inverts and reverses the meanings of a standard or rule versus an exception or defense. A standard is a "model accepted as correct by custom, consent, or authority." Black's Law Dictionary (11th ed. 2019). Similarly, a rule is "established and authoritative standard or principle; a general norm mandating or guiding conduct or action in a given type of situation." *Id.* On the other hand, an exception is "[s]omething that is excluded from a rule's operation." *Id.* Likewise, a legal defense is "[a] complete and adequate defense in a court of law." *Id.* An exception denotes a particular instance where the standard does not apply. An exception thus can only be defined with reference to a standard; without the standard, there would be no exception. Along the same lines, there can be no defense unless a claim or standard is filed or argued.

Here, the standard is the statute, Section 5/13-205, enacted by the Illinois General Assembly which, by its plain terms, applies to the civil actions in Counts 62 through 73. The three conditions necessary for the public interest *exception* to apply are: (1) the General Assembly codified the exception in the text of the Environmental Protection Act and/or Section 5/13-205; (2) the statute does not apply to the government; and (3) the government's action is brought pursuant to the public interest per the three-factor public interest analysis. Conditions 1 and 2 are not satisfied here because: (a) the public interest exception appears nowhere in the text of either the Environmental Protection Act or Section 5/13-205; and (b) Section 5/13-205 plainly applies to

“all civil actions” without distinguishing between government and private party actions. The State does not dispute that the present action is a civil action. Therefore, Section 5/13-205 explicitly applies to the State and bars its untimely claims in Counts 62 through 73.

Moreover, Complainant’s Sur-Reply cites two additional Board opinions which are decades-old decisions that could have been cited previously, are inapposite, and do not impact the requisite statutory analysis. *See* Sur-Reply at 6. In both *Lake County Forest Preserve*, PCB 92-80, slip op. at 4-5 (July 30, 1992) and *Landfill Emergency Action Comm.*, PCB 85-9, slip op. at 4 (Mar. 22, 1985), the Board cited to *Pielet Bros. Trading, Inc. v. IEPA and IPCB*, 110 Ill. App. 3d 752, 442 N.E. 2d 1374 (5th Dist. 1982) for the proposition that Section 5/13-205 is a limitation on “personal actions” as opposed to State enforcement actions. However, *Pielet Bros* analyzed the text of Section 14 of the Limitations Act, 415 ILCS 5/13-202, not Section 5/13-205. The statutes are materially different. Section 5/13-205 includes the ‘catchall’ provision at issue here: “all civil actions not otherwise provided for, shall be commenced within 5 years next after the cause of action accrued.” In contrast, Section 5/13-202 does not include any text regarding civil actions. That statute thus provides no guidance and is of no import. The parties in those cases likewise did not present and argue the dispositive language contained in Section 5/13-205. Accordingly, the Board should disregard these newly introduced citations in the Sur-Reply.

II. Complainant Cannot Have It Both Ways in Raising What Should be Irrelevant Settlement Discussions and Other Cases Involving Petco, But Now Prevent and Rejoin Petco from Showing that Such Discussions and Other Matters Have No Bearing in Applying the Statute of Limitations

In its initial Response, Complainant first raised the history of settlement negotiations and its litigation with Petco in other venues, contending in the first four pages and concluding comments of the brief that settlement negotiations have reached an “impasse” despite “years of good faith efforts on the part of the State to work with Respondent to achieve a workable solution”

and “[n]ew violations by Petco gave rise to new actions.” Response at 1-4, 18-20. Complainant seeks to pin its own delay filing Counts 62 through 73 on the history of litigation with Petco, despite no tolling agreement or other circumstances that would delay the running of the limitations period. *See* Response at 18 (“Petco’s own failure to comply with previous court orders, or to reach a settlement agreement, have resulted in the filing of the First Amended Complaint.”). In its Reply, Petco responded to this jaundiced description by providing the Board with a brief timeline of Petco’s repeated requests for meetings and responses from the State from late 2021 through April 2023. Reply at 7-8. The purpose of the timeline is and was to show that Complainant’s use of settlement discussions and other cases is both irrelevant and full of inaccuracy.

In the Sur-Reply, Complainant now seeks to have it both ways by claiming that Petco “seeks to stray into discussing communications between the parties following the impasse, adding its own spin those correspondences” and asking the Board to disregard “[a]ny further discussion *by Petco* of settlement correspondences, or attempted settlement correspondences.” Sur-Reply at 7-8 (emphasis added). Rather than ignore only one party’s description of settlement efforts and other cases, Petco offers a simple solution to the Board (on which Petco has been consistent through the briefs): ignore the settlement discussions and other litigation entirely because they are irrelevant to the application of the five-year limitations period set forth in 5/13-205. Complainant has no excuse for filing Counts 62 through 73 nearly a decade after the claims accrued.

CONCLUSION

Based on the foregoing arguments and those set forth in its Motion to Dismiss Counts 62 Through 73 of the First Amended Complaint, and Reply to Complainant’s Response in Opposition to Respondent’s Motion to Dismiss Counts 62 Through 73 of the First Amended Complaint, Respondent Petco Petroleum Corporation requests that the Board dismiss with prejudice Counts

62 (LXII) through 73 (LXXIII) of the First Amended Complaint, that judgment be entered in its favor and against Complainant, and that Petco Petroleum Corporation be granted any other any further relief as the Board deems proper under the circumstances.

Respectfully submitted,

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