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)

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Pollution Control Board

NOTICE OF FILING AND PROOF OF SERVICE

TO: See Attached Service List

PLEASE TAKE NOTICE that on June 25, 2007, the attached document, **Complainant's 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 25th day of June, 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 MOTION TO STRIKE BURLINGTON NORTHERN AND SANTA FE'S AFFIRMATVE 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"), moves to strike the affirmative defenses of Respondent, Burlington Northern and Santa Railway Company ("BNSF"). In support thereof, Indian Creek states as follows:

INTRODUCTION

This matter involves a release of diesel fuel on January 20, 1993 on the BNSF Property which is owned and operated by the BNSF. The Complaint alleges that property owned by Indian Creek ("Indian Creek Property") continues to receive soil and groundwater contamination flowing from the BNSF Property fourteen (14) years after the release (Complaint, Paragraphs 11, 17, 24, 37). In 1996, prosecutors filed a civil enforcement action in Circuit Court and obtained a consent decree against the BNSF

which expressly denies rights of third parties and precludes enforcement by third parties such as Indian Creek (Consent Order (Complaint Exhibit A), Pages 2, 30 at Paragraph K). The Consent Order acknowledges that the BNSF has not fully remediated the diesel fuel contamination on the BNSF Property and requires the BNSF to identify potential pathways of migration of the diesel fuel, contaminated soil and groundwater along with the identification of potentially affected human and environmental receptors. (Consent Order (Complaint Exhibit A), Page 6 at Paragraphs 2(3) 5). In its previous Motion to Dismiss, claiming that this action is duplicative of the prior consent order, the BNSF stated:

> Under the Consent Decree, BNSF, among other things, assumed full responsibility for the cleanup, paid a civil penalty and agreed to cease and desist from future violations of the Act. (Respondent's Memorandum in Support of its Motion to Dismiss ("Memo") at 5.)

Fourteen (14) years after the release, near the midway point of the second decade after the initial incident and despite its prior position, in its Answer herein the BNSF denies liability and pleads six claimed affirmative defenses: the statute of limitation, the alleged failure of Indian Creek to mitigate its damages, waiver of its rights, estoppel, laches and the alleged failure of Indian Creek to adequately identify its damages. The alleged affirmative defenses range from one to three sentences each and fail to specify the count or counts to which they are intended to apply. The BNSF pled the following:

> **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's alleged affirmative defenses are wholly conclusory and not pled with sufficient particularity. 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.

ARGUMENT

Illinois is a fact pleading jurisdiction, 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 (1st Dist. 1997). 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. *Id.*

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); Richco Plastic Co., *supra.* In determining the sufficiency of any claim or defense, conclusions of fact or law that are not supported by allegations of specific fact will be ignored. Richo Plastic Co, *supra.*, Knox College, *supra*; Curtis v. Birch, 114 Ill. App. 3d 127, 448 N.E.2d 591 (1983). 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).

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). 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), citing People v. Community Landfill Co., PCB 97-193, slip op. at 3 (Aug. 6, 1998). The Board has also defined an affirmative defense as a "response to a plaintiff's claim which attacks the plaintiff's legal right to bring an action, as opposed to attacking the truth of claim." Grand Pier Center LLC, PCB No. 05-157, slip op. at 4, quoting Farmer's State Bank v. Phillips Petroleum Co., PCB 97-100, slip op. at 2 n. 1 (Jan. 23, 1997). Furthermore, if the pleading does not admit the opposing party's claim, but instead attacks the sufficiency of that claim, it is not an affirmative defense. Grand Pier Center LLC, PCB No. 05-157, slip op. at citing Worner Agency v. Doyle, 121 Ill. App. 3d 219, 221, 459 N.E.2d 663, 635 (4th Dist. 1984). Accordingly, the alleged failure to adequately specify damages is not an

affirmative defense at all and should be stricken for this reason alone. Here the BNSF has completely failed to plead other than sheer conclusions. Given the complete lack of proper pleadings, it is difficult to determine whether some of the alleged affirmative defenses are defenses at all. The affirmative defenses must be stricken.

WHEREFORE, Complainant, Indian Creek, respectfully requests that the Pollution Control Board enter an order striking Respondent's affirmative defenses and grant Indian Creek such further and other relief as this Board deems just and proper.

Respectfully submitted,

INDIAN CREEK

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