

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

In the Matter of:	)	
	)	
WEGLARZ HOTEL III, L.L.C.	)	
WEGLARZ HOTEL IV, L.L.C.	)	
WEGLARZ HOTEL V, L.L.C.	)	
	)	PCB 2019-064
Complainants,	)	
	)	
v.	)	
	)	
THE BELT RAILWAY	)	
COMPANY OF CHICAGO,	)	
	)	
Respondent	)	

**NOTICE OF FILING**

Please take notice that today we filed with the Clerk of the Illinois Pollution Control Board (“Board”) Complainants Weglarz Hotel III, L.L.C., Weglarz Hotel IV, L.L.C., and Weglarz Hotel V, L.L.C.s’ (Weglarz Hotels) Response in Opposition to The Belt Railway Company’s Motion for Permission to File Reply in Support of Motion to Stay Proceedings, a copy of which is served upon The Belt Railway Company.

Respectfully submitted,



Charles A. Spitulnik  
Allison I. Fultz  
Kaplan Kirsch & Rockwell LLC  
1001 Connecticut Avenue, N.W.  
Suite 800  
Washington, DC 20036  
(202) 955-5600  
[cspitulnik@kaplankirsch.com](mailto:cspitulnik@kaplankirsch.com)  
[afultz@kaplankirsch.com](mailto:afultz@kaplankirsch.com)

Richard J. Skrodzki  
Donald S. Rothschild  
Goldstine, Skrodzki, Russian, Nemeč and  
Hoff, Ltd.  
835 McClintock Drive, Second Floor  
Burr Ridge, Illinois 60527-0860  
(630) 655-6000 x230  
[RJS@gsrnh.com](mailto:RJS@gsrnh.com)  
[DSR@gsrnh.com](mailto:DSR@gsrnh.com)

*Attorneys for Weglarz Hotel III, L.L.C.,  
Weglarz Hotel IV, L.L.C., and Weglarz  
Hotel V, L.L.C.*

December 17, 2018

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THE BELT RAILWAY )  
COMPANY OF CHICAGO, )  
)  
Respondent )

**WEGLARZ HOTELS' RESPONSE IN OPPOSITION TO THE BELT RAILWAY  
COMPANY OF CHICAGO'S MOTION FOR PERMISSION TO FILE  
REPLY IN SUPPORT OF MOTION TO STAY PROCEEDINGS**

Weglarz Hotels files this Response in Opposition to The Belt Railway Company of Chicago's ("BRC") Motion for Permission to File a Reply in support of the Motion to Stay Proceedings (Motion for Permission). The Board's rules prohibit the filing of a reply unless a party demonstrates that a reply is necessary to "prevent material injustice." See 35 Ill. Admin Code § 101.500(e). BRC fails to satisfy that high standard.

First, BRC provides no basis or explanation for its assertion that a reply is necessary to prevent material prejudice. Under the Board's rules, a conclusory assertion of material prejudice does not justify granting leave to file a reply. As the Board has stated, "[a] bald assertion that material prejudice will result is not sufficient for the Board to grant a motion for leave to file." *People of the State of Illinois v. Skokie Valley Asphalt, Co., Inc.*, PCB No. 96-98, 2003 ENV.

LEXIS 312, \*5 (June 5, 2003) (denying motion for leave to file reply because party showed “no further information” other than a mere assertion of material prejudice).

Second, there is no merit in BRC’s claim that a reply is necessary given the “extraordinary nature” of Weglarz Hotels’ arguments that BRC states it did not “anticipate” in filing its Motion to Stay. The assertion that BRC did not anticipate that Weglarz Hotels would apply the Board’s standard for considering a *motion to stay* in response to a *motion to stay* defies logic. Whether BRC unwittingly, or deliberately, disregarded the Board’s standard, BRC’s interest in remedying its omission of that standard in its Motion to Stay does not justify a reply.

Third, there is nothing “extraordinary” or prejudicial about a Weglarz Hotels’ *comment in a footnote* indicating that, contrary to BRC’s contention, the Board is an appropriate forum to address BRC’s federal preemption defense and, in fact, federal courts have deemed state administrative agencies well-equipped to address preemption. The issue of *Younger* abstention is not germane to the question of whether a stay of these proceedings is justified, and BRC has made no showing that it will be materially prejudiced if it cannot reply to the footnote.

Without establishing any material prejudice, BRC fails to justify what is essentially a second bite of the apple with respect to its request for a stay of these proceedings. The Motion for Permission should be denied.

**I. There is nothing extraordinary or prejudicial about Weglarz Hotels’ arguments under the applicable motion to stay standard that would justify a reply.**

It is a well-established principle that arguments omitted from a motion or opening brief are waived and cannot be raised in a reply. *See e.g. Slates v. Illinois Landfills, Inc.*, PCB No. 93-106, 1993 Ill. ENV LEXIS 956, \*21 n.3 (Sept. 23, 1993) (finding that a “claim was raised for the first time in the reply brief,” and therefore, the Board “will not consider that claim.”); *see also DOT v. Dalzell*, 2018 IL App (2d) 160911, ¶ 126 (under appellate rules, an “appellant's arguments must

be made in its opening brief and cannot be raised for the first time in the reply brief”). BRC acknowledges the Board’s “4-part, state law test” applied to motions to stay (Motion for Permission ¶ 6; Proposed Reply ¶ 7), but opted for a different tactic in its Motion. In its Motion to Stay, BRC sought to convince the Board of the purported likelihood of success of BRC’s preemption claim, rather than address, distinguish, or even reference the Board’s standard in the Motion to Stay. Therefore, BRC has waived its right to present new arguments that address the Board’s standard for granting a stay in a proposed reply. *Slates*, 1993 Ill. ENV LEXIS 956, at \*21 n.3.

BRC does not claim that the Board’s standard set forth in Weglarz Hotels’ response was “new information” or contained “errors and misstatements” – issues that could present the risk of material prejudice. See Motion for Permission ¶ 3. BRC merely states that it never “anticipated” Weglarz Hotels’ raising the standard and – without citing to any legal authority – contends that the standard is not applicable. See Motion for Permission ¶ 6; see also Proposed Reply ¶¶ 7, 8. However, under the Board’s rules, allowance of a reply is intended only to prevent material prejudice, and is not an opportunity for a party to revise its original motion. Allowing BRC now to reply to the applicable standard set forth by Weglarz Hotels would turn the movant’s burden on its head, and would prevent Weglarz Hotels from meaningfully responding to BRC’s Motion to Stay under the applicable standard.

Finally, BRC makes no showing it would be materially prejudiced if it does not have the opportunity to present arguments in a reply that it should have made in its Motion to Stay.

**II. Weglarz Hotels’ footnote in its Response to the Motion to Stay does not result in a material prejudice to BRC.**

Rather than seek to justify a stay under the Board’s standards, much less explain why that standard does not apply, BRC’s Motion to Stay attempts to convince the Board not to proceed,

because any regulation of BRC is preempted by federal law. *See generally* Motion to Stay. As explained in Weglarz Hotels' Response, the merits of BRC's federal action are not relevant to Motion to Stay. Footnote 3 in Weglarz Hotels' Response simply reiterates that federal courts have deemed state administrative agencies like the Board capable of adjudicating preemption arguments, and that the Federal District Court "could elect" to do the same if presented with the issue in BRC's federal action. *See* Response at 10, n.3. Whether Weglarz Hotels' enforcement action forms the basis for *Younger* abstention (*see* Motion for Permission ¶ 5) is a question for the Federal District Court, and not the Board. Nothing negates the import of the footnote – that is, contrary to BRC's position, the Board is an appropriate forum to address any preemption defense raised by BRC.

BRC's Motion for Permission fails to show that any material prejudice would result if BRC is not afforded an opportunity to reply to the footnote. Where no material prejudice exists, arguments that a party must respond to another party's "interpretation of law" or that a reply will "help to narrow issues" are "insufficient grounds to allow a reply when an objection has been raised." *People of State of Illinois v. Tradition Investments, LLC*, PCB No. 11-68, 2011 Ill. ENV. LEXIS 452, \*4 (Oct. 6, 2011) (citing 35 Ill. Adm. Code 100.500(e)). Thus, absent a showing of material prejudice, BRC's interests in replying to the footnote by further discussing the merits of its federal action does not justify a reply.

#### **CONCLUSION**

Accordingly, the Board should deny BRC's Motion for Permission and should not consider BRC's Proposed Reply. For the reasons stated in the Weglarz Hotels' Response the Motion to Stay, BRC's request to stay this proceeding should be denied.

Respectfully submitted,



Charles A. Spitulnik  
Allison I. Fultz  
Kaplan Kirsch & Rockwell LLC  
1634 Eye Street, N.W.  
Suite 300  
Washington, DC 20006  
(202) 955-5600  
[cspitulnik@kaplankirsch.com](mailto:cspitulnik@kaplankirsch.com)  
[afultz@kaplankirsch.com](mailto:afultz@kaplankirsch.com)

Richard J. Skrodzki  
Donald S. Rothschild  
Goldstine, Skrodzki, Russian, Nemecek and  
Hoff, Ltd.  
835 McClintock Drive, Second Floor  
Burr Ridge, Illinois 60527-0860  
(630) 655-6000 x230  
[RJS@gsrnh.com](mailto:RJS@gsrnh.com)  
[DSR@gsrnh.com](mailto:DSR@gsrnh.com)

*Attorneys for Weglarz Hotel III, L.L.C.,  
Weglarz Hotel IV, L.L.C., and Weglarz  
Hotel V, L.L.C.*

**CERTIFICATE OF SERVICE**

I, Allison I. Fultz, the undersigned, do certify that on December 17, 2018, I served copies of the foregoing Notice of Filing and Response of the Weglarz Hotels In Opposition to the Belt Railway Company of Chicago's Motion for Permission to File Reply in support of Motion to Stay Proceedings, The Belt Railway Company of Chicago and its counsel, at the address listed below by electronic mail and certified U.S. Mail with return receipt requested to the person listed on the Notice of Filing.

Timothy E. Coffey  
General Counsel, Secretary & Director of Human Resources  
The Belt Railway Company of Chicago  
6900 South Central Avenue  
Bedford Park, Illinois 60638  
[tcoffey@beltrailway.com](mailto:tcoffey@beltrailway.com)

Thomas J. Litwiler  
James D. Helenhouse  
Brandon M. Thompson  
Fletcher & Sipperl LLC  
29 North Wacker Drive  
Suite 800  
Chicago, IL 60606-3208  
[tlitwiler@fletcher-sippel.com](mailto:tlitwiler@fletcher-sippel.com)  
[jhelenhouse@fletcher-sippel.com](mailto:jhelenhouse@fletcher-sippel.com)  
[bthompson@fletcher-sippel.com](mailto:bthompson@fletcher-sippel.com)

Respectfully submitted,



Allison I. Fultz

December 17, 2018