BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS, by KWAME RAOUL, Attorney General of the State of Illinois Complainant, v. SIX M. CORPORATION INC., an Illinois, corporation, and THOMAS MAXWELL, an individual, Respondents, and JAMES MCILVAIN, Necessary Party.	)	PCB No. 12-035 (Enforcement – LUST/Water)

NOTICE OF FILING COMPLAINANT'S MOTION FOR LEAVE TO REPLY AND REPLY

PLEASE TAKE NOTICE that on February 21, 2019, I caused to be filed with the Clerk of the Illinois Pollution Control Board via "COOL" System the attached Motion for Leave to Reply and Reply.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,
KWAME RAOUL
Attorney General of the State of Illinois

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS, by KWAME RAOUL, Attorney General of the State of Illinois Complainant, v. SIX M. CORPORATION INC., an Illinois, corporation, and WILLIAM MAXWELL, an individual, Respondents, and JAMES MCILVAIN, Necessary Party.	)	PCB No. 12-035 (Enforcement – LUST/Water)

COMPLAINANT'S MOTION FOR LEAVE TO REPLY INSTANTER AND REPLY TO RESPONDENTS' OPPOSITION TO MOTION TO STRIKE RESPONDENTS'AFFIRMATIVE DEFENSE

NOW COMES COMPLAINANT, People of the State of Illinois, *ex rel*. KWAME RAOUL, Attorney General of the State of Illinois, pursuant to Section 101.500(e) of the Illinois Pollution Control Board's ("Board") procedural rules, 35 Ill. Adm. Code 101.500(e), and respectfully moves the Board for leave to file its Reply to Respondents' Opposition to Complainant's Motion to Strike Respondents' Affirmative Defense ("Opposition"), and replies instanter. In support of this motion, the Complainant states as follows:

MOTION FOR LEAVE TO REPLY INSTANTER

Section 101.500(e) of the Illinois Pollution Control Board's ("Board") procedural rules, 35 Ill. Adm. Code 101.500(e) provides in pertinent part:

> The moving person will not have the right to reply, except as permitted by the Board or the hearing officer to prevent material prejudice. A motion

> for permission to file a reply must be filed with the Board within 14 days after service of the response.

Respondents' Opposition collaterally attacks the First Amended Complaint and cites inapplicable case law out of its proper context, and as such the Complainant would be materially prejudiced if not permitted to address it. First, Respondents cite a series of federal decisions in cases brought under the citizen suit provision of the Resource Conservation and Recovery Act, 42 U.S.C.§ 6972(a)(1)(B) ("RCRA") (2016), wherein federal courts were willing to entertain a possible affirmative defense based on refusal of access to contaminated property that is the subject of the suit where citizen suit plaintiffs bringing the suit are alleged to be using the federal environmental laws for the plaintiff's own financial advantage. Opposition at pp. 6-8. This line of case law is irrelevant to a State enforcement action brought under Illinois law. Second, Respondents improperly attack the First Amended Complaint, arguing its improper affirmative statements are justified because "many of the allegations in the complaint contain conclusions, and not facts…" Opposition at p. 8. Respondents waived their opportunity to attack the sufficiency of the First Amended Complaint when they filed their Answer instead of a motion to dismiss.

Complainant should be granted the opportunity to address these arguments and file the following reply.

COMPLAINANT'S REPLY TO RESPONDENTS' OPPOSITION TO COMPLAINANT'S MOTION TO STRIKE AFFIRMATIVE DEFENSE

A. Federal RCRA Precedent Regarding Citizen Suits has no bearing on this State Enforcement Proceeding.

Despite the lack of Board precedent for the existence of an "impossibility" affirmative defense, *see e.g.* Motion at p. 4, Respondents rely on a line of case law regarding the citizen suit provision of RCRA, 42 U.S.C.A. § 6972 in their Opposition. *Carlson v. Ameren Corp.*, 41 Envtl.

L. Rep. 20074 (C.D. Ill. 2011); *Aurora Nat'l Bank v. Tri Star Mktg.*, 990 F. Supp. 1020, 1025-26 (N.D. Ill. 1998); *Albany Bank & Trust Co. v. Exxon Mobil Corp.*, 310 F.3d 969, 973 (7th Cir. 2002). The crux of the issue in these cases was not that refusal of access made compliance "impossible", but rather whether or not, as a matter of public policy, there would be a perverse incentive to allow a finding of liability in a citizen's suit where the plaintiff is in a position to extort profit from the defendant by withholding access. For example, in *Aurora*, the court reasoned that there is no question that the defendant was liable for the remediation, the only question was whether or not plaintiff's conduct undermined their specific authority under 42 U.S.C.A. § 6972 of RCRA, because "the citizen suit provision of the RCRA only allows claims by parties "acting as private attorneys general rather than [those] pursuing a private remedy." 990 F. Supp. at 1026. Thus "if plaintiffs here have impeded the enforcement of environmental laws for their own financial advantage, they have not acted consistent with the purpose of the statute and a finding of liability would not be warranted." *Id.* This matter is not a citizen suit brought by a private party with a potential conflict of interest, but rather an enforcement action brought to enforce a public right.

Likewise in *Carlson*, the Central District only declined to strike the defense because "[i]n this case, there are allegations that the Carlsons are acting for personal gain and that they are attempting to use the federal environmental laws for their own financial advantage." Slip Op. at p. 3. It should be noted that while Respondents' affirmative defense alleges that Necessary Party James McIlvain demands a new access agreement with additional compensation, it does not go so far as to allege that McIlvain is abusing this enforcement action for personal financial gain, only that a new access agreement is unwarranted. *See e.g.* Answer at p. 21, ¶20 ("Since the access was needs [sic] to investigate the adequacy of the remediation efforts taken on the McIlvain's property prior to the 2006 incident, and there was no evidence that the 2006 incident

contaminated the McIlvains' property, the demand for more money was inappropriate."). At best Respondents allege a disagreement about the scope of their original access agreement and whether or not the 2006 incident caused additional contamination Respondents even note that in *Albany*, a lack of allegations that the plaintiff sough "additional private payments unrelated to environmental law" made it distinguishable from *Aurora*. 310 F.3d at 973. Once again, the concerns raised in federal RCRA citizen suits are not relevant here because this enforcement action is brought by the State, not the owner of the contaminated property at issue, and the State has no profit motivation for enforcement of the Act.

Moreover, an enforcement action under the Act is distinguishable from a RCRA citizen suit as the Act contains key provisions that circumvent potential extortionary refusal of access. First, as explained in Complainant's Motion at pp. 5-7, Board regulations do not require remediation of off-site property where access has been refused and provide procedures for requesting access and documenting denial thereof. *See* Sections 734.325(b) and 734.350 of the Board Underground Storage Tank Regulations, 35 Ill. Adm. Code 734.345(b) and 734.350. However, as Respondents admit in their affirmative defense, they have "**so far declined to use the available procedure."** Answer at p. 22, ¶28 (emphasis added).

Furthermore, the Act allows a respondent to sue for access under Section 22.2c of the Act, 415 ILCS 5/22.2c (2016). The Act also provides for the indemnification "costs incurred as a result of a release of petroleum from an underground storage tank" under Section 57.8(c), 415 ILCS 5/57.8(c) (2016) where "there is a legally enforceable judgment" or reasonable third party settlement. As Respondents have failed to provide relevant authority in support of their affirmative defense, it should be dismissed.

B. It is Improper for Respondents to Use Their Opposition to Complainant's Motion to Strike to Attack the Sufficiency of the First Amended Complaint.

Rather than address the merits of Complainant's arguments regarding the improper pleading of affirmative matters in its Answer, Respondents' Opposition, at pp. 8-9, attempts to deflect the issue by attacking the propriety of the allegations of the First Amended Complaint. The time to attack defects within the four corners of a complaint is prior to answering the complaint, or such objections are considered waived. *Fox v. Heimann*, 375 Ill. App. 3d 35, 43 (1st Dist. 2007) ("[W]here a defendant files an answer to a complaint, any defect in the pleading is waived."). Moreover, in attacking the Complainant's pleading, Respondents provide no argument in response to Complainant's contention that the affirmative statements pled in its Answer are improper. As Respondents' Opposition fails to address the impropriety of these affirmative matters, Complainant's Motion should be granted and all non-responsive affirmative allegations within the Answer, including but not limited to Count I, ¶¶4, 17, 19, 21, 26, 27, and 33; Count II, ¶¶33 and 36; Count III, ¶¶21, 22, 23, and 24; and Count IV, ¶¶24, 25, 26, 27, 32, 33, and 34, should be stricken.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY FIRST CLASS MAIL

I, Elizabeth Dubats, do certify that I caused to be served this 21st day of February, 2019, Complainant's Motion to for Leave to Reply and Reply to Respondents Opposition to Complainant's Motion to Strike Respondents' Affirmative Defense, upon the person listed below by placing a in the envelope bearing sufficient first class postage with the United States Post Office at 100 W. Randolph Street, Chicago, IL 60601.

Patrick Shaw
Law Offices of Patrick Shaw
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/s/ Elizabeth Dubats
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