BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

JOHNS MANVILLE, a Delaware corporation,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB No. 14-3
	)	(Citizen Suit)
ILLINOIS DEPARTMENT OF TRANSPORTATION,	)	
	)	
	)	
Respondent.	)	

NOTICE OF FILING AND SERVICE

To: ALL PERSONS ON THE ATTACHED CERTIFICATE OF SERVICE

Please take note that today, May 4, 2016, Respondent, Illinois Department of Transportation, filed and served IDOT's Response to Complainant's Partial Motion to Strike Affirmative Defenses with the Clerk of the Pollution Control Board, a copy of which are hereby served upon you.

Respectfully Submitted,

By: _____

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IDOT'S RESPONSE TO COMPLAINANT'S PARTIAL MOTION TO STRIKE RESPONDENT'S AFFIRMATIVE DEFENSES

I. INTRODUCTION

As discussed in detail below, IDOT's Answer, and the relevant affirmative defenses contained therein: 1) comply with the Board's March 3 Order; 2) were timely filed before hearing in this matter and create no prejudice to the Complainant; and 3) asserts affirmative matters that negate Complainant's claims, making each a valid affirmative defense in the context of this matter. For these reasons the Board should deny the Complainant's Motion.

II. STATEMENT OF FACTS

On September 4, 2014, the Illinois Pollution Control Board ("Board") issued an Order ruling on the Illinois Department of Transportation's ("IDOT") Section 2-619.1 Motion to Dismiss filed in response to Johns Manville's First Amended Complaint, stating in part that "IDOT is entitled to respond to the complaint in its new form." (Sept. 4 Order, at 4.)

On March 3, 2016, the Board issued an Order granting Johns Manville ("Complainant") leave to file its Second Amended Complaint ("SAC"), and Respondent, the IDOT until April 12, 2016, to file its Answer. See March 3, 2016 Order of the Board, at p. 3. The March 3 Order also directed the hearing officer to set a new discovery deadline and new hearing date consistent with

the Order, and nothing else. On April 12, 2016, IDOT filed its Answer and Affirmative Defenses to Johns Manville's SAC ("Answer"). On April 20, 2016, the Complainant filed its Partial Motion to Strike Respondent's Affirmative Defenses ("Motion"), asserting that IDOT's fifth, sixth, and seventh affirmative defenses ("relevant affirmative defenses"): 1) undermine the spirit of the Board's March 3 Order; 2) are akin to an amended pleading and are untimely and prejudicial; and 3) that the sixth and seventh affirmative defenses do not qualify as valid affirmative defenses.

III. ARGUMENT

A. IDOT'S ANSWER COMPLIES WITH THE BOARD'S MARCH 3, 2016 ORDER

Complainant contends that IDOT's fifth, sixth, and seventh affirmative defenses, filed with the Answer, are barred by the March 3 Order, arguing that the March 3 Order expressly limits IDOT to filing an Answer only. See, Motion at p. 7. Complainant's argument misstates the Order, claiming that the March 3 Order bars IDOT from filing any further motions relating to the pleadings in this matter. See, Motion at pp. 7 and 11. A plain reading of the March 3 Order demonstrates that the only actions expressly ordered by the Board allowed the Complainant to file the SAC, gave IDOT until April 12, 2016 to file its answer, and directed the hearing officer to set new discovery deadlines and a new hearing date. See Order at p. 3. There is no other language in the Order denying IDOT its procedural rights moving forward. This is true despite the fact that Complainant requested more stringent limitations when it moved for leave to file the SAC. The absence of such limiting language clearly shows that the Board did not intend to deny IDOT the opportunity to file affirmative defenses in response to the SAC.

Complainant's Motion highlights the arguments it made to the Board when moving for the right to file the SAC, including the assertion that "JM did not believe that IDOT 'should be allowed to file a responsive pleading that would delay these proceedings, such as any type of motion." See Motion at p. 8. Even though this argument was raised by the Complainant, no such limitation on IDOT's pleadings, amendments, or motions was ordered by the Board. Instead, the only limitation placed on IDOT, after consideration of the Complainant's arguments to deny IDOT the opportunity to respond to the SAC, was the time period for filing an Answer.

The Motion further argues that IDOT has strayed from the intent of the March 3 Order because the narrow amendments of the SAC are not material changes that would justify the inclusion of the fifth, sixth, and seventh affirmative defenses in the Answer, rendering the fifth, sixth and seventh affirmative defenses more akin to an amendment of the pleadings. In support of this argument Complainant relies on *American Pharmaseal v. TEC Ses.,* 162 Ill.App.3d 351 (2d Dist. 1987), for the proposition that the changes in IDOT's Answer were not necessitated by Complainant's narrow changes in the SAC, and therefore the fifth, sixth, and seventh affirmative defenses should be treated as amendments to the pleadings. See Motion at p. 8. As noted above in the Statement of Facts, other than the amount of time afforded IDOT to answer the SAC, the Board's March 3rd Order placed no limits on the scope or nature of response that IDOT could file in response to the SAC. Should the Board view the fifth, sixth, and seventh affirmative defenses as an amendment to IDOT's pleadings outside of the Answer filed in compliance with the March 3 Order, the questions of timeliness and prejudice of amended pleadings are addressed below.

B. IDOT'S AFFIRMATIVE DEFENSES ARE TIMELY AND NONPREJUDICIAL

The Complainant next argues that, because the fifth, sixth, and seventh affirmative defenses do not arise directly from the limited amendments to the SAC, the relevant affirmative

defenses must be treated as amendments to IDOT's pleadings. Should the Board choose to consider the fifth, sixth, and seventh affirmative defenses as amendments to IDOT's pleadings, and not merely part of the Answer allowed pursuant to the March 3 Order, the considerations of timeliness and the lack of prejudice to the Complainant weigh entirely in favor of accepting the affirmative defenses in this matter.

1. IDOT's Affirmative Defenses are Timely

Complainant argues that IDOT's fifth, sixth, and seventh affirmative defenses are untimely. This is simply not supported by the Illinois Code of Civil Procedure or case law.

First, the Board states in its March 3 Order that where the Board's procedural rules are silent, the Board looks to Illinois civil practice law for guidance. See March 3 Order, at p. 2. Section 2-616(a) of the Illinois Code of Civil Procedure, the same section that permitted the Complainant to file the SAC, permits a party to amend its pleadings to include an affirmative defense any time prior to judgment. 735 ILCS 5/2-616(a) (2014) (emphasis added), *See Hobart v. Shin*, 185 Ill.2d 283, 292 (1998), citing 735 ILCS 5/2-616 (a trial court (or the board) has broad discretion to allow the addition of new defenses at any time before final judgment), *See also, Horwitz ex rel. Gilbert v. Bankers Life and Cas. Co.*, 319 Ill.App.3d 390, 399 (1st Dist. 2001). Here, the affirmative defenses in question were filed April 12, 2016. No judgment has been entered, and hearing in this matter is not set to begin until May 23, 2016. Indeed, discovery in this matter was still open on April 12, 2016, and is now set to remain open until May 9, 2016. Clearly, IDOT's relevant affirmative defenses were filed in a timely manner as contemplated by Illinois courts and civil procedure.

Next, Complainant argues that, despite the clarity of the rule above, the potential disruptive effect of the timing of IDOT's affirmative defenses is similar to the disruptive effect the Appellate Court found impermissible in *American Pharmaseal,* 162 Ill.App.3d 351. The facts of this matter, and those in *American Pharmaseal,* are simply not aligned in a manner that supports the Complainant's argument.

In *American Pharmaseal*, the plaintiff filed a third amended complaint prior to hearing that differed from the second amended complaint by rearranging the claims within the complaint and adding more specific allegations of actions or omissions by the defendant. *Id.* at 353. After the close of plaintiff's case at hearing, the defendant filed its answer to the third amended complaint, including new affirmative defenses. *Id.* at 354. The trial court struck the affirmative defenses on plaintiff's motion, finding that the new defenses unfairly surprised the plaintiff after the conclusion of its case. *Id.*

On appeal, the Appellate Court reviewed the matter for abuse of discretion in the decision to strike the defendant's amended answer and affirmative defenses. *Id.* at 359. In its review, the Appellate Court considered the prejudice created by fact that the new defenses were raised for the first time after the close of plaintiff's case at hearing, concluding that the trial court did not abuse its discretion in striking the new affirmative defenses, raised for the first time after the close of plaintiff's case. *Id.* at 359 – 361 (emphasis added).

The facts in *American Pharmaseal* differ materially from the facts in this matter. Here, the relevant affirmative defenses were filed April 12, 2016, more than one month before the start of the Complainant's case is set to be presented at the hearing on May 23, 2016. Indeed, not only were the relevant affirmative defenses filed prior to hearing, they were filed prior to the May 9,

2016 close of discovery. Given these facts, there is simply no relevant similarity between this matter and the basis for the decision to strike the defendant's affirmative defenses filed after the close of plaintiff's case in *American Pharmaseal*.

Finally, considering the Complainant itself moved to file the SAC less than one month before the date the hearing was to begin in this matter, it borders on the ridiculous to assert that IDOT's fifth, sixth, and seventh affirmative defenses are untimely when filed more than a month before the hearing in this matter is now set to begin, and while discovery remains open.[1] Should the Board view the fifth, sixth, and seventh affirmative defense as amendments to the pleadings, judicial equity alone requires that IDOT be afforded the same opportunities under Section 2-616(a) to offer amended pleadings as the Board has afforded the Complainant. The notion of judicial equity, coupled with the Illinois Code of Civil Procedure and case law allowing for liberal amendment of pleadings, including affirmative defenses, any time prior to judgment demonstrates that IDOT has timely filed its fifth, sixth, and seventh affirmative defenses as part of the April 12, 2016 Answer.

2. IDOT'S RELEVANT AFFIRMATIVE DEFENSES CREATE NO PREJUDICE

Complainant also contends that it will be prejudiced if the fifth, sixth and seventh affirmative defenses are allowed. This proposition is untenable in light of the Board's findings in its March 3 Order. Indeed, when Complainant moved to file the SAC the hearing was less than one month away, discovery had been closed for over a year, and IDOT had to investigate new claims and to potentially depose a new witness. When the Board considered the potential

[1] The Complainant's Motion to for Leave to File Second Amended Complaint was filed February 16, 2016. At that time, the hearing in this matter was set to begin March 15, 2016, less than one month from the date of Complainant's request to amend the pleadings. It is acknowledged that the hearing date has since been reset for May 10, 2016, and reset again for May 23, 2016, the current date the hearing is set to begin pursuant to the Hearing Officer's Order of April 28, 2016.

prejudicial effect of those circumstances on IDOT, it found that there was no prejudice and that the SAC would be allowed.

Comparing the circumstances and posture of the case at the time that IDOT's affirmative defenses were filed on April 12, 2016, to the circumstances and posture of the case when the Complainant moved to file the SAC, it cannot credibly be argued that the Complainant has suffered any prejudice. Similar to the timing of the SAC, the fifth, sixth, and seventh affirmative defenses were filed at least as far in advance of hearing as the SAC, if not further in advance. And, unlike the timing of the filing of the SAC, the fifth, sixth, and seventh affirmative defenses were all filed at a time when discovery was open and ongoing. Given the timing of the fifth, sixth, and seventh affirmative defenses, when viewed in light of the Board's previous finding in this matter, it is inarguable that there has been no prejudice to the Complainant. Accordingly, if deemed to be amendments to the pleadings, the fifth, sixth, and seventh affirmative defenses should be found both timely and to not create any prejudice, and must be allowed by the Board.

C. IDOT'S SIXTH AND SEVENTH AFFIRMATIVE DEFENSES ARE VALID AFFIRMATIVE DEFENSES

The Complainant's final argument, against at least the sixth and seventh affirmative defenses, is that they are not valid affirmative defenses. (Motion at p. 10.) This assertion, for both affirmative matters, is simply wrong, and the Board should find that the sixth and seventh affirmative defenses are properly before the Board.

1. IDOT'S SIXTH AFFIRMATIVE DEFENSE IS VALID

Complainant contends that IDOT's sixth affirmative defense, alleging the failure to join a necessary party, is not a valid affirmative defense. See Motion, at p. 10. This contention is based on the 35 Ill. Admin. Code 103.206, which allows a respondent the opportunity to move

the Board to join a party as a co-respondent or to ask the Board for leave to file a third-party complaint. 35 Ill. Admin Code 103.206. In enforcement actions, such as *State of Illinois v. Peabody Coal, Co.*, PCB 99-134, at *9 (June 5, 2003), relied upon by the Complainant, this rule would be certainly applicable and a potential bar to a failure to join a necessary party affirmative defense where the respondent is claiming a co-contributor to a violation has not been named. Here, the circumstances are markedly different.

A careful reading of the sixth affirmative defense demonstrates the inapplicability of Section 103.206, and the reasoning in *Peabody.* In *Peabody*, the affirmative defense that was disallowed involved the joinder of an unnamed potential co-contributing party to an enforcement action. Here, the sixth affirmative defense does not merely address the failure to join a contributing party that is necessary for a complete determination of a controversy. Instead, the sixth affirmative defense addresses the Complainant's failure to join the United States Environmental Protection Agency ("USEPA") and Commonwealth Edison ("ComEd"), both parties, along with the Complainant, to the Administrative Order on Consent ("AOC") from which this controversy arises. As alleged in the sixth affirmative defense, the AOC entered between Complainant, USEPA, and ComEd does not allow for deviation from the AOC without the consent of all parties, and was not entered as a Board Order. Because the AOC can only be modified by the parties to the agreement, no enforceable order can be entered in this matter without all the parties to the AOC being present in this action. Even then, it remains questionable whether the Board can enter an enforceable order in this matter that would require USEPA and ComEd to agree to a modification of the AOC, when the Board does not have jurisdiction over the AOC.

Accordingly, because the affirmative defense is not merely limited to the heading introducing it in the Answer, "Failure to Join a Necessary Party," but involves facts that are more nuanced and clearly an affirmative matter that would defeat the apparent rights of the Complainant, the sixth affirmative defense is proper.

2. IDOT'S SEVENTH AFFIRMATIVE DEFENSE IS VALID.

Complainant contends that IDOT's seventh affirmative defense does not assert new matter that would defeat the Complainant's claims. See Motion at pp. 10 and 11. The SAC alleges, in numerous paragraphs, that IDOT caused or allowed the violations alleged in this matter between the years 1971 and 1976. The SAC goes on to allege that IDOT's actions between 1971 and 1976 constitute violations of the Illinois Environmental Protection Act ("Act") as it is currently drafted, repeatedly asserting the applicability of the 2014 version of the Act as the basis for the violations alleged.

IDOT's seventh affirmative defense gives color to these claims by providing the version of the Act applicable to the relevant time the violations allegedly occurred, 1971 through 1976. By asserting this new matter, the version of the Act relevant to actions occurring between 1971 and 1976, IDOT is not merely attacking the pleading, but has asserted new matter that defeats the Complainant's claim. When viewed under the proper iteration of the Act, and assuming the allegations of the SAC to be true, IDOT's actions were not a violation of the Act. Accordingly, because the seventh affirmative defense does indeed assert new material which would tend to defeat the Complaint's claims, the seventh affirmative defense is proper and a valid affirmative defense.

IV. CONCLUSION

As discussed above, IDOT's Answer, and the affirmative defenses contained therein were filed in compliance with the Board's March 3 Order. Further, even when viewing the fifth, sixth, and seventh affirmative defenses as amendments to the pleadings, the relevant affirmative defenses clearly meet the standard for allowing an amendment to the pleadings pursuant 735 ILCS 5/2-616. Indeed, it is inarguable that, in the context of this matter, the relevant affirmative defenses were filed well in advance of hearing and at a time while discovery was still open to the Complainant, clearly demonstrating that they are both timely and create no prejudice to the Complainant. Finally, the sixth and seventh affirmative defenses are both valid affirmative defenses by asserting new matter which defeats the Complainant's claims alleged in the SAC. Accordingly, the Complainant's Partial Motion to Strike Respondent's Affirmative Defenses must be denied.

Respectfully Submitted,

By: _____

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CERTIFICATE OF SERVICE

***Johns Manville v. Illinois Department of Transportation*, PCB 14-3 (Citizens)**

I, EVAN J. McGINLEY, do hereby certify that, today, May 4, 2016, I caused to be served on the individuals listed below, by electronic mail, a true and correct copy of IDOT's Response to Complainant's Partial Motion to Strike Affirmative Defenses on each of the parties listed below:

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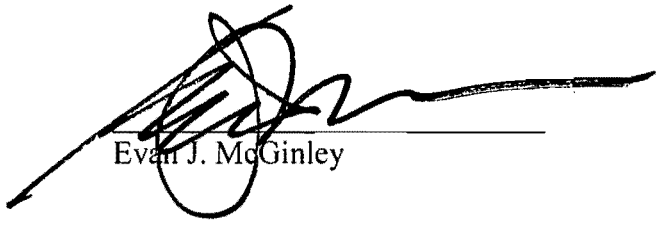

Evan J. McGinley