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CERTIFICATE OF SERVICE

I, Kevin Garstka, as Assistant Attorney General, do certify that on this 8th day of August 2022, I caused to be served a copy of the foregoing Notice of Filing and People's Response in Opposition to Respondent's Motion to Dismiss, upon the person listed on the attached Service List via U.S. Mail and Email.

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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.)	PCB No. 22-77
)	(Enforcement - Air)
LALA KALA, INC.,)	
an Illinois corporation,)	
)	
Respondent.)	

**THE PEOPLE’S RESPONSE IN OPPOSITION TO
RESPONDENT’S MOTION TO DISMISS**

Complainant, PEOPLE OF THE STATE OF ILLINOIS, by KWAME RAOUL, Attorney General of the State of Illinois (“the People”), hereby responds opposing Respondent, LALA KALA, INC.’S (“Respondent”) Sections 2-615 and 2-619 motion to dismiss. In support thereof, the People state as follows:

I. INTRODUCTION

On May 20, 2022, the People filed a complaint (“Complaint”) against Lala Kala, Inc. on the Attorney General’s own motion and at the request of the Illinois Environmental Protection Agency (“Illinois EPA”) for alleged violations that occurred at Respondent’s gasoline dispensing facility located at 938 East St. Charles Road, Lombard, DuPage County, Illinois (“Facility”). The Complaint alleges that Respondent failed for at least five years to decommission its vapor collection and control system and submit reports for its Facility, in violation of Section 9(a) of the Environmental Protection Act (“Act”), 415 ILCS 5/9(a) (2020), and Sections 218.586(i)(1)(B) and 218.586(i)(2)(C) of the Illinois Pollution Control Board (“Board”) Air Pollution Regulations, 35 Ill. Adm. Code 218.586(i)(1)(B) and 218.586(i)(2)(C).

On July 26, 2022, Respondent filed its 3-page §2-615 and §2-619 Motion to Dismiss and Memorandum in Support of 2-615 and 2-619 Motion to Dismiss (“Motion”). The Board should deny Respondent’s Motion, because (1) the Motion is untimely, does not meet the statutory requirements for a Section 2-619.1 hybrid motion, and offers no recognized basis for dismissal, and (2) the Complaint pleads sufficient facts supporting the People’s claims.

II. ARGUMENT

A. Respondent’s Motion to Dismiss is Untimely and Should be Denied.

Section 101.506 of the Board’s procedural rules, 35 Ill. Admin. Code 101.506, states that “all motions to strike, dismiss, or challenge the sufficiency of any pleading filed with the Board must be filed within 30 days after the service of the challenged document, unless the Board determines that material prejudice would result.” On July 27, 2022, the People filed a Proof of Service showing that Respondent was served the Complaint on May 27, 2022. Respondent filed its Motion to Dismiss on July 26, 2022, 60 days after service, and provided no evidence of material prejudice preventing it from timely filing its Motion within the 30-day deadline set forth in 35 Ill. Admin. Code 101.506. Accordingly, the Board should deny the Motion as untimely.

B. Respondent’s Motion Fails to Meet the Plain Language Requirement of 735 ILCS 5/2-619.1 and Should be Denied.

Respondent does not bring its Motion pursuant to Section 2-619.1 of the Code of Civil Procedure, 735 ILCS 5/2-619.1 (2020). The Motion should be denied because it fails to meet the plain language requirement of Section 2-619.1, which provides:

Motions with respect to pleadings under Section 2-615, motions for involuntary dismissal or other relief under Section 2-619, and motions for summary judgment under Section 2-1005 may be filed together as a single motion in any combination. **A combined motion, however, shall be in parts. Each part shall be limited to and shall specify that it is made under one of Sections 2-615, 2-619, or 2-1005.** Each part shall also clearly show the points or grounds relied upon under the Section upon which it is based.

735 ILCS 5/2-619.1 (2020) (emphasis added). “Because section 2-619.1 of the Code explicitly requires that a motion combining both sections 2-615 and 2-619 (1) must be in parts, (2) must ‘be limited to and shall specify that it is made under’ either section 2-615 or 2-619, and (3) must ‘clearly show the points or grounds relied upon under the [s]ection upon which it is based,’ trial courts should not—and need not—accept for consideration combined motions under section 2-619.1 that do not meet these statutory requirements.” Howle v. Aqua Illinois, Inc., 2012 IL App (4th) 120207, ¶¶ 73-75. “To avoid unnecessary complications and confusion, trial courts should *sua sponte* reject such motions and give the defendants who filed them the opportunity (if they wish) to file a section 2-619.1 motion that meets the statutory requirements.” *Id.* “Or, of course, such defendants may choose to file separate motions under sections 2-615 and 2-619, thereby avoiding any improper commingling of their claims.” *Id.*

Respondent’s Motion neither is brought under Section 2-619.1 nor does it meet the requirements of Section 2-619.1. Specifically, the Motion (1) was not segregated into parts, (2) did not specify which portions were claims brought under section 2-615 or section 2-619, and (3) did not clearly show the points or grounds relied upon under the section on which they were based. Therefore, the Board should reject the Motion.

C. Respondent’s Alleged Property Sale is not a Basis for Dismissing the Complaint.

Respondent brings its Motion under Sections 2-615 and 2-619 of the Code of Civil Procedure, 735 ILCS 5/2-615 and 2-619 (2020), but provides no legal support for its purported argument or any analysis as to why the Complaint should be dismissed pursuant to either Section. Instead, Respondent recites two pages of case law explaining the legal standard for Section 2-615 and 2-619 motions and provides three sentences identifying two exhibits: 1) the People’s Complaint and 2) a quitclaim deed. Respondent does not explain why the Board should dismiss

the Complaint pursuant to either Section 2-615 or 2-619, other than generally stating the Board should dismiss the Complaint because “Respondent was not the owner at the time of the complaint’s initiation.” Motion at 3, ¶3.

This alleged defense has been considered and rejected by the Board previously. In People v. State Oil Company, et al., PCB 97-103, slip op. at 16 (Mar. 20, 2003), the Board in assessing a civil penalty held that it is immaterial that Respondents were not currently in control or possession of the property when it is not disputed that Respondents were in control when the violation occurred). Accordingly, the Board should deny Respondent’s Motion.

However, even if the Board were to find any merit in Respondent’s claim, Section 33(a) of the Act, 415 ILCS 5/33(a) (2020), provides in relevant part:

It shall not be a defense to findings of violations of the provisions of this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order, or a bar to the assessment of civil penalties that the person has come into compliance subsequent to the violation, except where such action is barred by any applicable State or federal statute of limitation

415 ILCS 5/33(a) (2020) (emphasis added). Respondent’s alleged property sale does not change or cure the initial violation, *i.e.*, failure to timely decommission its vapor collection and control system and submit reports. Respondent does not dispute that it was in control of the Facility at the time of the alleged violations, and offers no argument for why its alleged property sale defeats the Complaint’s alleged violations.

To the extent Respondent contends the Complaint is not timely, it is long held that “a statute of limitations bar will not preclude any action seeking enforcement of the Act, if brought by the State on behalf of the public’s interest”. Pielet Bros. Trading, Inc. v. PCB, 110 Ill. App. 3d 752, 758 (5th Dist. 1982); *see also* IEPA v. Capital Eng’g & Mfg. Co., PCB 85-101, slip op. at 1 (Oct. 10, 1985) (“The Board has consistently held that the statute of limitations does not bar enforcement

actions under the Act.”). Thus, even though Respondent may have sold its property in May 2022, this does not prevent the Attorney General from bringing an environmental enforcement action to resolve violations occurring prior to the sale. As a result, the Board should deny the Motion.

D. Respondent Inappropriately Attached an Exhibit in Support of its 2-615 Motion Complainant, and in any Event, Complainant Pleads Sufficient Facts Supporting its Claims.

a. Legal Standard for Section 2-615 Motion to Dismiss.

A motion to dismiss brought pursuant to Section 2-615 “tests the legal sufficiency of the complaint.” Green v. Rogers, 234 Ill. 2d 478, 491 (2009). Accordingly, “[o]n review, the question is whether the allegations of the complaint, when construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action upon which relief may be granted.” *Id.* “All facts apparent from the face of the pleadings, including the exhibits attached thereto, must be considered.” *Id.* “A cause of action should not be dismissed under section 2–615 unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to recovery.” *Id.* In ruling on a section 2–615 motion, however, the court “may not consider affidavits, products of discovery, documentary evidence not incorporated into the pleadings as exhibits, or other evidentiary materials.” Cwikla v. Sheir, 345 Ill. App. 3d 23, 29 (1st Dist. 2003).

b. Respondent Inappropriately Attached an Exhibit in Support of its 2-615 Motion.

Respondent inappropriately attached a quitclaim deed in Support of its Motion. Motion at 3, ¶2. Such reliance in support of a Section 2-615 motion is improper and the Board should not consider this exhibit in its ruling. Ill. State Toll Highway Auth. v. S. Barrington Office Ctr., 2016 IL App (1st) 150960, ¶ 25 (Court would not consider exhibits filed pursuant to a section 2-615 motion); *see also* York v. Mulryan, 2015 IL App (1st) 132830, ¶ 44 (“When ruling upon a 2-615 motion, a trial court may consider only the allegations of the complaint and may not consider

defendant's other supporting material."). Accordingly, the portion of Respondent's Motion based on 2-615 should be denied.

c. The People's Complaint States an Actionable Claim for Violations of the Act and Illinois Pollution Control Board Regulations.

Further, Respondent's sole argument in support of its 2-615 Motion is that it sold the Facility before the Complaint was filed. Motion at 3, ¶2. As discussed above, that is not a basis for dismissal. Moreover, the Complaint clearly sets forth an actionable claim for violations of the Act and Illinois Pollution Control Board Regulations. Specifically, Count I of the Complaint alleges a violation of Section 9(a) of the Act, 415 ILCS 5/9(a) (2020). The Complaint must therefore only allege facts that Respondent's gasoline dispensing facility "threaten[ed] . . . emission of any contaminant into the environment . . . so as to violate regulations or standards adopted by the Board under this Act" which the Complaint's facts establish. As stated in the Complaint, Respondent owned and operated, and continues to own and operate a gasoline dispensing facility containing gasoline dispensing pumps that emit volatile organic compounds ("VOCs") into the environment. Complaint at 2, ¶¶3-4. VOCs are "contaminants" as that term is defined by Section 3.165 of the Act, 415 ILCS 5/3.165 (2020). *Id.* at ¶9. Respondent's gasoline dispensing facility therefore threatened the emission of a contaminant into the environment so as to violate regulations adopted by the Board, as explained below.

In Count I, the People further allege violations of Sections 218.586(i)(1)(B) and 218.586(i)(2)(C) of the Board Air Pollution Regulations, 35 Ill. Adm. Code 218.586(i)(1)(B) and 218.586(i)(2)(C). For Section 218.586(i)(1)(B), the People's Complaint must only allege facts that Respondent did not "[by] December 31, 2016 . . . complete the decommissioning of all vapor collection and control systems in accordance with all of the provisions . . ." which the Complaint's

facts establish. As stated in the Complaint, on information and belief, Lala Kala failed to timely decommission its vapor collection and control system. Complaint at 4, ¶19.

For Section 218.586(i)(2)(C), the People's Complaint must only allege facts that Respondent did not "complete and sign a decommissioning checklist and certification . . . documenting the decommissioning procedures performed [and] [w]ithin 30 days after completion of the decommissioning procedures . . . provide the completed checklist and certification and the test results to the Agency," which the Complaint's facts establish. As stated in the Complaint, as of the date of the filing of the Complaint, Lala Kala had not submitted a decommissioning checklist, certification, or test results to Illinois EPA. *Id.* at ¶17. Thus, the Complaint contains an actionable claim and sufficient facts for violations of the Act and Board regulations.

The Board should therefore deny the Motion because the Complaint states an actionable claim and sufficient facts alleging violations of the Act and Board regulations.

E. Defendant Disregards the People's Well-Pled Allegations and Fails to Raise Any "Affirmative Matter."

a. Legal Standard for Section 2-619 Motion to Dismiss.

A dismissal under Section 2-619 is a drastic means of disposing of litigation and should only be allowed when the right of the moving party is clear and free from doubt. *Levine v. EBI, LLC*, 2013 Ill App (1st) 121049, ¶19. A motion brought pursuant to Section 2-619 must still admit the legal sufficiency of a complaint and assert an affirmative matter that avoids or defeats the plaintiff's claim. *American Family Mut. Ins. Co. v. Tyler*, 2016 IL App. (1st) 153502. "Essentially, the defendant is saying in such a motion, 'Yes, the complaint was legally sufficient but an affirmative matter exists that defeats the claim This is why a Section 2-619 motion is sometimes referred to as a 'Yes, but' motion." *Howle v. Aqua Illinois, Inc.*, 2012 IL App. (4th) 120207, ¶34. The standard articulation of 'affirmative matter' is "[A] type of defense that either

negates an alleged cause of action completely or refutes crucial conclusions of law or conclusion of material fact unsupported by allegations of specific fact or inferred from the complaint . . . [not] merely evidence upon which defendant expects to contest an ultimate fact stated in the complaint.” Smith v. Waukegan Park Dist., 231 Ill.2d 111, 121 (2008); *see also* Village of Willow Springs v. Village of Lemont, 2016 IL App. (1st) 152670, ¶23 (“The affirmative matter relied upon ‘must be more than just evidence that refutes a well-pled fact of the complaint.’”). An affirmative matter is something other than the defendant’s version of the facts. Reynolds v. Jimmy John’s Enterprises, LLC, 2013 IL App (4th) 120139, ¶34 (4th Dist. 2013). Stated another way, “where the affirmative matter is merely evidence which the movant expects to submit in contesting an ultimate fact contained in the contested pleading, Section 2-619 may not be invoked.” Curtis Casket Co v. D.A. Brown & Co., 259 Ill.App.3d 800, 805 (1st Dist. 1994). “[A] claim concerning the negation of a plaintiff’s pleadings – that is, a defendant’s assertion of ‘Not true’ – is appropriately resolved either at trial or in a fact-based motion . . . not in a motion to dismiss under section 2-619 . . .” Howle, 2012 IL App. (4th) 120207, ¶37.

b. Respondent’s Alleged Property Sale and Quitclaim Deed are not Affirmative Matter that Defeat the Alleged Violations.

Respondent does not provide any argument as to how its property sale serves as a basis to dismiss the Complaint. Respondent states that it “was no longer the owner of the said property as of May 3, 2022.” Motion at 3, ¶2. Respondent also states that the “complaint should be dismissed in regards to Respondent, as Respondent was not the owner at the time of the complaint’s initiation.” *Id.* at ¶3. While this is clearly affirmative matter it does not serve as basis to overcome its five year failure to address the violations alleged in the Complaint. “Where the affirmative matter is merely evidence which the movant expects to submit in contesting an ultimate fact contained in the contested pleading, Section 2-619 may not be invoked.” Curtis Casket Co., 259

Ill.App.3d at 805. “The affirmative matter relied upon ‘must be more than just evidence that refutes a well-pled fact of the complaint.’ *Id.* Here, Respondent contests well-pled facts in Count I of the Complaint by introducing a quitclaim deed to demonstrate that it no longer owns the gasoline dispensing facility. Complaint at 2, ¶¶ 3-4. While this may be true it does not provide a defense to Respondent’s five years of violation prior to the alleged sale, and the Board should deny the Motion.

III. CONCLUSION

The Board should deny Respondent’s Motion because (1) it was untimely filed pursuant to 35 Ill. Admin. Code 101.506, (2) it does not meet the statutory requirements of Section 2-619.1 of the Code of Civil Procedure, (3) Respondent improperly attached an exhibit in support of its alleged subsequent sale of the property for its 2-615 portion of its Motion, (4) the Complaint alleges sufficient facts to support its allegations, and (5) the Section 2-619 portion of the Motion fails to raise any “affirmative matter” that would defeat the People’s claims.

Respectfully submitted,

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