BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS, BY LISA MADIGAN, ATTORNEY GENERAL OF THE STATE OF ILLINOIS,	)	
COMPLAINANT,	)	
VS.	)	PCB No. 02-186
PERFETTI VAN MELLE U.S.A. INC., A DELAWARE CORPORATION,	)	(ENFORCEMENT - AIR)
RESPONDENT.	)	

NOTICE OF FILING

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board *Response to Complainant's Motion to Strike or Dismiss Respondent's Affirmative Defenses,* a copy of which is herewith served upon you.

Respectfully submitted,

PERFETTI VAN MELLE USA, INC.

By: _____
Jon S. Faletto, Attorney for Respondent

Dated: January 21, 2004

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RESPONSE TO COMPLAINANT'S MOTION TO STRIKE OR DISMISS RESPONDENT'S AFFIRMATIVE DEFENSES

Respondent, PERFETTI VAN MELLE USA, INC., by and through its attorneys, Howard & Howard Attorneys, P.C. provides its *Response to Complainant's Motion to Strike or Dismiss Respondent's Affirmative Defenses*. This Response is submitted in accordance with applicable procedural regulations of the Illinois Pollution Control Board (the "Board") and the Order entered by Hearing Officer Bradley P. Halloran on January 7, 2004. In support of its Response, Respondent states as follows:

INTRODUCTION

1. On November 21, 2003, Respondent filed its *Answer and Affirmative Defenses* to the Plaintiff's Complaint filed in this cause.

2. On December 24, 2003, Complainant filed its *Complainant's Motion to Strike or Dismiss Respondent's Affirmative Defenses* (hereafter "Complainant's Motion" or "Motion to Strike"), pursuant to the Board's procedural regulations and Section 2-615 of the Illinois Code of Civil Procedure.

3. By Order entered on January 7, 2004, Hearing Officer Bradley P. Halloran provided the Respondent with additional time to file its Response to Complainant's Motion with said response due on or before January 21, 2004.

LEGAL STANDARD FOR PLEADING AFFIRMATIVE DEFENSES

4. Complainant's Motion correctly points out that Section 2-613(d) of the Illinois Code of Civil Procedure, 735 ILCS 5/2-613(d) sets forth the requirements for pleading Affirmative Defenses. Illinois case law developed under Section 2-613(d) imposes an obligation on the Respondent in this cause to assert all available Affirmative Defenses, whether complete or partial, when filing its Answer to the Complainant's Complaint. Although exceptions exist to prevent injustice, generally a party will not be permitted to assert an Affirmative Defense if it has not been specifically plead in its Answer. Athans v. Williams, 327 Ill. App. 3d 700, 764 N.E.2d 586 (2nd Dist. 2002). Some Illinois courts have strictly construed the rule and held that an Affirmative Defense, which is not timely pleaded, cannot be considered even if the evidence supports its existence. Vanlandingham v. Ivanow, 246 Ill. App. 3d 348, 615 N.E.2d 1361 (4th Dist. 1993).

5. In addition to the obligation placed on Respondent to raise any Affirmative Defense in its pleading, Respondent also has the burden of proof regarding all Affirmative Defenses. The Complainant is not required to put on any evidence to counter an Affirmative Defense plead by the Respondent, until Respondent presents its evidence to substantiate and prove the Affirmative Defense. Capital Plumbing & Heating Supply, Inc. v. Vans Plumbing & Heating, 58 Ill. App. 3d 173, 373 N.E.2d 1089 (4th Dist. 1978).

LEGAL STANDARD FOR COMPLAINANT'S MOTION TO STRIKE OR DISMISS UNDER SECTION 2-615

6. As a general rule, in ruling on a Motion to Strike or Dismiss directed at the pleadings, the Court must accept as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts. In addition, the Court should not grant a Motion to Strike or Dismiss unless it clearly appears that no set of facts can be proved under the pleadings that will entitle the party to recover. American National Bank & Trust Company v. City of Chicago, 192

Ill. 2d 274, 735 N.E.2d 551 (2000). In addition, the Complainant's *Motion to Strike or Dismiss Respondent's Affirmative Defenses* admits the truth of all well-pleaded facts constituting the Affirmative Defenses and partial Affirmative Defenses raised by the Respondent and attacks only the legal sufficiency of those facts. International Insurance Co. v. Sargent & Lundy, 242 Ill. App. 3d 614, 609 N.E.2d 842 (1st Dist. 1993).

7. As a general rule, where a pleading has been dismissed on a Motion brought pursuant to Section 2-615, leave to amend is granted as a matter of course, particularly if additional facts are necessary or are curable by amendment. Sinclair v. State Bank of Jerseyville, 226 Ill. App. 3d 909, 589 N.E. 2d 862 (4th Dist. 1992). That same principle applies to a Motion to Strike or Dismiss an Affirmative Defense, where it has been found that the trial court abused its discretion in refusing to allow an amendment to an Answer to assert new Affirmative Defenses or additional facts. Bituminous Casualty Corporation v. Fulkerson, 212 Ill. App. 3d 556, 571 N.E.2d 256 (5th Dist. 1991).

8. In the instant action, Complainant seeks to strike or dismiss the Respondent's Affirmative Defenses pursuant to Section 2-615. Should the Board find a lack of specificity or well-pleaded facts to support the Affirmative Defenses, Respondent respectfully requests leave to amend its Affirmative Defenses.

COMPLETE AFFIRMATIVE DEFENSE
AND FIRST PARTIAL AFFIRMATIVE DEFENSE

9. Complainant has challenged the sufficiency of the Respondent's Affirmative Defenses based on the equitable doctrine of laches. Complainant's Motion accurately characterizes the equitable doctrine of laches as a neglect or delay in asserting a right or claim which taken together with the lapse of time and other circumstances causing prejudice to the adverse party, operates as a bar to the requested relief.

10. The Complainant has filed a five count Complaint against the Respondent. In its prayer for relief for each of those five counts, Complainant demands the imposition of civil penalties against the Respondent for each of the alleged violations of the Illinois Environmental Protection Act and implementing Board regulations. Complainant's prayer for relief further requests the imposition of additional civil penalties for each violation of the Act for each day that the violation continued.

11. The Complaint alleges in several instances that the alleged violations had been committed and were continuing "since at least November 1999" (Paragraph 7 of Count I), and "since 1999" (Paragraphs 20, 28 and 29 of Count II), and "since at least 1999" (Paragraph 22 of Count V). Clearly, Complainant has raised in its Complaint the issue of the date or dates upon which the alleged violations first occurred and the period of time the alleged violations continued. Moreover, Complainant seeks to impose civil penalties based upon the alleged date(s) of the violation(s) and additional penalties for the duration of each of the alleged violations. Complainant has made the passage of time an essential element of its enforcement action and the civil penalties it seeks from the Respondent.

12. In determining the appropriate civil penalty to be assessed for statutory or regulatory violations, the Illinois Environmental Protection Act directs the Board to consider any matters of record in mitigation or aggravation of a penalty, including but not limited to the factors specified in Section 42(h). [415 ILCS 5/42(h).] Those statutory factors to be considered by the Board render the date of violation and the duration of any proven violation to be extremely significant in evaluating an appropriate civil penalty. Those Section 42(h) factors include:

(1) The duration and gravity of the violation;

(2) The presence or absence of due diligence on the part of the violator in attempting to comply with the requirements of this Act and regulations thereunder or to secure relief therefrom as provided by this Act.

(3) Any economic benefits accrued by the violator because of delay in compliance with requirements. [415 ILCS 5/42(h)(1), (2) and (3).]

13. Complainant cites the decision in Cook County v. Chicago Magnet Wire Corp., 152 Ill. App. 3d 726, 504 N.E.2d 904 (1st Dist. 1987), for the general rule that a defense of laches may not be asserted against a governmental authority in actions involving public rights. In that case, the Court allowed the Defendant to present evidence at trial to prove its defense of laches, but found no "extraordinary circumstances" and no "prejudice to Defendant brought about by the delay." (Cook County, 504 N.E.2d at page 906.) In the Cook County case, the Defendant was allowed to present evidence that the relief requested by the Government was barred by the doctrine of laches. Through its Motion to Strike, the Complainant seeks to deny Respondent the right to present that same type of evidence at trial.

14. The facts plead by the Complainant in this case are distinguishable from the facts in the Cook County case. Complainant in the instant action seeks substantial civil penalties that would be determined by considering the alleged dates of violations, the passage of time and the duration of the alleged violations. An unreasonable delay by the Complainant or its representatives in pursuing this enforcement action against Respondent or unreasonable delay in taking actions that prevented Respondent from correcting such alleged violations would serve to prejudice the Respondent. In short, Complainant seeks civil penalties that are time-dependent, and therefore its unreasonable delay, if any, would severely prejudice the Respondent in the amount of civil penalties assessed by the Board, if Complainant prevails in this action. As a result, the Board should not strike or dismiss Respondent's Affirmative Defenses of laches and allow it to present evidence in support of the defense during the trial of this cause.

SECOND PARTIAL AFFIRMATIVE DEFENSES

15. Complainant, in its Motion to Strike, also seeks to strike or dismiss the Respondent's second partial Affirmative Defense. Respondent's second partial Affirmative Defense raises a defense to liability based upon the actions or omissions of a third party that resulted in the violations alleged in the Plaintiff's Complaint.

16. Contrary to the arguments raised by Complainant in its Motion to Strike, the Complaint contains a number of alleged violations related to construction, not operation, of the Buffalo Grove facility. Assuming arguendo that all of the allegations in the Complainant's Complaint related solely to operation of the subject facility, the Respondent has not been the sole operator of the facility during its entire existence and during the time periods relevant to the Complaint.

17. The Respondent's second partial Affirmative Defense is in the nature of a claim for contributory negligence, which is an Affirmative Defense that must be plead. If a party wishes to assert contributory negligence, as with any other Affirmative Defense, he is required to specifically plead it. Carlson v. City Construction Company, 239 Ill. App. 3d 211, 606 N.E.2d 400 (1st Dist. 1992) app. denied, 148 Ill. 2d 640, 610 N.E.2d 1260 (1992).

18. The facts to be presented during the trial of this proceeding will establish that the Respondent acquired the subject facility as an ongoing enterprise and took ownership and control of the facility a significant amount of time after it had been constructed and was being operated by another company. That company has not been named as a Respondent in this proceeding.

19. This Respondent cannot be found liable for those alleged violations based on construction of the facility because Respondent did not construct the facility. Similarly, Respondent cannot be found liable for not complying with regulatory obligations that must be

satisfied prior to or at the time the facility was constructed. This is a basic "impossibility" defense to the imposition of liability.

20. Recent judicial decisions in other jurisdictions have recognized that a subsequent owner/operator cannot be held liable for a failure by the previous owner/operator to obtain required construction permits under Clean Air Act permitting programs. New York v. Niagra Mohawk Power Corporation, 263 F.Supp. 2d 650 (W.D. N.Y. 2003). In that case, the State had instituted an enforcement case against the current owner/operator of an electric power plant alleging that failure to obtain construction permits before modifying the facility violated the Clean Air Act and related state environmental laws. In addressing the State's allegations against the current owner/operator, the court first observed, "In no aspect of this case are the distinctions between the Clean Air Act's construction permit and operation permit programs more critical than in the NRG Defendant's (current owner/operator) Motion to Dismiss." (New York, 263 F.Supp. 2d at 668).

21. The Court found that the current owner/operator that had acquired the existing and operating power plant had no liability for any of the alleged violations related to the construction permitting requirements. "It is simply counterintuitive to construe the Clean Air Act in such a way as to impose liability for failure to follow the Act's preconstruction requirements on a person for whom compliance would have been impossible." (New York, 263 F.Supp. 2d at 669). Finding that the current owner/operator neither owned nor operated the subject facilities at the time the modifications allegedly occurred, the Court held that no liability could be imposed.

22. The facts presented in the New York case are strikingly similar to the facts alleged in the Complaint filed in this proceeding, except that the State has not named as a party Respondent the prior owner/operator of the Buffalo Grove Facility. Consequently, Respondent's

Second Partial Affirmative Defense informs the Complainant that it must look to some third party for the alleged violations that occurred before Respondent owned or operated the subject facility.

THIRD PARTIAL AFFIRMATIVE DEFENSE

23. As set forth in the preceding discussion, the Complainant's five count Complaint seeks the imposition of civil penalties against the Respondent for alleged violations of the Act and implementing regulations. Complainant's prayer for relief requests the imposition of civil penalties for each alleged violations and additional civil penalties for each day the alleged violations continued.

24. For its third partial Affirmative Defense, Respondent has alleged that the Illinois Environmental Protection Agency improperly and unlawfully denied permit applications submitted by the Respondent without providing Respondent with the opportunity to provide additional information requested by the application reviewer or to answer the reviewer's questions about the permit applications. Had the permits been issued in accordance with the permit applications submitted by Respondent, permit issuance would have served to end the time period during which the Respondent was operating without the requisite permits, as alleged in the Complaint. In essence, the Agency's failure to issue a "Wells letter" is directly related to the duration of any of the violations alleged in the Complaint.

25. The Complaint seeks civil penalties and injunctive relief against the Respondent for failing to have various permits or other governmental authorizations. The Complaint also admits that the subject facility was in existence and operating without the alleged permits.

26. As noted above, for purposes of Complainant's Motion, all well-pleaded facts of the Respondent's Affirmative Defenses are deemed admitted. Respondent has alleged in this Third Partial Affirmative Defense that the Illinois Environmental Protection Agency has

wrongfully denied permit applications submitted by Respondent on three separate occasions during the time periods relevant to this enforcement proceeding. The obligation imposed upon the Illinois Environmental Protection Agency pursuant to the Court's decision in Wells Manufacturing Company v. Illinois Environmental Protection Agency, 195 Ill. App. 3d 593, 552 N.E.2d 1074 (1st Dist. 1990), are clearly at issue in this proceeding.

27. In its Motion to Strike, Complainant attempts to distinguish the obligation imposed upon the Agency by the "Wells letter" doctrine by references to Pollution Control Board cases involving solid waste permitting situations. West Suburban Recycling and Energy Center, LP ("WSREC") v. Illinois EPA, PCB 95-119 and 95-125 (October 17, 1996).

28. Contrary to Complainant's argument, the obligation imposed on the Illinois Environmental Protection Agency by the Wells decision is not limited solely to solid waste permitting situations. In fact, the Wells case involved the Agency's denial of an application for renewal of an existing air operating permit. The Court in Wells relied upon a previous decision by the Illinois Supreme Court in Celotex Corporation v. Pollution Control Board, 94 Ill. 2d 107, 445 N.E.2d 752 (1983), and observed in that case, "No distinction was made between an original operating permit application and a renewal application." (552 N.E.2d at 1077.) Clearly, the obligation imposed on the Agency by the Wells decision arises in the air permitting process and in the case of an original operating permit application.

29. The decision in Wells is not limited to a situation where there exists a previously issued development or construction permit. The Court's finding of a violation of due process was based on the denial by the Illinois Environmental Protection Agency of a "fair chance to protect its interests." The "interest" of the permit applicant being protected by due process is the right to operate an existing business or facility. The Court in Wells explained, "In effect, it (IEPA) denied Wells the right to operate its business because it may be violating the Act, but

never gave it an opportunity to submit information which would disprove the allegation." (552 N.E.2d at 1077.)

30. The facts to be presented during the trial of this proceeding will establish that the Respondent acquired the subject facility as a going concern and began operating the existing candy making equipment a significant period of time after the facility had been constructed and was operating. The Agency's summary denial of the permit applications submitted by the Respondent denied Respondent the opportunity to protect its "interest", specifically the facility and candy-making business that it had acquired and was operating. To accept Complainant's argument that the only "protected" interest is a pre-existing development or construction permit unduly restricts the holding in Wells and fails to recognize a fundamental principle of due process.

CONCLUSION

31. For the reasons set forth above, the Complainant's Motion to Strike or Dismiss Respondent's Affirmative Defenses should be denied. In the alternative, Respondent requests leave to amend its Affirmative Defenses to provide additional specificity, if deemed necessary by the Board.

Respectfully submitted,

PERFETTI VAN MELLE USA, INC.

By: _____

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 21st day of January, 2004, I have served the attached *Response to Complainant's Motion to Strike or Dismiss Respondent's Affirmative Defenses*, by depositing same via First Class Mailto:

Dorothy M. Gunn, Clerk
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Hearing Officer
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THIS FILING IS SUBMITTED ON RECYCLED PAPER