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APR 15 2004

STATE OF ILLINOIS
Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)
by LISA MADIGAN, Attorney)
General of the State of Illinois)
)
Complainant,)
)
v.)
)
DRAW DRAPE CLEANERS, INC., an)
Illinois corporation, AMERICAN)
DRAPERY CLEANERS & FLAMEPROOFERS,)
INC., an Illinois corporation, and)
RICHARD ZELL, an Illinois resident,)
)
Respondents.)

No. PCB 03-51

NOTICE OF FILING

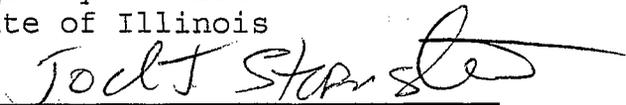
TO: See Attached Service List

PLEASE TAKE NOTICE that on April 15, 2004, the People of the State of Illinois filed with the Illinois Pollution Control Board COMPLAINANT'S SECOND MOTION TO STRIKE OR DISMISS RESPONDENT'S AFFIRMATIVE DEFENSES true and correct copies of which are attached and hereby served upon you.

Respectfully submitted,

LISA MADIGAN
Attorney General
State of Illinois

BY:


JOEL J. STERNSTEIN
Assistant Attorney General
Environmental Bureau
188 W. Randolph St., 20th Floor
Chicago, Illinois 60601
(312) 814-6986

THIS FILING IS SUBMITTED ON RECYCLED PAPER

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Mr. Richard Zell
President, Draw Drape Cleaners
Vice President and Secretary,
American Drapery Cleaners and Flameproofers Inc.
2235 West Roscoe
Chicago, Illinois 60618

APR 15 2004

STATE OF ILLINOIS
Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)
by LISA MADIGAN, Attorney)
General of the State of Illinois)

Complainant,)

v.)

No. PCB 03-51

DRAW DRAPE CLEANERS, INC., an)
Illinois corporation, AMERICAN)
DRAPERY CLEANERS & FLAMEPROOFERS,)
INC., an Illinois corporation, and)
RICHARD ZELL, an Illinois resident,)

Respondents.)

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

Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, pursuant to Section 101.506 of the Board's Procedural Regulations and Section 2-615 of the Illinois Code of Civil Procedure, moves for an order striking or dismissing all five affirmative defenses of Respondents DRAW DRAPE CLEANERS, INC. ("Draw Drape"), AMERICAN DRAPERY CLEANERS & FLAMEPROOFERS, INC. ("ADCAFI") and RICHARD ZELL ("Zell"). In support of its motion, Complainant states as follows:

1. On October 15, 2002, Complainant, the People of the State of Illinois, filed an eight-count Complaint for Civil Penalties against Respondent Draw Drape.

2. On December 17, 2002, Draw Drape filed an answer and five affirmative defenses to the Complaint ("First Answer").

3. On January 16, 2003, Complainant filed a Motion to Strike or Dismiss all Five Affirmative Defenses for the reasons outlined below ("First Motion to Strike").

4. On February 20, 2003 the Board issued an order striking all five of Draw Drape's affirmative defenses. See People v. Draw Drape Cleaners, Inc., PCB 03-51 (February 20, 2003). Attached as Exhibit No. 1.

5. On December 30, 2003 Complainant filed an Amended Complaint for Civil Penalties ("Amended Complaint") against Draw Drape, ADCAFI, and Zell. Complainant filed an Amended Notice of Filing on January 20, 2004 for the Amended Complaint.

6. On March 2, 2004 Respondents filed an answer to the Amended Complaint ("Second Answer").

7. Respondents raised five affirmative defenses in their Second Answer identical to the five affirmative defenses that Respondent Draw Drape raised in its First Answer that were struck by the Board on February 20, 2003.

8. Complainant incorporates the text of its First Motion to Strike into this Second Motion to Strike or Dismiss Respondent's Affirmative Defenses ("Second Motion to Strike"). Attached as Exhibit No 2.

9. All of the arguments in Complainant's First Motion to Strike pertaining to Respondent Draw Drape also pertain to Respondents ADCAFI and Zell in this Second Motion to Strike.

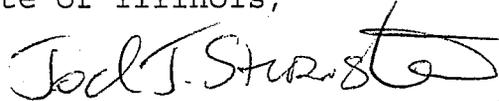
10. Complainant requests that the Board follow its holding in its February 20, 2003 order striking all five of Draw Drape's affirmative defenses with respect to the identical affirmative defenses in the Second Answer.

CONCLUSION

11. As Complainant stated in the First Motion to Strike, none of Respondents' affirmative defenses are appropriate affirmative defenses and should be stricken or dismissed. Complainant makes the same request to the Board in this Second Motion to Strike.

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. LISA MADIGAN,
Attorney General of the
State of Illinois,

By:

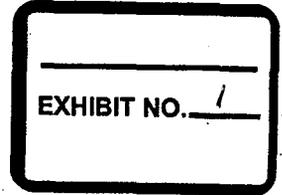


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ILLINOIS POLLUTION CONTROL BOARD
February 20, 2003

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Complainant,)
)
 v.)
)
 DRAW DRAPE CLEANERS, INC.,)
 an Illinois corporation,)
)
 Respondent.)

PCB 03-51
(Enforcement – Air)



ORDER OF THE BOARD (by M.E. Tristano):

On October 15, 2002, complainant, the People of the State of Illinois (complainant), filed an eight-count complaint against Draw Drape Cleaners, Inc. (respondent). The complainant alleged that respondent violated various provisions of the Environmental Protection Act (Act), the Board's air pollution regulations, and its Federally Enforceable State Operating Permit (FESOP). The complainant further alleged that respondent violated these provisions by emitting volatile organic material through the uncontrolled operation of its equipment. On December 17, 2002, the respondent filed an answer to the complaint and five affirmative defenses. On January 16, 2003, the complainant filed a motion to strike or dismiss defendant's affirmative defenses.

For the reasons stated below, the Board strikes the respondent's affirmative defenses.

BACKGROUND

Respondent operates a petroleum solvent dry cleaning operation located at 2235-2239 West Roscoe Street, Chicago, Cook County. The eight-count complaint against the respondent alleged various violations of the Act, the Board's air pollution regulations at 35 Ill. Adm. Code 201 and 218, and federal regulations made enforceable under Section 9.1(d) of the Act. Briefly the eight counts included:

- Count I: Complainant alleged that respondent emitted volatile organic material (VOM) into the atmosphere from the plant's Dryer #1 (installed in 1980 and is in use) and Dryer #2 (installed in 1996 and in use).
- Count II: Complainant alleged violation of the volatile organic material emission standards for petroleum solvent dry cleaners.
- Count III: Complainant alleged respondent failed to conduct adequate testing on Dryer #1 and Dryer #2.

- Count IV: Complainant alleged respondent constructed a "new emissions source," Dryer #2, without a permit in 1996.
- Count V: Complainant alleged respondent operated an emissions source, Dryer #2, without a permit since 1996.
- Count VI: Complainant alleged respondent violated FESOP condition 5 which stated: "The Permittee shall comply with the standards, operating practices, inspections and repair of leaks, and the testing and monitoring requirements for petroleum solvent dry cleaners as specified in 35 Ill. Adm. Code 218.607 through 218.610."
- Count VII: Complainant alleged Dryer #2 was a non-solvent recovery dryer and lacked a cartridge filter in violation of 1982 requirements.
- Count VIII: Complainant alleged respondent failed to perform an initial flow rate test on Dryer #2 after its 1996 installation.

STANDARD

In an affirmative defense, the respondent alleges "new facts or arguments that, if true, will defeat . . . [complainant's] claim even if all allegations in the complaint are true." People v. Community Landfill Co., PCB 97-193, (Aug. 6, 1998). The Code of Civil Procedure gives additional guidance on pleading affirmative defenses. Section 2-613(d) provides, in part:

The facts constituting any affirmative defense . . . and any defense which by other affirmative matter seeks to avoid the legal effect of or defeat the cause of action set forth in the complaint, . . . in whole or in part, and any ground or defense, whether affirmative or not, which, if not expressly stated in the pleading, would be likely to take the opposite party by surprise, must be plainly set forth in the answer or reply." 735 ILCS 5/2-613(d)(2002).

A valid affirmative defense gives color to the opposing party's claim but then asserts new matter which defeats an apparent right. Condon v. American Telephone and Telegraph Co. 210 Ill. App. 3d 701, 569 N.E.2d 518, 523 (2nd Dist. 1991), citing The Wornier Agency Inc. v. Doyle, 121 Ill. App. 3d 219, 222, 459 N.E.2d 633, 635 (4th Dist. 1984). A motion to strike an affirmative defense admits well-pleaded facts constituting the defense, and attacks only the legal sufficiency of the facts. "Where the well-pleaded facts of an affirmative defense raise the possibility that the party asserting them will prevail, the defense should not be stricken." International Insurance Co. v. Sargent and Lundy, 242 Ill. App. 3d 614, 630-631, 609 N.E.2d 842, 853-54 (1st Dist. 1993), citing Rapragar v. Allstate Insurance Co., 183 Ill. App. 3d 847, 854, 539 N.E.2d 787, 791 (2nd Dist. 1989).

First Affirmative Defense

Respondent's first affirmative defense is that in 1994, a fire at the facility damaged or destroyed part of the physical plant and equipment including a dryer identical to Dryer # 2. The

respondent alleges it was installed in the 1960's and, pursuant to the Act, was grandfathered in and did not require a permit.

The complainant responds that in the complaint there was no reference to respondent's dryer that it installed in the 1960. The complainant argues that the issue that the respondent raises is irrelevant to the complaint.

Discussion

Respondent's first affirmative defense does not allege "new facts or arguments that, if true, will defeat . . . [complainant's] claim even if all allegation in the complaint are true." People v. Community Landfill Co., PCB 97-193, (Aug. 6, 1998). Even if the dryer which was identical to Dryer #2 was damaged or destroyed, and was "grandfathered in," and did not require a permit, this is irrelevant to violations alleged concerning Dryers #1 and #2. The Board strikes the first affirmative defense.

Second Affirmative Defense

Respondent's second affirmative defense is that since Dryer #2 replaced an identical dryer damaged in the 1994 fire, Dryer #2 has been mainly used to ready drapes for pressing by "fluffing," and has been so used exclusively for the past year. Respondent argues the process of fluffing does not emit VOM into the environment. During the past year, Dryer #2 has been used only for fluffing and has not emitted VOMs into the environment.

Complainant alleges that in the complaint, Dryer #2 was installed in 1996. Complainant argues that respondent's second affirmative defense does not address VOM emissions from Dryer #2 prior to late 2001.

Discussion

Respondent's second affirmative defense does not allege "new facts or arguments that, if true, will defeat . . . [complainant's] claim even if all allegations in the complaint are true." People v. Community Landfill Co., PCB 97-193, (Aug. 6, 1998). Even if no VOM have been emitted into the environment during the past year, the second affirmative defense does not address VOM emissions from Dryer #2 prior to late 2001. The Board strikes respondent's second affirmative defense. Respondent is free to address these matters at hearing.

Third Affirmative Defense

Respondent's third affirmative defense is that Dryer #2 was installed after the 1994 fire because there was no recovery dryer available at that time in the size respondent needed for its operation. When a recovery dryer the proper size became available in March 2002, respondent ordered the new dryer immediately. The manufacturer accepted respondent's order in May 2002, and delivered the new dryer (Dryer #3) in late September 2002. Respondent states Dryer #3 is being installed and respondent has obtained a permit to operate Dryer #3.

The complainant responds that respondent's claim that it may have needed Dryer #2 for its operations is irrelevant to the allegations of noncompliance with the Act, the Board's regulations, and the federal regulations. In addition, complainant argues the complaint does not address Dryer #3, so any affirmative defense regarding Dryer #3 is also irrelevant.

Discussion

Respondent's third affirmative defense does not allege "new facts or arguments that, if true, will defeat . . . [complainant's] claim even if all allegations in the complaint are true." People v. Community Landfill Co., PCB 97-193, (Aug. 6, 1998). Whether it may have needed Dryer #2 for its operations is irrelevant to the issue of noncompliance with the Act. The installation of Dryer #3 is also irrelevant on the issue of past noncompliance with the Act, the Board's regulations, and the federal regulations. The Board strikes respondent's third affirmative defense. Respondent is free to address these matters at hearing, as they may be relevant to the Board's consideration of various factors under 33(c) and 42(h) of the Act. 415 ILCS 5/33(c), 42(h) (2002).

Fourth Affirmative Defense

Respondent's fourth affirmative defense is that it has always operated its plant below the emissions allowed under its FESOP permit. Respondent states it would have to emit an additional 1,000 gallons per year to reach the emissions allowed under its FESOP.

Complainant responds that it is not clear whether respondent is referring to emissions of VOM because (a) VOM is not mentioned in the fourth affirmative defense; and (b) reference to VOM emissions in the FESOP are expressed in ton/year and not in gallons/year. If respondent is referring to gallons of solvent per year, then the fourth affirmative defense is irrelevant as complainant does not allege a violation of the solvent usage limits in the FESOP at Section 4a. In addition, complainant alleges violations of the standards for petroleum solvent dry cleaners in terms of VOM per dry weight articles cleaned.

Discussion

Respondent's fourth affirmative defense does not allege "new facts or arguments that, if true, will defeat . . . [complainant's] claim even if all allegations in the complaint are true." People v. Community Landfill Co., PCB 97-193, (Aug. 6, 1998). The complainant is correct in that it is not clear whether the respondent is referring to emissions of VOM because VOM is not mentioned in the fourth affirmative defense and reference to VOM emissions in the FESOP are expressed in tons/year and not in gallons/year. The complainant does not allege a violation of the solvent usage limits in the FESOP at Section 4a. Therefore, if the respondent is referring to gallons of solvent per year, then the fourth affirmative defense is irrelevant. But, respondent may address compliance history at hearing, as it may be relevant to various factors under 33(c) and 42(h) of the Act. 415 ILCS 5/33(c), 42(h) (2002).

Fifth Affirmative Defense

Respondent's fifth affirmative defense is that its operations are unique in that its process commercially flame proofs drapes in a cost effective manner that triples the life of the drapes. Respondent asserts that the State of Illinois has approved respondent's operations for use by schools and related entities and lists respondent's operation as a source on the state's website.

Complainant argues that the unique nature of the respondent's business does not excuse it from compliance with the Act, the Board's regulations, and the federal regulations at issue in the complaint.

Discussion

Respondent's fifth affirmative defense does not allege "new facts or arguments that, if true, will defeat . . . [complainant's] claim even if all allegations in the complaint are true." People v. Community Landfill Co., PCB 97-193, (Aug. 6, 1998). The unique nature of respondent's business does not excuse it from compliance with the Act, the Board's regulations, and the federal regulations at issue in the complaint. The Board strikes this affirmative defense. Respondent is free to address these matters at hearing, as they may be relevant to the Board's consideration of various factors under 33(c), and 42(h) of the Act. 415 ILCS 5/33(c), 42(h) (2002).

CONCLUSION

The Board grants the motion to strike respondent's affirmative defenses. This case shall proceed expeditiously to hearing.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on February 20, 2003, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board

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STATE OF ILLINOIS
Pollution Control Board

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PEOPLE OF THE STATE OF ILLINOIS,)
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DRAW DRAPE CLEANERS, INC.,)
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Respondent.)

No. PCB 03-51

EXHIBIT NO. 2

NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that on January 16, 2003, the People of the State of Illinois filed with the Illinois Pollution Control Board COMPLAINANT'S MOTION TO STRIKE OR DISMISS DEFENDANT'S AFFIRMATIVE DEFENSES, true and correct copies of which are attached and hereby served upon you.

Respectfully submitted,

LISA MADIGAN
Attorney General
State of Illinois

BY: Joel J. Sternstein

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STATE OF ILLINOIS
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PEOPLE OF THE STATE OF ILLINOIS,)
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 Respondent.)

No. PCB 03-51
(Enforcement - Air)

COMPLAINANT'S MOTION TO STRIKE OR DISMISS
DEFENDANT'S AFFIRMATIVE DEFENSES

Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, pursuant to Section 101.506 of the Board's Procedural Regulations and Section 2-615 of the Illinois Code of Civil Procedure moves for an order striking or dismissing all five affirmative defenses of defendant, DRAW DRAPE CLEANERS, INC. ("Draw Drape"). In support of its motion, Complainant states as follows:

INTRODUCTION

1. On October 15, 2002, Complainant, the People of the State of Illinois, filed an eight-count complaint alleging that Draw Drape caused, threatened or allowed air pollution at its petroleum solvent dry cleaning operation located at 2235-2239 West Roscoe Street, Chicago, Cook County, Illinois ("facility") by emitting volatile organic material ("VOM") in violation of its Federally Enforceable State Operating Permit ("FESOP") (Count I); that Draw Drape violated standards for petroleum solvent dry

cleaners (Count II); that Draw Drape failed to conduct adequate testing at its facility (Count III); that Draw Drape constructed its Dryer #2, a new emissions source, without first obtaining a permit from the Illinois Environmental Protection Agency ("Illinois EPA") (Count IV); that Draw Drape operated and continues to operate Dryer #2, a new emissions source, without a permit issued by Illinois EPA (Count V); that Draw Drape violated Condition Number 5 of its FESOP (Count VI); that Draw Drape installed Dryer #2, a non solvent-recovery dryer which did not have a proper cartridge filter (Count VII); and that Draw Drape failed to perform an initial flow rate test Dryer #2 (Count VIII).

2. On December 17, 2002, defendants filed an answer and five affirmative defenses to the complaint. Complainant moves herein to strike or dismiss all five affirmative defenses for the reasons outlined below.

TEST FOR AFFIRMATIVE DEFENSES

3. The test for whether a defense is affirmative and must be pleaded by the respondent is whether the defense gives color to the opposing party's claim and then asserts a new matter by which the apparent right is defeated. Ferris Elevator Company, Inc. v. Neffco, Inc., 285 Ill.App.3d 350, 354, 674 N.E.2d 449, 452 (3rd Dist. 1996). In other words, an affirmative defense confesses or admits the cause of action alleged by the

Complainant, then seeks to avoid it by asserting a new matter not contained in the complaint and answer. Worner Agency, Inc. v. Doyle, 121 Ill.App.3d 219, 222-223, 459 N.E.2d 633, 635-636 (4th Dist. 1984). In addition, the facts in an affirmative defense must be pled with the same specificity as required by Complainant's pleading to establish a cause of action. International Insurance Co. v. Sargent & Lundy, 242 Ill. App. 3d 614, 630, 609 N.E.2d 842, 853 (1st Dist. 1993).

FIRST AFFIRMATIVE DEFENSE

4. Draw Drape's first affirmative defense is as follows:

In 1994, a fire at Respondent's plant damaged or destroyed part of the physical plant and equipment including a Dryer identical to Dryer #2 at issue in this Complaint. The dryer that was damaged was installed in the late 1960s and, pursuant to the Act, was "grandfathered in" and did not require a permit.

5. In the complaint, Complainant makes no reference to Draw Drape's dryer that it installed in the 1960s. The issue that respondent raises in its first affirmative defense is irrelevant to the complaint.

SECOND AFFIRMATIVE DEFENSE

6. Draw Drape's second affirmative defense is as follows:

Since Dryer #2 replaced an identical dryer damaged in the 1994 fire, Dryer #2 has been used mainly to ready drapes for pressing by "fluffing". The process of "fluffing" does not emit VOMs into the environment. During the last year

(emphasis added), Dryer #2 has been used only for "fluffing" and has not emitted VOMs into the environment.

7. In its second affirmative defense, Draw Drape claims that Dryer #2 has not emitted VOM during the last year. In the complaint, Complainant alleges that Dryer #2 was installed in 1996. Draw Drape's second affirmative defense does not address VOM emissions from Dryer #2 prior to late 2001.

THIRD AFFIRMATIVE DEFENSE

8. Draw Drape's third affirmative defense is as follows:

Respondent installed Dryer #2 after the fire because there was no recovery dryer available at that time (i.e., in 1994) in the size Respondent needed for his operations. When a recovery dryer the proper size became available in March 2002, Respondent ordered the new recovery dryer immediately. The manufacturer accepted Respondent's order for the new recovery dryer in May 2002 and delivered the new dryer (Dryer #3) in late September 2002. Dryer #3 is being installed at this time and Respondent has obtained a Permit #02030079 to operate Dryer #3.

9. Draw Drape's claim that it may have needed Dryer #2 for its operations is irrelevant to the allegations of noncompliance with the Act, the Board's regulations, and the federal regulations in the complaint. Furthermore, the complaint does not address Dryer #3, so any affirmative defense regarding Dryer #3 is also irrelevant.

FOURTH AFFIRMATIVE DEFENSE

10. Draw Drape's fourth affirmative defenses is as follows:

Respondent has always operated its plant below the emissions allowed under its FESOP Permit #95100005. Respondent would have to emit an additional 1,000 gallons per year to reach the emissions allowed under its FESOP.

11. It is not clear to Complainant that Draw Drape is referring to emissions of VOM because a) VOM is not mentioned in the fourth affirmative defense, and b) references to VOM emissions in the FESOP are expressed in tons/year and not in gallons/year. If respondent is referring to gallons of solvent per year, then the fourth affirmative defense is irrelevant as Complainant does not allege a violation of the solvent usage limits in the FESOP at Section 4a.

12. Furthermore, Complainant alleges violations of the standards for petroleum solvent dry cleaners in terms of VOM per dry weight articles cleaned. Draw Drape fails to counter that allegation with an affirmative defense based on VOM emissions per dry weight of articles cleaned.

FIFTH AFFIRMATIVE DEFENSE

13. Draw Drape's fifth affirmative defenses is as follows:

Respondent's operations are unique in that its process commercially flame proofs drapes in a cost effective manner that triples the life of the drapes. The State of Illinois has approved

Respondent's operations for use by schools and related entities, and lists Respondent's operation as a source on the State's website.

14. The unique nature of Draw Drape's business does not excuse it from compliance with the Act, the Board's regulations, and the federal regulations at issue in the complaint.

CONCLUSION

15. In all of affirmative defenses, Draw Drape does not confess or admit to the allegations in the complaint. None of the aforementioned affirmative defenses raise new matters which could defeat the complaint. In addition, the fourth affirmative defense is not pled with the same specificity as the complaint.

16. Thus, none of Draw Drape's affirmative defenses are appropriate affirmative defenses and should be stricken or dismissed.

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. LISA MADIGAN,
Attorney General of the
State of Illinois,

By:


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Assistant Attorney General
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Chicago, IL 60601
(312) 814-6986

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CERTIFICATE OF SERVICE

I, JOEL J. STERNSTEIN, an Assistant Attorney General, certify that on the 16th day of January, 2003, I caused to be served by First Class Mail the foregoing COMPLAINANT'S MOTION TO STRIKE OR DISMISS DEFENDANT'S AFFIRMATIVE DEFENSES to the parties named on the attached service list, by depositing same in postage prepaid envelopes with the United States Postal Service located at 100 West Randolph Street, Chicago, Illinois 60601.



JOEL J. STERNSTEIN

CERTIFICATE OF SERVICE

I, JOEL J. STERNSTEIN, an Assistant Attorney General, certify that on the 15th day of April 2004, I caused to be served by First Class Mail the foregoing COMPLAINANT'S SECOND MOTION TO STRIKE OR DISMISS RESPONDENT'S AFFIRMATIVE DEFENSES to the parties named on the attached service list, by depositing same in postage prepaid envelopes with the United States Postal Service located at 100 West Randolph Street, Chicago, Illinois 60601.



JOEL J. STERNSTEIN