

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
)
v.)
)
NACME STEEL PROCESSING, LLC,)
a Delaware limited liability corporation,)
)
Respondent.)

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PCB No. 13 - 12 **STATE OF ILLINOIS**
(Enforcement – Air) **Pollution Control Board**

 ORIGINAL

NACME STEEL PROCESSING, LLC’s MOTION TO STRIKE AFFIDAVIT OF VALERIY BRODSKY

NACME Steel Processing, LLC (“NACME”) moves the Board to strike the affidavit of Valeriy Brodsky attached to the People’s Motion for Summary Judgment and in support of its motion states as follows:

1. The State has filed herein a Motion for Summary Judgment pursuant to Section 101.516 of the Board’s regulations (35 IAC 101.516) and section 2-1005 of the Illinois Code of Civil Procedure (“ICCP”) (735 ILCS 5/2-1005) (the State’s Motion, without exhibits, is attached as Attachment A)
2. The State’s Motion attaches in support the affidavit of Valeriy Brodsky, a longtime Illinois Environmental Protection Agency (“IEPA”) employee and a “permit writer” in the Bureau of Air. (See, Attachment B)
3. Mr. Brodsky’s affidavit is fatally flawed in numerous ways including: A) the affidavit fails to meet the mandatory requirements of Supreme Court Rule 191(a); B) the affidavit

contains an expert opinion although the State has not disclosed Mr. Brodsky (or anyone else) as an expert; and, C) Mr. Brodsky relies on facts for which no evidentiary basis has been established.

Failure to Comply Supreme Court Rule 191(a)

4. Supreme Court Rule 191(a) states in relevant part: *Affidavits in support of and in opposition to a motion for summary judgment under section 2-1005 of the Code of Civil Procedure, ...shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all papers upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto. If all of the facts to be shown are not within the personal knowledge of one person, two or more affidavits shall be used. (emphasis supplied)*

5. An affidavit submitted in the summary judgment context serves as a substitute for testimony at trial. Therefore it is necessary that there be strict compliance with Rule 191(a), including the requirement that papers relied on be attached, so as to insure that trial judges are presented with valid evidentiary facts upon which to base a decision. *Robidoux v Oliphant*, 775 N.E. 2d 987, 995-96 (Ill. S. Ct. 2002) (citations omitted); *See, also, Preze v Borden Chemical, Inc*, 782 N.E. 2d 710, 714 (Ill. App. 1st 2003) Affidavits in support of summary judgment must be strictly construed against the movant. *Schultz v American National Bank and Trust Company*, 353 N.E. 2d 310, 315 (Ill. App. 3d 1976) Unsupported assertions, opinions, and conclusions do not comply with Rule 191(a) and may be stricken. *Collins v St. Paul Mercury Insurance Company*, 886 N.E. 2d 1035, 1040 (Ill. App. 1st 2008)

6. Mr. Brodsky's affidavit fails to comply with Rule 191(a) for the following reasons:

a) Portions of the affidavit are based not on personal knowledge but on inadmissible hearsay. For example in paragraph 4 Mr. Brodsky relies on "the manufacture's guaranteed

efficiency result” in making calculations with regard to a scrubber control device at NACME’s facility. Mr. Brodsky does not state that he has personal knowledge of the purported guaranteed efficiency result, does not disclose the identify the manufacturer or the source of his information and provides no evidentiary basis for the information that he says he relied on. Because an affidavit is akin to testimony at trial, Mr. Brodsky must testify from his personal knowledge, and not based on hearsay.

b) Mr. Brodsky states a variety of conclusions but fails to state with particularity the facts upon which his conclusions are based. His conclusions are, moreover, vague and confusing. He uses many terms and phrases without defining them, including “controlled emission rate”, “uncontrolled emission rate value”, and “measured or assumed negligible controlled emission.” (Aff. Par. 4) He uses numerous abbreviations without definition, including “PTE HCL”, “FESOP”, and “SOP”. (Id.) He uses the abbreviation “PTE” with no reference to its meaning, source or how it is determined and upon what methodology. “PTE” presumably means “potential to emit” and it is the State’s burden in this case to prove that NACME had the potential to emit above major source thresholds. Mr. Brodsky’s offhand conclusions about NACME’s “PTE” make it impossible for NACME to challenge Brodsky’s conclusions by counter-affidavit. NACME is not required to guess whether Brodsky means what he seems to mean or whether he means something else.

c) Mr. Brodsky presents a series of calculations and figures with no particulars about their source or reliability. He provides no evidentiary foundation for his approach for determining NACME’s potential to emit, fails to state whether it is the standard and generally accepted method in the air emissions testing community or even that it is IEPA’s standard method.

d) In paragraph 7 of his affidavit Mr. Brodsky states that “[I]n December 2005, I informed Nacme that the Agency could issue a FESOP...”, without providing the particulars, including how and to whom. In paragraph 8 he states, “on several occasions between December 2005 and January 26, 2012, ...the Agency requested Nacme to submit a construction permit application...”, but again fails to provide particulars about these purported Agency requests over this 6 year period. Also, in paragraph 10 he presents “relevant calculations for the facility”, but without any particulars that elucidate how they are relevant, upon what methodology he relies, and whether his methodology is standard practice or is otherwise acceptable.

e) Adding to the confusion, Mr. Brodsky fails to attach sworn or certified copies of the papers he says he relied on, as specifically required by the Rule. These include a stack test and various permit applications that he refers to but does not attach either in whole or in part (See Aff. Pars. 3, 4, 6 and 9)

f) Finally, there is no showing in the affidavit, as required under the Rule, that Mr. Brodsky can competently testify about the matters he asserts. The affidavit, including paragraph 2 which describes his duties and responsibilities with IEPA, contains no statement of his qualifications to interpret stack tests or to perform the mathematical analysis of test data in order to reach his stated opinions.¹

Because Mr. Brodsky’s affidavit does not strictly comply with Rule 191 as required, it should be stricken in whole or part.

Mr. Brodsky Has Not Been Disclosed as an Expert Witness

¹ In fact Mr. Brodsky admitted at deposition that he has no expertise in the review of stack tests and relies on a specialist at the Agency for assistance and he would not in the normal course even see such test results unless he specifically requested one. (See attached deposition excerpts, Attachment C.)

7. Mr. Brodsky was disclosed only as a lay witness in this matter, and not as an expert. (See Attachment D, par. 3) Notwithstanding his disclosure as a lay witness, Mr. Brodsky states a number of expert opinions derived from mathematical calculations he has performed as set forth in paragraphs 3, 4, 5 and 10 of the affidavit. Under Supreme Court Rule 213(f)(1), a “lay witness” is a person giving only fact or lay opinion testimony. Mr. Brodsky’s affidavit goes beyond lay witness testimony and ventures into technical analysis based on mathematical calculations ultimately stating, albeit in a vague way, an opinion about NACME’s purported potential to emit pollutants from its facility.

8. Mr. Brodsky’s affidavit testimony is in fact that of a controlled expert witness within the meaning of Rule 213(f)(3), but without required disclosure to NACME. NACME has not had the opportunity to conduct discovery, including by deposition, on Mr. Brodsky’s belated expert opinions. Among other things NACME has not had the opportunity to question Mr. Brodsky on his qualifications to render these opinions, on the methodology used, its general acceptance and the like.

9. The State’s non-disclosure of Mr. Brodsky as an expert is in direct contradiction of hearing officer Halloran’s order of April 23, 2013 (See, Attachment E) and of the applicable Rules and is highly prejudicial to NACME.

WHEREFORE, for all of the above reasons NACME requests:

1. That Mr. Brodsky’s affidavit be stricken in whole or in substantial part;
2. In the alternative that NACME be allowed to re-depose Mr. Brodsky with regards to the assertions in his affidavit and the expert opinion stated there; and,

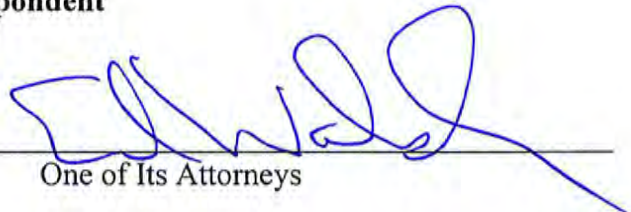
3. That NACME's time to respond to the State's Motion for Summary Judgment be extended to a time 14 days after ruling on the subject Motion to Strike or re-deposition of Mr. Brodsky.

Respectfully Submitted,

NACME STEEL PROCESSING, L.L.C.,

Respondent

By: _____

A handwritten signature in blue ink, appearing to be 'Edward V. Walsh, III', written over a horizontal line.

One of Its Attorneys

Edward V. Walsh, III
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CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached **NACME STEEL PROCESSING, LLC's MOTION TO STRIKE AFFIDAVIT OF VALERIY BRODSKY**,
by e-mail or U.S. Regular Mail, upon the following persons:

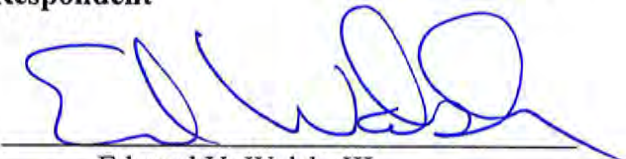
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**NACME STEEL PROCESSING, L.L.C.,
Respondent**

By:



Edward V. Walsh, III

Date: June 5, 2014