

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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MAY 27 2003

STATE OF ILLINOIS
Pollution Control Board

2222 ELSTON LLC, an Illinois limited
liability company,

Complainant,

v.

PUREX INDUSTRIES, INC., a Delaware
corporation, **FEDERAL DIE CASTING CO.**,
an Illinois corporation, **FEDERAL**
CHICAGO CORP., an Illinois corporation,
RAYMOND E. CROSS, an Illinois resident,
BEVERLY BANK TRUST NO. 8-7611, an
Illinois trustee, and **LAKESIDE BANK**
TRUST NOS. 10-1087 & 10-1343, an Illinois
trustee,

Respondents.

PCB No. 03-55

(Citizens UST Enforcement)

NOTICE OF FILING

To:

For **Purex Industries, Inc.**:

Robert L. Graham
Bill S. Forcade
Jason E. Yearout
Jenner & Block, LLC
One IBM Plaza
Chicago, Illinois 60611

For **Federal Die Casting Co., Federal**
Chicago Corp., Raymond E. Cross,
Lakeside Bank, Trust Nos. 10-1087, 10-1343,
Beverly Bank, Trust No. 8-7611:

Cary R. Perlman
Carrie L. Taubman
Latham & Watkins
5800 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the
Pollution Control Board the **2222 ELSTON LLC'S MOTION FOR LEAVE TO FILE ITS**
COMBINED SUR-REPLY IN SUPPORT OF ITS RESPONSE TO PUREX INDUSTRIES,
INC.'S MOTION TO DISMISS AND REPLY IN SUPPORT OF ITS MOTION TO

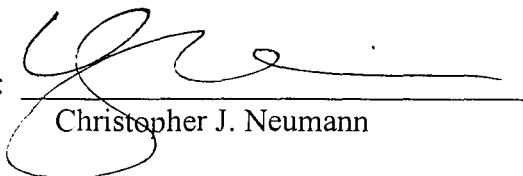
THIS FILING IS SUBMITTED ON RECYCLED PAPER

**STRIKE THE AFFIDAVIT OF JEFFREY M. SMITH, 2222 ELSTON LLC'S
COMBINED SUR-REPLY IN SUPPORT OF ITS RESPONSE TO PUREX INDUSTRIES,
INC.'S MOTION TO DISMISS AND REPLY IN SUPPORT OF ITS MOTION TO
STRIKE THE AFFIDAVIT OF JEFFREY M. SMITH and CERTIFICATE OF SERVICE**
filed on behalf of Complainant, 2222 Elston LLC, a copy of which is herewith served upon you.

Dated: May 23, 2003

Respectfully submitted,

GREENBERG TRAURIG, P.C.

By: 
Christopher J. Neumann

Attorneys for Complainant 2222 Elston LLC

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Daniel T. Fahner, Esq.
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Respondents.

PCB No. 03-55

(Citizens UST Enforcement)

STATE OF ILLINOIS
Pollution Control Board

CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached **2222 ELSTON LLC'S MOTION FOR LEAVE TO FILE ITS COMBINED SUR-REPLY IN SUPPORT OF ITS RESPONSE TO PUREX INDUSTRIES, INC.'S MOTION TO DISMISS AND REPLY IN SUPPORT OF ITS MOTION TO STRIKE THE AFFIDAVIT OF JEFFREY M. SMITH, 2222 ELSTON LLC'S COMBINED SUR-REPLY IN SUPPORT OF ITS RESPONSE TO PUREX INDUSTRIES, INC.'S MOTION TO DISMISS AND REPLY IN SUPPORT OF ITS MOTION TO STRIKE THE AFFIDAVIT OF JEFFREY M. SMITH** and NOTICE OF FILING upon the Respondents on May 23, 2003, by:

___ certified mail

___ registered mail

___ messenger service

___ personal service

 X U.S. Mail

at the addresses below:

THIS FILING IS SUBMITTED ON RECYCLED PAPER

For Purex Industries, Inc.:

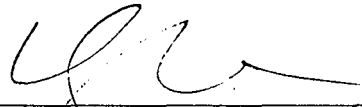
Robert L. Graham
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Jason E. Yearout
Jenner & Block, LLC
One IBM Plaza
Chicago, Illinois 60611

**For Federal Die Casting Co., Federal
Chicago Corp., Raymond E. Cross,
Lakeside Bank, Trust Nos. 10-1087, 10-1343,
Beverly Bank, Trust No. 8-7611:**

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Hearing Officer:

Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph Street, Suite 11-500
Chicago, Illinois 60601



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GREENBERG
ATTORNEYS AT LAW
TRAURIG

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CLERK'S OFFICE

MAY 27 2003

STATE OF ILLINOIS
Pollution Control Board

Christopher J. Neumann
(303) 572-6551

May 23, 2003

VIA U.S. MAIL

Pollution Control Board, Attn: Clerk
100 West Randolph Street
James R. Thompson Center, Suite 11-500
Chicago, IL 60601-3218

Re: 2222 Elston LLC v. Purex Industries, Inc., et al.
PCB No. 03-55

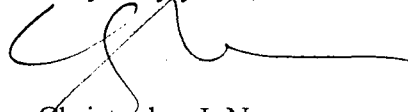
Dear Clerk:

Enclosed please find the original and nine copies of the following documents for filing in the above-referenced case:

1. 2222 Elston LLC's Motion for Leave to File its Combined Sur-Reply in Support of its Response to Purex Industries, Inc.'s Motion to Dismiss and Reply in Support of its Motion to Strike the Affidavit of Jeffrey M. Smith;
2. 2222 Elston LLC's Combined Sur-Reply in Support of its Response to Purex Industries, Inc.'s Motion to Dismiss and Reply in Support of its Motion to Strike the Affidavit of Jeffrey M. Smith;
3. Notice of Filing; and,
4. Certificate of Service.

Your assistance in this matter is appreciated.

Very truly yours,



Christopher J. Neumann
OF GREENBERG TRAURIG, L.L.P.

Enclosures

cc: Steven M. Siros, Esq.
Cary R. Perlman, Esq.

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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2222 ELSTON LLC, an Illinois limited
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corporation, **FEDERAL DIE CASTING CO.**,
an Illinois corporation, **FEDERAL**
CHICAGO CORP., an Illinois corporation,
RAYMOND E. CROSS, an Illinois resident,
BEVERLY BANK TRUST NO. 8-7611, an
Illinois trustee, and **LAKESIDE BANK**
TRUST NOS. 10-1087 & 10-1343, an Illinois
trustee,

Respondents.

PCB No. 03-55

(Citizens UST Enforcement)

STATE OF ILLINOIS
Pollution Control Board

**2222 ELSTON LLC'S MOTION FOR LEAVE TO FILE ITS COMBINED SUR-REPLY
IN SUPPORT OF ITS RESPONSE TO PUREX INDUSTRIES, INC.'S MOTION TO
DISMISS AND REPLY IN SUPPORT OF ITS MOTION TO STRIKE THE AFFIDAVIT
OF JEFFREY M. SMITH, INSTANTER**

Complainant 2222 Elston LLC ("Elston"), by and through its attorneys, Greenberg
Traurig, P.C., and pursuant to 35 ILL. ADMIN. CODE tit. 35, § 101.500(e), respectfully requests
leave from the Illinois Pollution Control Board ("Board") to file its Combined Sur-Reply in
Support of its Response to Purex Industries, Inc.'s Motion to Dismiss and Reply in Support of its
Motion to Strike the Affidavit of Jeffrey M. Smith, a copy of which is attached to this Motion,
instanter. In support of this Motion, Elston states as follows:

1. On December 2, 2002, Purex Industries, Inc. ("Purex") filed a Motion to Dismiss
the Complaint filed by Elston on the basis that the Board does not have personal jurisdiction over
Purex.

THIS FILING IS SUBMITTED ON RECYCLED PAPER

2. In response to this Motion to Dismiss, on December 12, 2002, Elston filed a Motion to Conduct Limited Personal Jurisdiction Discovery. The Board granted this Motion on December 16, 2002.

3. On April 21, 2003, after expending substantial resources conducting discovery into Purex's contacts with the State of Illinois and developing the factual record of Purex's legacy of pollution at 2228 N. Elston Avenue (the "Site"), Elston filed its Combined Motion to Strike and Response to Purex Industries, Inc.'s Motion to Dismiss.

4. On May 5, 2003, Purex responded to Elston's Motion to Strike the Affidavit of Jeffrey M. Smith through its Reply to 2222 Elston LLC's Response to Purex's Motion to Dismiss (the "Response to Elston's Motion to Strike Smith Affidavit" or "Response").

5. In its Response, Purex attaches as exhibits, and relies upon, certain documents responsive to Elston's personal jurisdiction discovery requests, which Purex has never produced to Elston.

6. In addition, Purex grossly mischaracterizes the factual record in its Response.


7. Elston also now seeks leave to file a Reply in Support of its Motion to Strike the Affidavit of Jeffrey M. Smith in order to: (a) respond to the "new" evidence relied upon by Purex and to request that the Supplemental Affidavit of Jeffrey M. Smith and all attached exhibits be stricken, and (b) clarify and correct misstatements of fact and law made by Purex in its Response.

WHEREFORE, Complainant 2222 Elston LLC respectfully requests that the Board grant Elston leave to file its Reply Memorandum in Support of its Motion to Strike the Affidavit of Jeffrey M. Smith, Instantly.

Dated: May 23, 2003

Respectfully submitted,

GREENBERG TRAURIG, L.L.P.

By: 
Christopher J. Neumann

Attorneys for Complainant 2222 Elston LLC

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#55481

MAY 27 2003

STATE OF ILLINOIS
Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

2222 ELSTON LLC, an Illinois limited liability company,)	
)	
)	
Complainant,)	
)	
v.)	PCB No. 03-55
)	(Citizens UST Enforcement)
)	
PUREX INDUSTRIES, INC., a Delaware corporation, FEDERAL DIE CASTING CO., an Illinois corporation, FEDERAL CHICAGO CORP., an Illinois corporation, RAYMOND E. CROSS, an Illinois resident, BEVERLY BANK TRUST NO. 8-7611, an Illinois trustee, and LAKESIDE BANK TRUST NOS. 10-1087 & 10-1343, an Illinois trustee,)	
)	
)	
Respondents.)	
)	
)	

**2222 ELSTON LLC'S COMBINED SUR-REPLY IN SUPPORT OF ITS RESPONSE TO
PUREX INDUSTRIES, INC.'S MOTION TO DISMISS AND REPLY IN SUPPORT OF
ITS MOTION TO STRIKE THE AFFIDAVIT OF JEFFREY M. SMITH**

Complainant 2222 Elston LLC ("Elston"), by and through its attorneys, Greenberg Traurig, L.L.P., respectfully submits the following Combined Sur-Reply in Support of Elston's Response to Purex Industries, Inc.'s Motion to Dismiss and Elston's Reply in Support of its previously filed Motion to Strike the Affidavit of Jeffrey M. Smith. Elston would show the Board as follows:

I. INTRODUCTION AND SUMMARY OF ARGUMENT

In its desperate attempt to evade the jurisdiction of this Board and to escape accountability for its shameful legacy of pollution in this State, Respondent Purex Industries, Inc.

("Purex" or "Respondent") flees not only from its corporate past. Purex also flees from procedural and evidentiary fairness.

First, nearly half of the exhibits attached to Purex's May 5, 2003 Reply to Elston's Response to Purex's Motion to Dismiss (the "Purex Reply") consist of documents *never produced* to Elston in these proceedings. These documents were plainly responsive to any number of the discovery requests propounded by Elston, pursuant to the Hearing Officer's December 16, 2002 Order. (*Compare* Exhibits 6, 7 and 8 to the May 5, 2003 Affidavit of Jeffrey M. Smith ("Supplemental Affidavit of Jeffrey M. Smith" or "Suppl. Smith Aff.") (which were never produced to Elston by Purex) to Document Request Nos. 4, 5 and 6 set forth in Exhibit 2 to the Affidavit of Jason Yearout ("Yearout Aff."), filed in support of the Purex Reply.)

Second, after submitting an entirely conclusory, half-page, 89-word affidavit in support of its opening Motion to Dismiss, Purex now comes forward, at the eleventh hour and after the close of jurisdictional discovery, with a new four-page, 18-paragraph affidavit given by the same affiant. In his "supplemental" affidavit, attorney Jeffrey M. Smith provides all kinds of self-serving spins on Purex's corporate pedigree, many of them about periods of time when Mr. Smith was still in school. Shockingly, Purex then suggests that Mr. Smith's testimony "concerning complicated events that occurred over an extended period of time," somehow does not constitute "binding testimony" on behalf of Purex under Illinois Supreme Court Rule 206. *See* Purex Reply, at 17 & n.9. If that is the case, then there is absolutely *no* competent, binding evidence now before this Board sufficient to controvert the jurisdiction-conferring allegations in Elston's Complaint, and Purex's Motion must fail on those grounds alone. And, if that were not enough, what testimony *is* competent and *is* binding – the 1988 and 1992 testimony of William Finck (Purex's now-deceased President and CEO who, unlike Mr. Smith, presumably had

personal knowledge of the matters about which he was testifying), never includes any of the revisionist corporate history Purex now advances. Indeed, Mr. Finck testified (in a 1988 declaration, *see* Ex. A, Suppl. Neumann Aff., Ex. 1 (PUREX 003972-003979), and a 1992 prepared direct examination, *id.*, Ex. 2 (PUREX 003987-003997)), in excruciating detail about Purex's relationship to, and operations at, the Elston Site – a Site with which Mr. Smith now testifies, decades later to meet his needs, that Purex has no connections whatsoever. If there was no legal nexus between Purex and the Elston Site, why didn't Mr. Finck just say that in 1988 and 1992, years after responsibility for the Site was supposedly transferred to some unfortunate Delaware corporation? Why did the President and CEO of Purex, a witness with the personal, contemporaneous knowledge Mr. Smith clearly lacks, give page after page of testimony concerning the Elston Site? All of that could have been cut-off by simple testimony that "you've got the wrong Purex." The reason Mr. Finck did not take that approach, Elston respectfully suggests, was that it would have been false.

Third, in its Reply, Purex completely ignores several important points and arguments that thoroughly undermine its position that it is not the lawful successor to Purex Corporation. For example, Purex does not even *attempt* to explain why *it* is asserting the attorney-client privilege over documents created by a corporate entity whose assets and liabilities, Purex now claims, it did not succeed to. Why is *Purex* asserting that privilege? Why *not* the unfortunate corporate entity Purex contends was left standing – holding the liability bag – when the corporate musical chairs game ended? If *that* entity truly succeeded to Purex Corporation's assets and liabilities, then *it* would be the holder of the privilege, *not* Purex. Purex's own evidentiary objections belie its argument. Purex is asserting the privilege over Purex Corporation's documents simply because Purex is the lawful successor to Purex Corporation. Similarly, Purex never explains

why it filed, under its own letterhead, Section 103(c) notifications with the U.S. Environmental Protection Agency in 1981 concerning the Elston Site. *See* Elston Resp., Ex. A., Neumann Aff., Ex. 16 (EPA 00002-00004). Presumably, Mr. Smith would testify (at his acknowledged rate of \$225 an hour) that fact is somehow vitiated because it took place before the August 1982 leveraged buyout that he claims gave Purex a pass to pollute Illinois. Then why, when Mr. Smith was himself contacted by EPA agents in 1986 about the Elston Site didn't he simply state to the agents that Purex bore no responsibility for the Site? Purex never bothers to answer that nagging question either.

Finally, Purex plays fast and loose with the facts, picking and choosing from the vast documentary landscape the granular tid-bits that support its cause, ignoring the overwhelming cascade of facts demonstrating its ties to Illinois. Purex even stoops to parsing statements out of documents, omitting unhelpful phrases, apparently assuming such shenanigans would go undetected. In the face of such sharp litigation tactics, Elston unfortunately has no choice but to submit a Sur-Reply and to bring these important matters – matters which go to the heart of Purex's credibility for the duration of these proceedings – to the attention of the Board.¹

II. SUR-REPLY STATEMENT OF FACTS

Initially, Purex describes as “replete with errors and misstatements” Elston's description of the transactions that link Purex to contamination at the Elston Site caused by the operations of its predecessors in interest – Purex Corporation and its Industrial Division, and, before that, T.F. Washburn. Strikingly, Purex's four-page recitation of its own history actually corroborates each

¹ Elston acknowledges that Sur-Replies – even Replies, for that matter – are disfavored in the Board's jurisprudence and practice. Nonetheless, the Board has stated that it may grant leave to file a sur-reply “when a reply raises new arguments or evidence, . . .” *Trepanier v. Speedway Wrecking Co.*, No. PCB 97-50 (Oct. 15, 1998), at 3. Because Purex relies, in material part, on documents withheld from production in the course of jurisdictional discovery, Elston respectfully believes a Sur-Reply is warranted and serves the interests of justice. Elston begs the Board's leave and indulgence, and regrets the necessity of further briefing.

of the critical chronological bullet points set forth on page 4 of Elston's April 21, 2003

"Combined Motion to Strike and Response to Purex Industries, Inc.'s Motion to Dismiss (the "Elston Response").

- Purex *admits* Purex Corporation, Ltd. acquired T.F. Washburn in 1961. Purex Reply, at 3.
- Purex *does not dispute* that in June 1964, Purex Corporation, Ltd. liquidated and dissolved T.F. Washburn, and merged it into Purex Corporation, Ltd. *Id.*
- Purex *admits* T.F. Washburn was operated as a division of Purex Corporation, Ltd. until 1974. *Id.*
- Purex *does not dispute* that in June 1974, Purex Corporation, Ltd. changed its name to Purex Corporation. *Id.*
- Purex *does not dispute* that Purex Industries, Inc., a Delaware corporation, acquired all of the stock of Purex Corporation in 1978. *Id.*
- Purex *admits* that in August 1982, Purex Corporation changed its name to T.P. Industrial, Inc. *Id.* at 4.
- Purex *does not dispute* that in 1986, T.P. Industrial, Inc. merged with the respondent in these proceedings, Purex Industries, Inc.

Second, Purex centrally relies on a document, the so-called "Plan of Partial Liquidation," *see* Suppl. Smith Aff., Ex. 6,² to suggest that Purex's predecessor – what Purex now calls "Purex California" – "only retained the assets and liabilities of certain businesses." *See* Purex Reply, at 4. Curiously, Purex relegates the critical identification of those "certain businesses" to footnote 2 on page 4. *Id.* In that footnote, Purex contends "Turco Products Division" and "Freshpict Foods, Inc." were the "*only*" businesses retained by its predecessor. *Id.* at 4 n.2 (emphasis

² The version of the Plan of Partial Liquidation that is attached as Exhibit 6 to the Supplemental Smith Affidavit is not the same document that was produced to Elston in the course of discovery. Exhibit 6 bears Bates Numbers PUREX 4816-4826. Those Bates numbers are not affixed to any document ever produced to Elston in these proceedings. The documents produced to Elston bore five-digit and, later, six-digit Bates numbers – never four digits. Further, the font of the Bates numbers placed on Exhibit 6 are different than the fonts of the Bates numbers on documents produced to Elston in discovery. Another version of the Plan was produced to Elston bearing Bates Numbers PUREX 01514-01525, but it contains a page in addition to the version of the Plan attached as Exhibit 6 to the Supplemental Smith Affidavit – Bates Number PUREX 01515.

added). Purex leaves out of its footnoted description of the retained “certain businesses” a critical phrase from the Plan of Partial Liquidation. That phrase – perhaps more than any other in these proceedings – is absolutely devastating to Purex’s jurisdictional challenge. Paragraph 2 of the Plan of Partial Liquidation states:

The Corporation shall retain all the assets and liabilities of the Turco Products Division (with the exception of the land and buildings located at 24600 So. Main Street, Carson, California), ***the Purex Industrial Division***, the Collateral (as defined in that certain Security Agreement, dated August 1, 1979, from the Corporation to Equitable Life Insurance Company of Iowa), and all the stock of Freshpict Foods, Inc., Purex Export Corporation, and the foreign subsidiaries of the Corporation (the “Retained Assets and Liabilities”). . .

Suppl. Smith Aff., Ex. 6, at PUREX 4817-4818 (emphasis added). “Purex Industrial Division” was precisely the operation within Purex Corporation that was responsible for activities at the Elston Site. According to Purex Corporation’s own Annual Report in 1974 (the very year Purex sold T.F. Washburn), Purex told the securities markets that:

*The Purex Industrial Division sells **floor maintenance products**, a line of institutional cleaning products, hotel bar soaps, and synthetic floor pads.*

Ex. A, Suppl. Neumann Aff., Ex. 3, at PUREX 02540 (emphasis added). T.F. Washburn, in turn, described itself before its acquisition by Purex as a manufacturer of “quality paint components and **floor finishing and maintenance products** since 1886.” *Id.*, Ex. 4, at PUREX 004337 (emphasis added). The operations of T.F. Washburn were clearly subsumed within the Purex Industrial Division of Purex Corporation, according to Purex Corporation’s own Annual Report. It should now be clear to the Board precisely why Purex found it so necessary to omit the phrase “Purex Industrial Division” from its misleading footnote 2. To have included that phrase would have truthfully informed the Board of the nexus between the Respondent and the Elston Site.

Third, conveniently omitted from Purex's presentation of the Plan of Partial Liquidation is a document entitled "Clarifications to Plan of Partial Liquidation" that was obviously contemporaneously executed by representatives of "Purex California." See Ex. A, Suppl. Neumann Aff., Ex. 5, at PUREX 02805-02806. The "Clarifications" to the Plan include the following statement:

1. The following assets and liabilities are included in Exhibit A "***Retained*** Assets and Liabilities" to the Plan:

All liabilities, known and unknown, relating to discontinued operations previously disposed of.

Id. at PUREX 02805 (emphasis added). Therefore, among the liabilities retained by Purex California – which Purex contends is the predecessor to the Respondent in these proceedings – were the liabilities, known and unknown, arising from Purex Corporation's discontinued operations at the Elston Site, which had been "previously disposed of" in 1974 and again in 1978.

Fourth, another document conveniently ignored by Purex is one that was created *after* the cut-off date (August 11, 1982) at which Purex chooses to end its chronological presentation in the Reply. See Ex. A, Suppl. Neumann Aff., Ex. 6, at PUREX 02801-02802. That document, entitled "Instrument of Assignment and Assumption" is dated August 13, 1982, and it confirms that the corporate entity Respondent now calls "Purex Delaware" transferred to the Respondent in these proceedings, Purex Industries, Inc., the liabilities of the "Discontinued Businesses." *Id.* Obviously, by 1982, Purex's operations at the Elston Site (through its Industrial Division and through T.F. Washburn) had ended. By that time, the Elston operations were patently a "Discontinued Business." Thus, even assuming Respondent were remotely correct – which it is not – that the liabilities for the Elston Site were transferred on August 11, 1982 to "Purex Delaware," two days later, on August 13, 1982, those liabilities would have been further

transferred to the Respondent, under the plain meaning of documents Purex chooses to sweep under the rug. *Id.* That inescapable fact perhaps explains why Respondent chose to end its story on August 11, 1982. “The final step in the leverage buyout,” Purex Reply, at 4, was not so “final” it would appear.

As the foregoing amply demonstrates, Purex’s *own* documents – including those it withheld from production until serving its Reply – contradict its self-serving version of events. Purex’s Motion collapses under the weight of the overwhelming facts.

III. ARGUMENT

A. Purex Industries, Inc. Is Subject To The Board’s *In Personam* Jurisdiction.

1. Purex Corporation Transacted Business And Committed Torts In Illinois.

Initially, Purex absurdly states it has provided an “affidavit” from the Illinois Secretary of State’s office confirming that Purex has never been registered to do business in Illinois. *See* Purex Reply, at 7. Certificates like the one Purex obtained from the Secretary of State simply indicate that State records do not reflect any filings by Purex reporting on its business activities in Illinois. The information is only as good as the information voluntarily supplied by firms that do business in Illinois. The Illinois Secretary of State’s office lacks the resources and personnel actually to investigate and to determine which firms in the United States conduct business in Illinois. The certificate is not remotely an “affidavit.” It should only be accorded the evidentiary weight it deserves: it is probative but not dispositive.

Second, Purex incorrectly characterizes Elston’s argument as resting on the concept that “Respondent is or was the parent of several different subsidiaries or corporations that may or may not have done business or otherwise had contacts with Illinois.” *Id.* at 7-8. Purex misstates Elston’s argument. Elston does not contend Respondent Purex Industries, Inc. *is* Purex Corporation or *is* Purex Corporation’s Industrial Division or *is* T.F. Washburn or was the

“parent” of any of those entities. Rather, Elston contends Respondent *succeeded* to the liabilities of those entities by virtue of the continuity of ownership that spans a generation of corporate forms. Elston need not show that Respondent transacted business in Illinois – only that Respondent succeeded to the liabilities of a firm that did. As stated in Elston’s opposition brief: “the controversy now before this Board really boils down to one, inherently legal question: whether the personal jurisdictional contacts of a predecessor corporation with Illinois are fairly imputed to a non-resident successor corporation.” Elston Resp., at 23. While Purex throws up as much chaff as it can to distract the Board from that central question, it remains the dispositive legal issue presented in the briefing.

2. The Personal Jurisdictional Contacts Of Purex Corporation Are Imputed To Its Successor, the Respondent Purex Industries, Inc.

Purex does not seriously dispute that the jurisdiction-conferring contacts of a predecessor corporation are imputed to its lawful successor. See Purex Reply, at 10 (citing *Select Creations, Inc. v. Paliapito America, Inc.*, 852 F. Supp. 740, 765 (E.D. Wis. 1994), and *R.J. O’Brien & Assoc., Inc. v. Newport Futures & Options Corp.*, 1993 WL 14685, *5 (N.D. Ill. 1993)). Purex simply contends that it is not the successor to the corporations that operated the Elston Site, and that Elston has failed to make the factual case for Purex’s status as successor. *Id.*

As should be evident from Elston’s opposition brief, Elston has chosen to rely on Purex’s own admissions and on the findings of other courts and administrative bodies for the proposition that Purex is the successor to Purex Corporation. Stated differently, if Purex has *admitted* that it is the successor to Purex Corporation, or other fact-finders have *made* that finding already, then Elston *does not need* to make a factual case or put on independent evidence in support of that proposition to defeat Purex’s Motion.

a. United States v. Farber

Purex *concedes* that in response to interrogatories propounded in the *Farber* proceedings in 1988, it stated that it was in fact the legal successor to Purex Corporation, which it also concedes operated the Elston Site. *See* Purex Reply, at 6-7, 14-15. Amazingly, Purex now states that “in 1988, it may not have been fully aware” of the manner in which responsibility for the Elston Site was transferred. *Id.* at 15. Purex seriously contends, and apparently expects this Board seriously to believe, that while it was not fully aware in 1988 of the inter-corporate allocation of responsibility effected by the 1982 leveraged buyout – when memories were fresh and witnesses with personal knowledge were still alive and employed by Purex – it has nonetheless come to its senses in 2003. It is emphatically certain now, over twenty years later, that it is *not* responsible for the Elston Site, after all. Elston respectfully suggests that the interrogatory responses in 1988 should be given far greater weight than the self-serving arguments Purex now advances to escape the jurisdiction of this State.

Finally, Purex asserts, without more, that it did not benefit in the *Farber* proceedings from the *verified* discovery response (verified by the very same Mr. Smith) indicating that it was the corporate successor to Purex Corporation. How does the Board *know* that to be true? Where is the *evidence* disproving beneficial effect? Where is the judicial order rejecting Purex’s interrogatory response as false or perjurious? Did the assertion carry any value in the settlement reached in *Farber*? Mr. Smith’s “supplemental” affidavit is silent on these points. Purex is judicially estopped from taking a position now so directly at odds with the position it took in *Farber*.

b. *In the Matter of the Petition of Purex Industries, Inc.*

Next, Purex contends that the California State Water Resources Control Board (the “California Board”) somehow got it wrong when it ruled that Purex is responsible for the

pollution of Purex Corporation. *See* Purex Reply, at 11-13. Initially, it is no defense to a collateral estoppel argument that the original fact-finder was in error. The entire point of the doctrine is to avoid re-litigating decided matters that Purex had a full and fair opportunity to litigate. Purex made precisely the same argument before the California Board that it makes here. Purex lost. The matter is decided.

Purex further argues that the California Board ignored what Purex says is a controlling decision of the U.S. District Court for the Central District of California in *Lockheed-Martin v. Crane Co.*, No. 94-2717 (C.D. Cal. Apr. 7, 1997). *See* Purex Reply, at 11-12. Purex is wrong. Initially, according to the case caption, it does not appear Purex Industries, Inc. was an original party in the *Lockheed-Martin* proceedings. Second, none of the parties in *Lockheed-Martin* are the same as the parties that were before the California Board or that are implicated in these proceedings. Owing to this utter lack of party identity, it strains credulity that anything decided by the *Lockheed-Martin* court could ever conceivably bind the California Board – or this Board – in reaching any findings of fact about Purex Industries, Inc. Even assuming there were party identity, the *Lockheed-Martin* decision does not stand for the proposition for which Purex cites it. The finding of the *Lockheed-Martin* court was not some generalized, universal determination that all of Purex's environmental responsibilities, everywhere, were blissfully transferred to others. Such a reading of that decision is patently absurd. Rather, the ruling rested on *specific* agreements concerning *specific* properties and relating to *specific* liabilities – none of which was at issue in the California Board proceedings or in these. Purex also contends that the California Board “disregarded contracts between the parties.” *See* Purex Reply, at 12. Of course the Board did. Those agreements did not govern the liabilities the California Board was weighing concerning the Belmont Site. Further, the California Board took the position (a position this

Board should follow) that private agreements allocating responsibility or liability for pollution *never* can bind administrative pollution control boards. *See* Elston Resp., Ex. A, Neumann Aff., Ex. 6, at *6-*7. On the contrary, such agreements either simply expand the scope of liability to include the transferees (with the transferors still responsible) or create private rights of contribution between contractual parties that do not affect the public's right to compensation and remediation of contaminated sites. *Id.* Here, if Purex truly believes that it has contractually transferred its liabilities for the Elston Site to a non-party, Purex is free to bring that party into these proceedings, and to seek appropriate contribution, or to bring a separate action in the forum of its choice.

Finally, rounding out a series of selectively parsed quotations that risk misleading the Board, Purex cites the California Board's decision for the proposition that a stock purchase is insufficient to impose liability on the purchaser. *See* Purex Reply, at 8-9. Purex quotes one sentence from the California Board's decision, but omits a subsequent qualifying sentence. The entire quotation reads:

Although AlliedSignal, Inc. purchased the stock of [Baron-Blakeslee], this fact alone is insufficient to impose liability on [AlliedSignal]. As a general rule, a parent corporation, like any other stockholder, is protected from liability by the corporate veil. *There is some evidence in the record, however, to indicate that the two companies may have merged. If this is true, AlliedSignal, Inc. would have acquired the liabilities of Baron-Blakeslee-Del.*

Elston Resp., Ex. A, Neumann Aff., Ex. 6, at *5 (emphasis added). Here, Elston argues and Purex concedes that just such *mergers* occurred between (a) Purex Corporation and T.F. Washburn in 1964 and (b) between T.P. Industrial (to which Purex Corporation changed its name in 1982) and the Respondent, Purex Industries, Inc., in 1986. Respondent has, in the words of the California Board, "acquired the liabilities" of Purex Corporation and T.F. Washburn via a series of mergers. Just as Elston does not remotely contend that Respondent *is* Purex

Corporation or *is* T.F. Washburn, Elston does not suggest that Respondent is merely the *parent* or *stockholder* of those operators of the Elston Site. Rather, Respondent is the lawful *successor* to those corporations, by merger, and is fully accountable for their pollution at the Site.

c. *Associated Aviation Underwriters, Inc. v. Purex Industries, Inc.*

Next, Purex contends Elston's reliance on *Associated Aviation Underwriters v. Purex Industries, Inc.*, 99 Cal. App. 4th 400 (Cal. Ct. App.), *cert. granted*, 124 Cal. Rptr. 2d 662 (Cal. 2002), is misplaced. *See* Purex Reply, at 13-14. Purex states that it merely retained insurance coverage rights under the applicable policy by virtue of a "1985 contract of sale." First of all, where is that contract of sale? All the Board is given are the words of a witness whose testimony has gone through various iterations and gyrations since 1988 on the matter of whether Purex is a successor to Purex Corporation. Second, the *Associated Aviation* court used the precise words "successor" to describe Purex's own argument that it was entitled to insurance coverage. *See Associated Aviation*, 99 Cal. App. 4th at 403. The court did not use the words contractor, purchaser, assignee, beneficiary or any other term with legal significance. It used the word "successor" to describe Respondent's relationship to the insurance policies of Purex Corporation. Third, Elston has repeatedly requested that Purex produce the briefing and pleadings from the *Associated Aviation* case in order to discover what precisely Purex argued in those proceedings about its relationship to Purex Corporation. Purex has steadfastly refused to provide those documents. Fourth and finally, Purex completely glosses over the authority in *Columbia Cas. Co. v. Playtex, Inc.*, No. 88 C 3446, 1988 WL 76976 (N.D. Ill. 1988). *See* Purex Reply, at 14 & n.7. Purex does not dispute the *Columbia* court's holding that where a corporation claims the benefits of an insurance contract procured by its predecessor, "it appears to us that [it] has taken on the rights and obligations of [the predecessor] and therefore that [the predecessor's] contacts

with Illinois may be imputed to [the successor claiming the insurance rights].” *Id.* Therefore, by its own conduct in the *Associated Aviation* proceedings, Purex claimed the status of successor to Purex Corporation and is now properly estopped from denying that status in these proceedings.

d. Purex Is *Not* A Mere Asset Purchaser; It Merged With Purex Corporation And T.F. Washburn

Finally, Purex cites the *Hoppa* decision for the completely irrelevant point that there are four limited exceptions to the basic tenet of corporate law that “a mere transfer of assets from one corporation to another does not make the latter liable for the debts or liabilities of the first corporation.” *See* Purex Reply, at 15-16. For the record, Elston is not contending that Purex merely purchased the assets of Purex Corporation or T.F. Washburn. Elston is contending, and the record unequivocally demonstrates, that Purex succeeded to the liabilities of these entities *via a series of statutory and formal mergers*. Therefore, the asset purchaser case law is entirely inapposite.

Next, Purex ignores the *overwhelming* weight of authority from the federal and sister state courts holding that, if successor liability is established, a corporate successor succeeds to the jurisdictional contacts of its predecessor. Purex relies on unpublished cases, proactively cited by Elston in its opposition brief as inapposite *asset purchaser* cases, and on a lone Southern District of Mississippi case, for the spurious proposition that a successor corporation is not properly imputed with the jurisdictional contacts of its predecessor. *See* Purex Reply, at 9-10. Elston stands on the briefing. The Board should simply compare the *fourteen* well-reasoned federal and state decisions cited by Elston in its opposition brief with the paltry case authority to which Purex directs the Board. The result should be clear: successor corporations are imputed with the jurisdictional contacts of their predecessors, as a matter of law.

B. The Affidavit of Jeffrey M. Smith Should Be Stricken.

Purex strives mightily to save Mr. Smith's opening affidavit from its rather obvious invalidity. *See* Purex Reply, at 17-19. Purex utterly fails.

First, Purex has now resolved any lingering doubts about whether Mr. Smith has even a modicum of actual, personal knowledge of the facts concerning Purex's relationship to the 1961-1978 operations of its T.F. Washburn and Industrial Divisions. He emphatically does not. Mr. Smith has now twice provided sworn testimony that he became employed by Purex in **1984** – 23 years after Purex acquired T.F. Washburn, and six years after Purex sold the assets of its T.F. Washburn Division at the Elston Site. Indisputably, Mr. Smith cannot possibly have “innate” knowledge of any of these facts which occurred decades before the “inception” of his employment with Purex. In fact, Purex now acknowledges that Mr. Smith cannot even “provide binding testimony on behalf of the corporation” on these matters. *See* Purex Reply, at 17 n.9.

Second, Mr. Smith's rather sudden expertise in these matters is surprising, and it is at least contradicted by what he told EPA agents in 1986, to wit: “Mr. Smith wished he could help me out but he essentially [k]new nothing of T F Washburn.” Elston Resp., Ex. A, Neumann Aff., Ex. 16, at EPA 00004.

Third, Mr. Smith *still* has not met the very specific factual allegations set forth in Elston's Complaint. Those allegations describe in detail the facts surrounding Purex's succession to the liabilities of T.F. Washburn Co. and Purex Corporation at the Site. Rather than address these allegations head-on, Mr. Smith describes how an entity referred to as “Purex Delaware” succeeded to the “assets” of Purex Corporation's “consumer household products” operations. Suppl. Smith Aff. ¶ 6. Mr. Smith then attaches, without comment, various incomplete “plans of liquidation” which his client has never produced to Elston in these proceedings and from which

Purex argues that liabilities relating to the Site were “transferred” to “Purex Delaware.” *Id.* ¶¶ 14 & 15; Purex Reply, at 4-6. Even assuming these “plans of liquidation” are relevant to the Board’s deliberation of Purex’s contacts with Illinois, Purex’s version of history derived from these documents cannot be “corroborated independently” as Purex suggests. In fact, Elston offers in support of its Sur-Reply a “Clarification” and subsequent “Assignment and Assumption” relating to these “plans of liquidation” that Purex *did* produce in these proceedings. *See* Ex. A, Suppl. Neumann Aff., Exs. 5 & 6. As stated above, these documents, when read in conjunction with the related “plans of liquidation” relied upon by Purex, demonstrate that Purex *has* in fact succeeded to the liabilities of its former T.F. Washburn and Industrial Divisions relating to the Site.

Finally, Purex does not successfully rebut the obvious, conclusory nature of Mr. Smith’s opening affidavit. Rather, it tries to salvage that affidavit by relying on a line of Illinois cases that suggests that the non-conclusory portions of a defective affidavit need not be stricken. *See* Purex Reply, at 18-19. Purex never identifies precisely which part of Mr. Smith’s nine-line, 89-word opening affidavit is *not* conclusory and, therefore, not subject to exclusion. Perhaps the best evidence that Purex now understands that Mr. Smith’s affidavit was and is inadequate to support a jurisdictional challenge is found in its submission of a “supplemental” affidavit that relies, in material part, on documents Purex has previously withheld from production.

In sum, Mr. Smith does not have personal knowledge of the facts to which he testifies in either of his affidavits, and his testimony is not “reasonably reliable.” In addition, Mr. Smith relies on documents never before produced to Elston in these proceedings. Finally, Mr. Smith’s testimony regarding the alleged “transfer” of liability relating to Purex’s T.F. Washburn and Industrial Divisions at the Site cannot be “independently corroborated.” For these reasons, even

under the forgiving test posited by Purex, Mr. Smith's original affidavit, and now his supplemental affidavit, must be stricken and should be disregarded by the Board. Since Purex has proffered no competent evidence to controvert Elston's jurisdictional allegations, the truth of those allegations must now be assumed by the Board, and Purex's Motion to Dismiss must be denied.

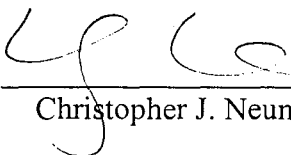
IV. CONCLUSION

WHEREFORE, for all the reasons stated herein, Elston respectfully requests that the Board grant its Motion to Strike, and deny Purex's Motion.

Dated: May 23, 2003

Respectfully submitted,

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