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SEP 26 2003

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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 REPLY TO RESPONDENT PUREX**
INDUSTRIES, INC.'S ANSWER AND AFFIRMATIVE DEFENSES, and **CERTIFICATE**

THIS FILING IS SUBMITTED ON RECYCLED PAPER

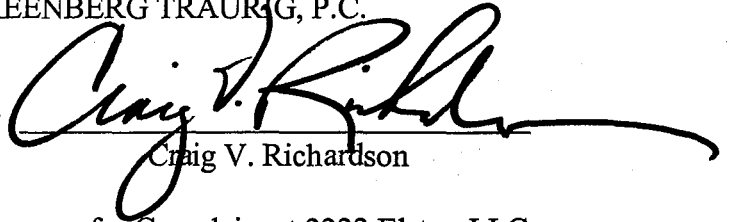
OF SERVICE filed on behalf of Complainant, 2222 Elston LLC, a copy of which is herewith served upon you.

Dated: September 22, 2003

Respectfully submitted,

GREENBERG TRAURIG, P.C.

By:

A handwritten signature in black ink, appearing to read "Craig V. Richardson", written over a horizontal line.

Craig V. Richardson

Attorneys for Complainant 2222 Elston LLC

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**2222 ELSTON LLC'S REPLY TO RESPONDENT PUREX INDUSTRIES, INC.'S
ANSWER AND AFFIRMATIVE DEFENSES**

Complainant 2222 Elston LLC ("Elston"), by and through its attorneys, Greenberg
Traurig, LLP, for its reply to Respondent Purex Industries, Inc.'s ("Purex") Answer and
Affirmative Defenses (filed on August 22, 2003), responds as follows:

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE: LACK OF PERSONAL JURISDICTION

In the alternative, without admitting any of the Complaint's allegations that it has denied
or otherwise contradicting its answers and solely by way of affirmative and/or additional
defense, Purex alleges as follows:

1. In March 1982, Purex was created under the name PII Holdings, Inc. ("PII
Holdings") to effect a leveraged buyout of Purex Industries, Inc. (a Delaware corporation
incorporated in 1978 and not the Respondent Purex Industries, Inc.) by private investment
groups consisting of corporations, banks, and insurance companies.

RESPONSE:

Elston lacks sufficient information to form a belief as to the truth of the allegations contained in Paragraph 1, and therefore denies each and every allegation contained therein.

2. On August 30, 1982, PII Holdings changed its name to Purex Industries, Inc. (the Respondent in this proceeding).

RESPONSE:

Elston lacks sufficient information to form a belief as to the truth of the allegations contained in Paragraph 2, and therefore denies each and every allegation contained therein.

3. In order for the Board to exercise personal jurisdiction over Purex, Complainant must demonstrate that Purex has sufficient contacts with the State of Illinois so as to satisfy Illinois' long-arm statute.

RESPONSE:

The allegations contained in Paragraph 3 are legal conclusions for which no answer is required.

4. Since its inception in March 1982, Purex has not transacted business within Illinois, committed any tortious acts within Illinois, or otherwise had any contacts with Illinois so as to subject it to the jurisdiction of the Illinois courts.

RESPONSE:

Elston denies the allegations stated in Paragraph 4.

5. As such, the Board lacks personal jurisdiction over Purex.

RESPONSE:

Elston denies the allegations stated in Paragraph 5. Responding further, Elston objects to Purex's First Affirmative Defense inasmuch as it does not assert any new facts which would defeat Elston's right to recover, but rather merely refutes the allegations stated by Elston in its Complaint. *See, e.g., People v. Wood River Ref'g Co.*, PCB 99-120 (Aug. 8, 2002), at 9 (striking affirmative defense simply refuting allegations of complaint.).

Wherefore, Purex asks that the Board enter an order that Complainant be awarded nothing as against Purex and denying Complainant any and all of the relief it seeks herein against Purex; and such other and further relief to which Purex is entitled under the law.

RESPONSE:

The allegations and other statements contained in Purex's prayer for relief require no answer from Elston.

SECOND AFFIRMATIVE DEFENSE: LACHES

In the alternative, without admitting any of the Complaint's allegations that it has denied or otherwise contradicting its answers and solely by way of affirmative and/or additional defense, Purex alleges as follows:

1. Upon information and belief, Complainant acquired the property comprising the Site in or about January 2000.

RESPONSE:

Elston admits the allegations stated in Paragraph 1.

2. Upon information and belief, before Complainant acquired the Site, it was fully aware of the fact that USTs and various contaminants were present on and beneath the property comprising the Site.

RESPONSE:

Elston denies the allegations stated in Paragraph 2.

3. Upon information and belief, Complainants remained aware of the potential environmental concerns at the Site for at least two years after purchasing the Site, and elected not to file the Complaint now pending before the Board until October 25, 2002.

RESPONSE:

Elston denies the allegations stated in Paragraph 3.

4. Purex has been prejudiced by Complainant's unreasonable delay in filing its Complaint.

RESPONSE:

Elston denies the allegations stated in Paragraph 4.

Wherefore, Purex asks that the Board render a judgment in its favor and against the Complainant; and that the Board enter an order that Complainant be awarded nothing as against Purex and denying Complainant any and all of the relief it seeks herein against Purex; and such other and further relief to which Purex is entitled under the law.

RESPONSE:

The allegations and other statements contained in Purex's prayer for relief require no answer from Elston.

THIRD AFFIRMATIVE DEFENSE: EQUITABLE ESTOPPEL/WAIVER

In the alternative, without admitting any of the Complaint's allegations that it has denied or otherwise contradicting its answers and solely by way of affirmative and/or additional defense, Purex alleges as follows:

1. Upon information and belief, prior to acquiring the Site in 2000, Complainant was aware that the Site was contaminated and that USTs were present at the Site.

RESPONSE:

Elston admits that prior to acquiring the Site in 2000, Die Casting Respondents provided Elston with information indicating the presence of only six USTs at the Site. Except as expressly admitted, Elston denies the remaining allegations stated in Paragraph 1. Further, Elston contends that no affirmative defense that might otherwise be applicable in a civil action in contract is relevant to, or applies in, an action brought before the Illinois Pollution Control Board pursuant to the Illinois Environmental Protection Act.

2. Upon information and belief, Complainant's knowledge, awareness, and acceptance of these environmental concerns and conditions was reflected in both conversations and correspondence during contract negotiations, as well as the final purchase price for the property comprising the Site.

RESPONSE:

Elston denies the allegations stated in Paragraph 2.

3. Upon information and belief, Complainant was afforded the opportunity to conduct further investigation of environmental conditions prior to acquiring the Site; Complainant, however, elected not to conduct further environmental investigation of the Site.

RESPONSE:

Elston admits that it relied on misrepresentations by Respondent Lakeside concerning the presence of only six USTs at the Site and, on the basis of those misrepresentations, Elston determined that no further environmental investigation was required. Except as expressly admitted, Elston denies the remaining allegations stated in Paragraph 3. Further, Elston contends that no affirmative defense that might otherwise be applicable in a civil action in contract is relevant to, or applies in, an action brought before the Illinois Pollution Control Board pursuant to the Illinois Environmental Protection Act.

4. Complainant knowingly waived its right to perform additional environmental due diligence prior to acquiring the Site.

RESPONSE:

Elston admits that it relied on misrepresentations by the Die Casting Respondents concerning the presence of only six USTs at the Site and, on the basis of those misrepresentations, Elston determined that no further environmental investigation was required. Except as expressly admitted, Elston denies the remaining allegations stated in Paragraph 4. . Further, Elston contends that no affirmative defense that might otherwise be applicable in a civil action in contract is relevant to, or applies in, an action brought before the Illinois Pollution Control Board pursuant to the Illinois Environmental Protection Act. Finally, Elston contends that since the contract for the purchase and sale of the Site was between Elston and Lakeside, Elston had no contract with any other Respondents, and it therefore had no contractual rights to waive vis-à-vis any other Respondents.

5. As a result of the facts set forth in Paragraphs 1 through 4 above, Complainant is estopped from recovering any response costs relating to environmental conditions at the Site from Purex.

RESPONSE:

Elston denies the allegations stated in Paragraph 5. Responding further, Elston objects to Purex's assertion of an equitable estoppel defense inasmuch as Purex has failed to plead the elements of such a defense with the requisite specificity. In order to plead an affirmative defense of equitable estoppel, Purex must allege:

(1) words or conduct by the party against whom the estoppel is alleged constituting either a misrepresentation or concealment of material facts; (2) knowledge on the part of the party against whom the estoppel is alleged that representations made were untrue; (3) the party claiming the benefit of an estoppel must have not known the representations to be false either at the time they were made or at the time they were acted upon; (4) the party estopped must either intend or expect that his conduct or representations will be acted upon by the party asserting the estoppel; (5) the party seeking the estoppel must have relied or acted upon the representations; and (6) the party claiming the benefit of the estoppel must be in a position of prejudice if the party against whom the estoppel is alleged is permitted to deny the truth of the representation made.

See, e.g., People v. QC Finishers, Inc., No. PCB 01-7 (June 19, 2003), at 4 (citations omitted)

(striking affirmative defense of equitable estoppel for failure to plead elements with specificity.).

Purex has failed to allege that Elston made any misrepresentation or concealment, or to allege any of the remaining five elements of the defense of equitable estoppel.

Elston further objects to Purex's assertion of an affirmative defense based on waiver.

The Board has previously held that in order to state an affirmative defense of waiver a party must have both knowledge of the existence of a right and an intention to relinquish it. *QC Finishers*, No. PCB 01-7, at 5 (striking affirmative defense of waiver.). Elston has not intentionally waived any right. The arguments raised by Purex fail to state an affirmative defense inasmuch as they speak to the issue of the penalty and not the cause of action. *Id.*

Wherefore, Purex asks that the Board render a judgment in its favor and against Complainant; and that the Board enter an order that Complainant be awarded nothing as against

Purex and denying Complainant any and all of the relief it seeks herein against Purex; and such other and further relief to which Purex is entitled under the law.

RESPONSE:

The allegations and other statements contained in Purex's prayer for relief require no answer from Elston.

FOURTH AFFIRMATIVE DEFENSE: PROPORTIONATE LIABILITY

In the alternative, without admitting any of the Complaint's allegations that it has denied or otherwise contradicting its answers and solely by way of affirmative and/or additional defense, Purex alleges as follows:

1. Section 58.9 of the Illinois Environmental Protection Act (the "Act"), 415 ILCS 5/58.9, states:

Notwithstanding any other provisions of this Act to the contrary, including subsection (f) of Section 22.2, in no event may the Agency, the State of Illinois, or any person bring an action pursuant to this Act . . . to require any person to conduct remedial action or to seek recovery of costs for remedial activity conducted by the State of Illinois or any person beyond the remediation of releases of regulated substances that may be attributed to being proximately caused by such person's act or omission or beyond such person's proportionate degree of responsibility for costs of the remedial action of releases of regulated substances that were proximately caused or contributed to by 2 or more persons.

RESPONSE:

The allegations contained in Paragraph 1 are conclusions of law for which no answer is required. Responding further, Elston objects to Purex's assertion of an affirmative defense based on Section 58.9 of the Act. The Board has previously held that: "Proportionate share liability is a limitation on remedies, not a bar to a cause of action." *Cole Taylor Bank v. Rowe Indus., Inc.*, No. PCB 01-173 (June 6, 2002), at 5 (striking affirmative defense based on proportionate share liability).

2. In its prayer for relief, Complainant seeks an order requiring Purex to reimburse Complainant for cleanup costs it has incurred and will in the future incur relating to the Site.

RESPONSE:

Elston admits the allegations stated in Paragraph 2.

3. Pursuant to Section 58.9 of the Act, Purex may only be liable for those costs of remedial activities relating to contamination proximately caused by Purex's acts or omissions.

RESPONSE:

Elston denies the allegations stated in Paragraph 3. Responding further, Elston objects to Purex's assertion of an affirmative defense based on Section 58.9 of the Act. The Board has previously held that: "Proportionate share liability is a limitation on remedies, not a bar to a cause of action." *Cole Taylor*, No. PCB 01-173, at 5 (striking affirmative defense based on proportionate share liability).

4. Purex was not and is not responsible by act or omission for any response costs associated with the Site.

RESPONSE:

Elston denies the allegations stated in Paragraph 4. Responding further, Elston objects to Purex's assertion of an affirmative defense based on Section 58.9 of the Act. The Board has previously held that: "Proportionate share liability is a limitation on remedies, not a bar to a cause of action." *Cole Taylor*, No. PCB 01-173, at 5 (striking affirmative defense based on proportionate share liability).

Wherefore, Purex asks that the Board render a judgment in its favor and against Complainant; and that the Board enter an order that Complainant be awarded nothing as against Purex and denying Complainant any and all of the relief it seeks herein against Purex; and such other and further relief to which Purex is entitled under the law.

RESPONSE:

The allegations and other statements contained in Purex's prayer for relief require no answer from Elston.

FIFTH AFFIRMATIVE DEFENSE:
PROHIBITION ON RECOVERY OF RESPONSE COSTS

In the alternative, without admitting any of the Complaint's allegations that it has denied or otherwise contradicting its answers and solely by way of affirmative and/or additional defense, Purex alleges as follows:

1. By this Complaint, Complainants seeks to recover its costs in remediating alleged environmental contamination at the Site.

RESPONSE:

Elston admits the allegations stated in Paragraph 1.

2. Section 45(b) of the Act, 415 ILCS 5/45(b), allows private parties to obtain only injunctive relief, attorney's fees, and court costs from another private party for violating the Act.

RESPONSE:

The allegations contained in Paragraph 2 are conclusions of law for which no answer is required. Responding further, Elston objects to Purex's Fifth Affirmative Defense inasmuch as it does not assert any new facts which would defeat Elston's right to recover, but rather merely refutes the allegations stated by Elston in its Complaint. *See, e.g., People v. Wood River Ref'g Co.*, PCB 99-120 (Aug. 8, 2002), at 9 (striking affirmative defense simply refuting allegations of complaint.).

3. The Act contains no explicit provision by which a private citizen may sue another private citizen to recover costs associated with remediating contaminated properties.

RESPONSE:

Elston denies the allegations stated in Paragraph 3. Responding further, Elston objects to Purex's Fifth Affirmative Defense inasmuch as it does not assert any new facts which would defeat Elston's right to recover, but rather merely refutes the allegations stated by Elston in its Complaint. *See, e.g., People v. Wood River Ref'g Co.*, PCB 99-120 (Aug. 8, 2002), at 9 (striking affirmative defense simply refuting allegations of complaint.).

Wherefore, Purex asks that the Board render a judgment in its favor and against Complainant; and that the Board enter an order that complainant be awarded nothing as against Purex and denying Complainant any and all of the relief it seeks herein against Purex; and such other and further relief to which Purex is entitled under the law.

RESPONSE:

The allegations and other statements contained in Purex's prayer for relief require no answer from Elston.

SIXTH AFFIRMATIVE DEFENSE: PROHIBITION ON RECOVERY FOR ALLEGED VIOLATIONS OCCURRING BEFORE 1970

In the alternative, without admitting any of the Complaint's allegations that it has denied or otherwise contradicting its answers and solely by way of affirmative and/or additional defense, Purex alleges as follows:

1. Counts I and [sic] through VII of Complainant's Complaint allege various violations of the Act.

RESPONSE:

Elston admits the allegations stated in Paragraph 1.

2. Without an express statutory provision stating that a statute has retroactive effect, that statute can be applied only prospectively, not retroactively.

RESPONSE:

The allegations contained in Paragraph 2 are conclusions of law for which no answer is required.

3. The Act contains no provision expressly stating that it is to be applied retroactively, nor does the Act's legislative history indicate any such intent by the Illinois legislature.

RESPONSE:

The allegations contained in Paragraph 3 are conclusions of law for which no answer is required.

4. The effective date of the Act was July 1, 1970.

RESPONSE:

The allegations contained in Paragraph 4 are conclusions of law for which no answer is required.

5. Thus, Complainant's [sic] are barred from recovering damages for any activities that are alleged to have occurred prior to July 1, 1970.

RESPONSE:

Elston denies the allegations stated in paragraph 5. Responding further, Elston states that: 1) it has only alleged violations which occurred after the enactment of the Act, and 2) regardless, it is entitled to recover damages from activities which occurred prior to the enactment of the Act which result in continuing violations of the Act.

Wherefore, Purex asks that the Board render a judgment in its favor and against Complainant to the extent that Complainant seeks damages for activities that are alleged to have occurred prior to July 1, 1970; and such other and further relief to which Purex is entitled under the law.

RESPONSE:

The allegations and other statements contained in Purex's prayer for relief require no answer from Elston.

SEVENTH AFFIRMATIVE DEFENSE: ATTORNEYS' FEES

In the alternative, without admitting any of the Complaint's allegations that it has denied or otherwise contradicting its answers and solely by way of affirmative and/or additional defense, Pure alleges as follows:

1. In its prayer for relief, Complainant seeks attorneys fees, expert witness fees and costs.

RESPONSE:

Elston admits the allegations stated in Paragraph 1.

2. Section 42(f) of the Act, 415 ILCS 5/42(f), authorizes the Board to award attorneys' fees only in cases in which the Attorney General or a State's Attorney prevails on behalf of the People of the State of Illinois.

RESPONSE:

The allegations contained in Paragraph 2 are conclusions of law for which no answer is required.

3. The Board has already acknowledged that it cannot award attorney fees or other ordinary expenses of litigation in this case.

RESPONSE:

Elston admits the allegations stated in Paragraph 3.

Wherefore, Purex asks that the Board enter an order denying Complainant's request for attorney's fees, expert witness fees, and other costs from Purex, and provide such other and further relief to which Purex is entitled under the law.

RESPONSE:

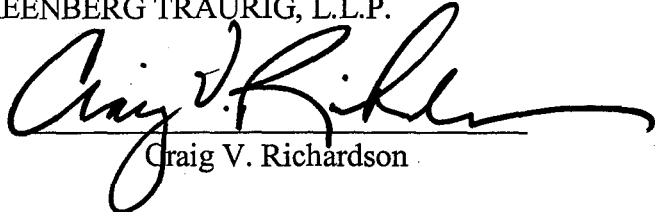
The allegations and other statements contained in Purex's prayer for relief require no answer from Elston.

Dated: September 22, 2003.

Respectfully submitted,

GREENBERG TRAURIG, L.L.P.

By:

A handwritten signature in black ink, appearing to read "Craig V. Richardson", is written over a horizontal line.

Craig V. Richardson

Attorneys for Complainant 2222 Elston LLC

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PCB No. 03-55

(Citizens UST Enforcement)

CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached **2222 ELSTON LLC'S
REPLY TO RESPONDENT PUREX INDUSTRIES, INC.'S ANSWER AND
AFFIRMATIVE DEFENSES**, and **NOTICE OF FILING** upon the Respondents on
September 22nd, 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.:

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Steven M. Siros
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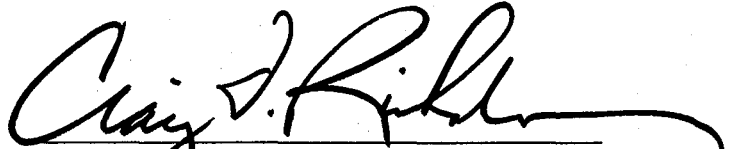
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