BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MATE TECHNOLOGIES, INC.	)	
	)	
Complainant,	)	
	)	
v.	)	PCB No. 2004-075
	)	(Enforcement X)
	)	
F.I.C. AMERICA CORPORATION,	)	
	)	
Respondent.	)	

COMPLAINANT'S RESPONSE IN OPPOSITION TO MOTION OF RESPONDENT TO DISMISS OR, IN THE ALTERNATIVE, STRIKE

Complainant Mate Technologies, Inc. ("Mate") opposes Respondent FIC America Corporation's ("FIC" or "Respondent") motion to dismiss (the "Motion") because it does not satisfy the judicial standard applicable to a motion to dismiss. Additionally, FIC's arguments are premised on the notion that environmental regulations do not apply until *after* wastes, emissions and effluents are released. Such reasoning is plainly wrong, and stands modern environmental regulation on its head. For more than three decades the Illinois Pollution Control Board ("Board") has promulgated regulations that require intensive management to *prevent* the types of messes which FIC has created.

Judicial Standard

The standard that the Board must apply to Respondent's motion cannot be in dispute:

> When ruling on a motion to dismiss, the Board takes all well-pled allegations as true and draws all inferences from them in favor of the non-movant. *Dismissal is proper only if it is clear that no set of facts could be proven that would entitle complainant to relief.* See People v. Peabody Coal Co., PCB 99-134, slip. Op. at

1-2 (June 20, 2002); People v. Stein Steel Mills Co., PCB 02-1, slip op. at 1 (Nov. 15, 2001) citing Import Sales, Inc. v. Continental Bearings Corp., 217 Ill. App. 3d 893, 577 N.E. 2d 1205 (1st Dist. 1991).

People v. Michael Grain Company, Inc. et al., PCB 96-143 (October 2, 2003); 2003 WL 22334782, at *4 (emphasis added).

Respondent does not argue the that no set of facts could be proven that would entitle Complainant to relief. Instead, Respondent relies on extraordinary regulatory interpretations that find no basis in law. As demonstrated below, the Complaint alleges facts which, when proven, will entitle Mate to relief. FIC's Motion has no merit and should be denied.

Counts I through VII[1]

Ignoring the language of the regulations involved in Counts I through VII, FIC baldly asserts that the oil that FIC has wantonly spewn about must qualify as "waste." But, the argument continues, the oil could not be waste until *after* FIC releases it, *and after* FIC ponders what to do with the stuff. Motion, at pp. 4-5. Consider some of FIC's more striking assertions:

> Mate's premature application of regulatory duties should be rejected; such duties cannot attach until, at a minimum, the materials of concern have been affirmatively collected and identified and a handling determination has been made.
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> * * *
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> The mere existence or presence of a material in an active facility that may eventually require certain regulated management does not mean it is a waste or somehow has been 'passively' discarded.
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> * * *
>
> . . . FIC has not located any precedent or authority for the proposition that waste management requirements apply to material in a manufacturing facility actively in use, where such material has not yet even been collected and handled for purposes of eventual storage, treatment or disposal.

[1] For reasons that are not clear, FIC has lumped together Counts I through VII. Motion, at pp. 3-7.

Motion, at pp. 5-6.

Such statements are utterly preposterous. Virtually the entire structure of Title 35 of the Illinois Administrative Code is founded on the premise that effluents, emissions and wastes must be intensively analyzed and managed – before, during, and after their production. And this, for the very purposes of *preventing* their release to the environment, and *avoiding* the dilemma of how on earth to "collect" them. *See, e.g.* 35 Ill. Adm. Code Parts 720 through 725, which impose "cradle-to-grave" requirements on the generation, transportation, treatment, storage and disposal of hazardous wastes.[2]

The Complaint alleges, in painstaking detail, exactly how FIC's policy of "dump now, think later" has violated a host of environmental regulations, as follows:

Count I	The oil that FIC generated was "used oil" within the meaning of 35 Ill. Adm. Code §739.100, and FIC's wanton dissemination of it on the building surfaces, the environment, and in the lungs of individuals violated the used oil storage requirements of 35 Ill. Adm. Code §739.122(a). Complaint ¶¶ 17, 22.
Count II	The used oil regulations require disposal in accordance with the both the hazardous waste regulations and the solid waste regulations. *Hazardous waste regulations:* Some of FIC's used oil was hazardous, and was disposed in violation of the hazardous waste regulations – thereby violating the used oil regulations. Complaint ¶¶ 25, 29-30. *Solid waste regulations:* To the extent that FIC's used oil was not hazardous, it was disposed in violation of the solid waste regulations – thus also violating the used oil regulations. Complaint ¶¶ 25, 37-38.
Count III	FIC's used oil was a solid waste, and FIC did not contain it to prevent its entry into the environment. Therefore, FIC caused the property to satisfy the definition of a "landfill" and ignored the regulatory requirements

[2] The well-known elaborate definition of "discarded material" in 35 Ill. Adm. Code §721.102(a)(2) clearly negates FIC's observation that "there appears to be no relevant statutory, regulatory or reported opinion on point defining or interpreting 'discarded' . . . . " Motion, at p. 5.

applicable to such facilities. Complaint ¶¶ 37-39, 44-45.

Count IV — FIC was a hazardous waste generator, and by failing to determine whether the oil was hazardous, violated the hazardous waste generator regulations. Complaint ¶¶ 51, 52 and 55.

Count V — FIC stored hazardous waste on-site for more than 90 days without a permit, and thus violated the hazardous waste storage regulations. Complaint ¶¶ 57, 58 and 60.

Count VI — FIC disposed of hazardous waste on-site without a permit, and thus violated the hazardous waste disposal regulations. Complaint ¶¶ 30 and 62.

Count VII — FIC disposed of waste on-site in violation of the statutory prohibition on waste disposal. Complaint ¶¶ 64, 66 and 68.

Mate has well-pled all facts necessary to demonstrate the violations cited in Counts I through VII. Respondent has not even attempted to show how Mate's proof of these facts would not entitle Complainant to the relief it seeks. Therefore, Respondent's motion should be denied.

Count VIII

FIC maintains that Count VIII, alleging that FIC violated the statutory prohibition on air pollution, should be dismissed because Mate did not allege a violation of a specific air pollution standard, and because Complainant's allegations of injury due to air pollution were "factually insufficient." Motion, at p. 8. FIC's arguments are refuted by the plain terms of the Environmental Protection Act. 415 ILCS 5/1 *et seq.* (the "Act"). They are also discredited by the face of the Complaint.

Section 9(a) of the Act prohibits discharges or emissions "so as to cause or tend to cause air pollution . . . *or* so as to violate regulations or standards . . . . " 415 ILCS 5/9(a). Obviously, the statute can be violated either on the basis of causing air pollution, or on the basis of exceeding a standard; both bases are not needed. The Illinois Supreme Court has held, "The Act

does not require that a specific standard adopted by the Board be found to have been violated for there to be determination either of air pollution or of prohibited conduct." *Mystik Tape, Division of Borden, Inc. v. Pollution Control Board et al.*, 60 Ill.2d 330, 328 N.E.2d 5, 8. Mate clearly alleged that FIC violated the statutory prohibition of air pollution. Complaint ¶ 73. No allegation of a violation of a specific standard was necessary.

Still, FIC claims that "Count [VIII] contains no allegations regarding air quality, either indoors or outdoors (such as at the property boundary), or description of any injuries caused thereby, whether to persons or property." Motion, at p. 8. This statement is simply belied by the plain language of Count IX, which reads in pertinent part:

> The oil emitted to the atmosphere by FIC's industrial operations has injured the Property by causing areas of the Property to be coated with a black film. For the same reason, it has also unreasonably interfered with the enjoyment of the Property. *FIC's emission of oil has also been injurious to human health because it has been inhaled by person in and near the Property.*

Id. (emphasis added).

FIC does not, and cannot validly argue that the Complaint does not provide sufficient notice to enable Respondent to prepare a defense. *See Finley et al. v. IFCO ICS-Chicago, Inc.*, PCB 02-208 (August 8, 2002); 2002 WL 1876193, at *5 (holding, "A complainant can allege air pollution . . . and be heard by the Board without having to identify the name of the chemical emitted, the specific operation in a plant that emitted the chemical on a specific day, and precise quantity of the chemical emitted." *Id.*)[3] Nor has FIC shown that Complainant could prove no set

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[3] FIC stated that it treats all factual allegations as true for the purposes of its motion. Motion, at n. 1. However, FIC exceeded the proper scope of a motion to dismiss by claiming that Mate's allegations are "ungrounded." Motion at p. 8. There should be no doubt about the support for Mate's allegations. Attachment 1 consists of a letter to OSHA from an FIC employee stating in part, "There are no ventilations in this plant and due to this, people are getting sick

of facts that would entitle it to relief on Count VIII. Therefore, FIC's motion as to Count VIII should be denied.[4]

Count IX

FIC seeks to have Count IX dismissed on the basis that it is duplicitous, claiming that IEPA issued a violation notice to FIC for violating 415 ILCS 5/12(a), the prohibition of water pollution that is the subject of Count IX. Motion, at p. 10. Duplicitous means "the matter is identical or substantially similar to one brought before the Board or *another forum*." 35 Ill. Adm. Code §101.202 (emphasis added). Mate's allegations are not duplicitous because the matter is not before *another forum*. IEPA is an enforcement agency (and of course, a frequent litigant before this Board) – not a forum. As the Board has clearly stated, "Investigation by the government of potential violations does not render duplicative a citizen complaint, formally filed with the Board under Section 31(d) of the Act." *Finley et al. v. IFCO ICS-Chicago, Inc.*, PCB 02-208 (August 8, 2002); 2002 WL 1876193, at *6 (citations omitted).

Moreover, Mate's complaint is not limited to the event on October 1, 2003, which is the

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from the smoke that the machines are emitting."

[4] FIC also argues that by virtue of the U.S. Supreme Court's holding in *Gade v. National Solid Wastes Management Association*, 505 U.S. 88, 112 S.Ct. 2374 (1992), the Act's prohibition of air pollution, 415 ILCS 5/9(a), was pre-empted by OSHA's regulation of welding. *Gade* allows no such conclusion. Rather, the Court affirmed the Seventh Circuit's holding that "the OSH Act pre-empts all state law that 'constitutes, in a direct, clear and substantial way, regulation of worker health and safety.'" *Gade* at p. 2387. The Court then explained, "Although some laws of general applicability may have a 'direct and substantial' effect on worker safety, they cannot fairly be characterized as 'occupational' standards, because they regulate workers simply as members of the general public." *Gade* at p. 2388. The Act's prohibition of air pollution, 415 ILCS 5/9(a), is a perfect example of such a law of general applicability; it is not an occupational standard and was not pre-empted by OSHA.

date of the incident addressed in IEPA's violation notice. Complaint ¶10. Especially in light of the positions espoused in FIC's Motion, the Board should deny the Motion and permit Mate to flush out the extent of FIC's unpermitted discharges through discovery.

Counts II -VIII

Finally, FIC asserts that Counts II through VIII should be stricken on the basis that "the requested relief cannot be granted because it bears no relation to the alleged violation of the Act or is unsupported by Board precedent." Motion, at p. 11. And, as if to mock the Board's regulations, FIC shrugs off the misdeeds alleged in Count II through VII as mere "paperwork violations," that "cannot be the basis for remediation relief." *Id.*

FIC is shockingly misguided. The unspecified "paperwork" to which FIC refers (presumably, matters such as permits and waste analyses) is not meaningless red tape. Rather, it is the product of intensive management of wastes, and reflects actions that must be taken to avoid physical injury to health and the environment. Ignoring mandates for such management bears a direct relation to environmental harm. For example, if a manufacturing facility chooses not to analyze its wastes, the chances of offensive substances being released to the environment increase substantially. That is precisely what occurred in the present case.

And that is precisely why Mate has requested the Board to order FIC to properly remediate the property. Section 33 of the Act provides the Board with ample authority to issue such an order. 415 ILCS 5/33; *Matteson WHP Partnership v. Martin*, PCB 97-121 (June 22, 2000); 2000 WL 890181.

In the very first paragraph of the Complaint, Mate stated in pertinent part, "FIC acted in total disregard of Illinois' plenary statutory and regulatory structure, which is designed to assure

environmentally sound management of wastes." The positions that FIC has asserted in its Motion provide strong support for that allegation.

Conclusion

For the reasons set forth above, the Board should soundly reject FIC's arguments and deny the Motion.

Respectfully submitted,

MATE TECHNOLOGIES, INC.

By: _____
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From TC
F.I.C. America Corporation
750 N. Rowhling Road
Itasca, IL 60143

MAR 12 2003

To: O.S.H.A.
365 Smoke Tree Plaza
Aurora, IL 60542
(Attention Complaints Department)

To Whom It May Concern:

We are writing to you due to complaints that TC have regarding the plant/company located in 750 North Rowhling Road, Itasca, IL. We know that in a company especially in a warehouse, safety of the employees is first. But in our case, it is not. There are no ventilations in this plant and due to this, people are getting sick from the smoke that the machines are emitting. Some of the employees are getting, nosebleeds, allergic reactions, and fever. These are just some of the common sickness that the employees are getting. We have two employees who have already reported to their doctors due to their conditions. The other employee quit due to health reasons. We are asking for your assistance in regards to this situation. We do still want to keep our jobs but we want to be able to work in a safe and healthy place. We are also asking you to keep our names anonymous and confidential. Thank you very much for your help.

Sincerely,

TC

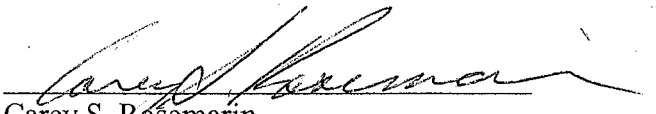
Attachment 1

CERTIFICATE OF SERVICE

I, Carey S. Rosemarin, an attorney, hereby certify that I caused a copy of the foregoing "Complainant's Response in Opposition to Motion of Respondent to Dismiss or In The Alternative, Strike," to be served upon:

Jeremy A. Gibson, Esq.
Mitchell S. Chaban, Esq.
Masuda, Funai, Eifert & Mitchell, Ltd.
One E. Wacker Dr.
Suite 3200
Chicago , IL 60601-2002

by regular U.S. Mail, on January 22, 2004.



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