BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

TO: Carey S. Rosemarin
Law Offices of Carey S. Rosemarin, P.C.
500 Skokie Boulevard, Suite 510
Northbrook, IL 60062

PLEASE TAKE NOTICE that on the 10th day of February, 2004 F.I.C AMERICA CORPORATION, by and through its attorneys, Jeremy A. Gibson and Mitchell Chaban of MASUDA, FUNAI, EIFERT & MITCHELL, LTD., shall file its **MOTION TO SUPPLEMENT THE REPLY OF RESPONDENT IN SUPPORT OF ITS MOTION TO DISMISS OR, IN THE ALTERNATIVE, STRIKE** with the Office of the Clerk of the Pollution Control Board , a copy of which is hereby served upon you.

One of Its Attorneys

Jeremy A. Gibson
Mitchell S. Chaban
MASUDA, FUNAI, EIFERT & MITCHELL, LTD.
203 N.LaSalle Street, Suite 2500
Chicago, Illinois 60601
(312) 245-7500

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PROOF OF SERVICE

I, the undersigned, do hereby state on oath that I served the foregoing **NOTICE OF FILING** upon Carey S. Rosemarin, Law Offices of Carey S. Rosemarin, P.C. 500 Skokie Boulevard, Suite 510, Northbrook, IL 60062 by placing a copy of the same in a properly addressed, postage prepaid, envelopes and depositing the same in the U.S. Mail Chute at 203 N. LaSalle Street Suite 2500, Chicago, Illinois 60601 on this 10 day of February, 2004.

Subscribed and sworn to before me this 10 day of February, 2004.

Notary Public

OFFICIAL SEAL
KATHLEEN E BARRY
NOTARY PUBLIC STATE OF ILLINOIS
MY COMMISSION EXP. MAY 10,2004

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

MOTION TO SUPPLEMENT THE REPLY OF RESPONDENT IN SUPPORT OF ITS MOTION TO DISMISS OR, IN THE ALTERNATIVE, STRIKE

Respondent, F.I.C. AMERICA CORPORATION ("FIC") hereby presents its Reply of Respondent ("Reply") in support of its Motion to Dismiss or, in the alternative, Strike ("Motion") and in reply to Complainant's Response ("Response") in opposition to the Motion.

I. Introduction

Complainant, MATE TECHNOLOGIES, INC. ("Mate"), has failed in the Response to address most of the Motion, much less rebut the fatal shortcomings of the Complaint catalogued in the Motion. Rather than refute the reasons its allegations cannot constitute violations of law, Mate mischaracterizes FIC's arguments and pontificates broadly that "effluents, emissions and wastes must be intensively . . . managed." FIC does not reject the Illinois Environmental Protection Act ("Act");[1] instead FIC simply notes that the facts alleged by the Complaint (and favorable inferences with respect thereto) could never constitute a violation of the Act or are duplicitous. Mate is stretching the Act and citizen complaint mechanism to the breaking point.

[1] 415 ILCS 5/1 *et seq.*

II. Argument

A. Counts I through VII are Frivolous and Legally and Factually Insufficient

Observing there is a "cradle-to-grave" system for hazardous waste, Mate states in conclusory fashion that the Property constitute an illegal landfill or other waste disposal operation. Though Mate seems to believe that the Act prohibits the settlement of any molecule during manufacturing, there is no basis alleged in the Complaint or Response to ever conclude that the materials of concern can constitute "waste" or result in a violation of the Act. As they are not discarded, they never reached the "cradle."

For the reasons stated in the Motion, the mere settlement of oily dust inside of a plant in the course of ongoing production does not mean such material has been disposed, "discarded" or constitutes waste. The Response and Complaint reinforce this as follows:

- Mate has cited no case law contrary to FIC's position. Other than referring in passing to an inapplicable description of discarded material at 35 Ill. Adm. Code §721.102(a)(2), Mate simply has repeated its allegations. The cited regulation simply notes that a material may be discarded for certain purposes if it has been "abandoned." As suggested in the Motion, there are no allegations that the materials of concern have been abandoned.

- Mate has not alleged that FIC left the materials of concern in place. Mate has not alleged that FIC failed to periodically conduct janitorial or maintenance activities at the Property to remove the materials or that FIC mishandled substances after they had been collected or stored.

- Mate has not alleged that FIC dumped or buried wastes at the Property or that manufacturing operations have contaminated the soil or groundwater at the Property so as to require remediation.

- Mate has not alleged that FIC abandoned the Property.

- Mate has not disputed that the alleged activities are exempt from air permitting and that air emissions are "contaminants" pursuant to the Act, rather than wastes.

- Mate has not disputed the applicability or holding of *Boyer v. Harris*, PCB 96-151 (September 4, 1997) (chipped and peeling lead-based paint throughout a structure,

which apparently emitted dust or particulate into soil and elsewhere, was not a "waste" because it had not yet been discarded).

- Mate has not alleged that FIC accepts wastes from other parties or is intentionally disposing of waste at the Property. Furthermore, a Board case cited elsewhere by Mate demonstrates that the Property as a matter of law cannot be a disposal or similar facility requiring a permit. *Matteson WHP Partnership v. Martin*, PCB 97-121 (June 22, 2000), 2000 WL 890181 at 6. (drycleaning business the site of leaking and spilling did not require a permit).

Dust inevitably settles in every building; this, without more, cannot violate the solid waste requirements of the Act. As there are no substantive allegations beyond industrial operations in the ordinary course, Counts I-VII should be dismissed.

B. Count VIII is Frivolous and Legally and Factually Insufficient

The Motion provides that Count VIII is fatally flawed (1) in its entirety because of insufficient factual allegations and (2) to the extent it addresses workplace emissions and welding activities subject to the federal Occupational Safety and Health Act ("OSH Act"). The Response does not refute either of these points.

After acknowledging that it has not alleged violation of a specific air pollution control standard, Mate argues that it has complied with 35 Ill. Adm. Code §103.204 by virtue of the following allegation:

> "FIC's emission of oil has been injurious to human health because it has been inhaled by persons in or near the Property."

Complaint, ¶73; *citing Finley v. IFCO ICS-Chicago, Inc.*, PCB 02-208 (August 8, 2002), 2002 WL 1876193. However, this simply is stating a conclusion and is far short of the specific allegations in *Finley* court or the cases cited in the Motion.

In upholding the *Finley* complaint, the Board noted the specificity as follows:

> "[T]he complaint elaborates that the alleged injuries and interference include: *Nausea, dizziness, lightheadedness, headaches, sinus pain, sore throats, eye irritation, chest pain, adverse effects on those with asthma, coughing . . . fatigue,*

breathing difficulty, irritation of upper respiratory tract and lower respiratory tract, causing the evacuation of office buildings . . . ."

Finley, 2002 WL 1876193at 5 (emphasis added).

In contrast, the Complaint contains no such allegations of serious actual adverse consequences.[2] Furthermore, as noted in the Motion and ignored by Mate, actionable air pollution does not include "trifling inconvenience, petty annoyance and minor discomfort."[3] To allow Count VIII to proceed would render 35 Ill. Adm. Code §103.204 meaningless. (As authorized by the Act, we all continually inhale permitted mobile and stationary source emissions of hazardous materials; if Mate's allegation is sufficient, then any person is entitled to a hearing against any source for statutory air pollution.)

Nonetheless, Count VIII should be dismissed or stricken with respect to indoor air emissions and welding because state regulation of such matters is preempted by the OSH Act. *See* 29 U.S.C. 667(a); *Gade v. National Solid Wastes Management Association*, 505 U.S. 88, 112 S.Ct. 2374 (1992).

Mate has not disputed that specific indoor air contaminant and welding standards have been promulgated by the federal Occupational Safety and Health Administration ("OSHA") pursuant to the OSH Act.[4] Nor has Mate disputed either that Count VIII primarily concerns indoor air emissions in a workplace arising from welding or that Illinois has not adopted its own regime to supplant the federal scheme.

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[2] Recognizing the weakness of the Complaint, Mate has improperly attached to the Response an exhibit purporting to be an FIC employee complaint to OSHA. This abuse of procedure should be rejected. As noted in Mate's own citation: "A party must prevail, if at all, on and according to the case made in the pleadings. *Matteson WHP Partnership v. Martin*, PCB 97-121 (June 22, 2000), 2000 WL 890181 at 11. Furthermore, per the attached May 9, 2003 and June 18, 2003 letters between FIC and OSHA, a site inspection and related indoor air quality testing demonstrated there was no need for further action. Finally, this serves to underscore that Count VIII should be preempted by the OSH Act.

[3] *See, e.g., Brill v. Latoria*, PCB 00-219 (June 6, 2002); *Trepanier v. Speedway Wrecking Co.*, PCB 97-50 (January 6, 2000).

[4] *See* §29 C.F.R. 1910.1000, §29 C.F.R. 1910.25.

Yet, by misreading *dicta* taken out of context, Mate argues that *Gade* does not preempt Count VIII. According to Mate, Gade holds that a law of "general applicability" is not preempted. However, *Gade* and federal law are clear that even general state laws are preempted *to the extent* that they regulate subjects covered directly by the OSH Act.

The OSH Act impliedly preempts the field where relevant federal standards have been promulgated and any state law intruding upon such standards must yield:

> The design of the statute persuades us that Congress intended to subject employers and employees to *only one set of regulations*, be it federal or state, and that the *only* way a State may regulate an OSHA-regulated occupational health and safety issue is pursuant to an approved state plan that displaces the federal standards . . . .
>
> * * *
>
> [W]e conclude that the OSH Act precludes *any* state regulation of an occupational safety or health issue with respect to which a federal standard has been established, unless a state plan has been submitted and approved . . . . Our review of the Act persuades us that Congress sought to promote occupational safety and health *while at the same time avoiding duplicative* and possibly counterproductive regulation. It thus established a *uniform* system of federal . . . standards.
>
> * * *
>
> If a State wishes to regulate an issue of worker safety for which a federal standard is in effect, its *only* option is to obtain the prior approval of the Secretary of Labor . . . .
>
> * * *
>
> Although we have chosen to use the term 'conflict' pre-emption, we could easily have stated the promulgation of federal safety and health standard 'pre-empts the field' for *any* nonapproved state law regulating the same safety and health issue.
>
> * * *
>
> *Whatever the purpose or purposes of the state law, pre-emption analysis cannot ignore the effect of the challenged state action on the pre-empted field.*

Gade, 505 U.S. 88 at 102-108 (emphases added).

Accordingly, the U.S. Supreme Court held that certain Illinois laws were preempted "*to the extent*" they established requirements within the scope of federal standards, even though such laws (1) were based upon traditional state police, health, safety and licensing powers, (2) supplemented, and were not necessarily inconsistent

with, the federal standards and (3) had effects outside of the workplace. *Gade*, 505 U.S. 88 at 108. Similarly, Count VIII must be dismissed to the extent it concerns matters covered by OSHA indoor air emission and welding standards.

In *dicta*, the *Gade* court commented in passing that the OSH Act does not preempt every law simply because it may apply to a workplace setting; it preempts only those that intrude upon an area subject to a federal standard:

> "On the other hand, state laws of general applicability (such as laws regarding traffic safety or fire safety) *that do not conflict with OSHA standards* and that regulate the conduct of workers and nonworkers alike would generally not be pre-empted. 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, 505 U.S. 88 at 108 (emphasis added). Because the Complaint concerns matters covered by OSHA standards, this comment is not relevant. Moreover, Mate cites no, and FIC has located no, precedent after *Gade* supportive of Mate's position.[5]

C. Count IX is Duplicitous

The Motion provides that Count IX is duplicitous of the pending proceeding initiated by the Illinois Environmental Protection Agency ("Agency'). Mate does not dispute that Count IX is identical or substantially similar to the allegations being prosecuted by the Agency. Instead, Mate argues that the Complaint is broader in scope and that there is no duplicative adjudicative proceeding, *citing Finley v. IFCO ICS-Chicago, Inc.*, PCB 02-208 (August 8, 2002). These contentions should be rejected.

[5] The only Illinois cases located by FIC construing *Gade* and finding no preemption are not applicable or relevant; they conclude that certain actions pursuant to the Illinois Structural Work Act are outside the scope of OSHA standards or were expressly saved. *See Davis v. States Drywall and Painting*, 268 Ill.App.3d 704, 645 N.E.2d 304 (1st Dist. 1994); *Kerker v. Elbert*, 261 Ill.App.3d 924, 634 N.E.2d 482 (4th Dist. 1994); *Adami v. Green Giant Division*, 849 F. Supp. 615 (N.D. Ill. 1994); *Vukadinovich v. Terminal 5 Venture*, 834 F. Supp. 269 (N.D. Ill. 1993).

Mate argues that it should be permitted to go on a fishing expedition by asking the Board to "permit Mate to flush out" discovery beyond the alleged October 1, 2003 events because ¶10 of the Complaint establishes broader concerns. However, neither ¶10 nor the rest of the Complaint alleges any other unpermitted wastewater discharge whatsoever.

In addition, *Finley* and the precedents cited therein are not directly on point. For example, *Finley* involved claims by the U.S. Environmental Protection Agency and City of Chicago Department of Environment pursuant to different laws than those at issue before the Board. Similarly, the cases cited in *Finley* are distinguishable from, and not applicable to, this case.[6] In fact, FIC has not located any precedent holding that a citizen complaint may proceed where the Agency is prosecuting the same factual allegations pursuant to the same provisions of the Act.

This should not be surprising. Although the Act authorizes "private attorneys general," such persons should not be allowed to proceed while their public counterparts actively are exercising their enforcement authority regarding the same claims. To do otherwise would interfere with the regulatory scheme and result in a waste of governmental resources and force citizens into duplicative litigation of the exact same issues. State authorities should not be in a race with private attorneys general or else run the risk of interference from premature citizen actions.

In addition, an enforcement proceeding by a regulatory agency such as the Agency should be considered a "forum." A reasonable person would consider the service

[6] See *UAW v. Caterpillar, Inc.*, PCB 94-240 (Nov. 3, 1994) (participation in Agency's voluntary cleanup program is not an enforcement forum and did not involve same facts or laws at issue in citizen complaint); *White v. Van Tine*, PCB 94-150 (June 23, 1994) (no indication that Agency initiated a notice of violation proceeding or investigated same facts or acted pursuant to same laws at issue in citizen complaint); *Gardner v. Twp. High School District 211*, PCB 01-86 (Jan. 4, 2001) (involved Cook County investigation pursuant to county code).

of an official written Agency notice of violation *after an inspection and investigation* to be the equivalent of a complaint and the commencement of a legal action, particularly because regulatory agencies often act as prosecutor, judge and jury. Thus, Count IX should be dismissed, at least until the Agency proceeding has been concluded.

D. Counts II-VIII Seek Relief that cannot be Granted

Mate has not refuted the Motion. As to Counts II-VII, any remedy cannot be arbitrary, capricious or unreasonable; it must bear a rational relationship to the harm.[7] The Response does not demonstrate how, where there can be no bar to the settlement of dust in the first place, remediation can be related to the filing of a report or application for a permit. As to Count VIII, Mate has not identified any precedent ordering remediation in the case of unreasonable air pollution, where there is no violation of any standard.

III. Conclusion

For the foregoing reasons, the Complaint is frivolous or duplicitous or legally or factually insufficient and should be dismissed in its entirety. In the alternative, the deficient counts or portions described above should be stricken.

Respectfully submitted,

One of the Attorneys for Respondent

Jeremy A. Gibson
Mitchell S. Chaban
MASUDA, FUNAI, EIFERT & MITCHELL, LTD.
203 North LaSalle Street, Suite 2500
Chicago, Illinois 60601

[7] *See, e.g.*, ESG Watts, Inc. v. Illinois Pollution Control Board, 282 Ill.App.3d 43, 668 N.E.2d 1014 (4th Dist. 1996)

FIC America Corporation

9 May 2003
Via Fax
Complaint #
20431146
Notice of
Corrective Action

Mr. Charles J. Shields
Area Director
Occupational Safety and Health Administration
U. S. Department of Labor
365 Smoke Tree Plaza
North Aurora, IL. 60542-1793

Dear Mr. Shields,

Enclosed please find a copy of the air quality sampling results collected during the industrial hygiene visit by Mr. Robert Pietschmann of the Illinois Department of Commerce and Community Affairs on Friday, 21 March 2003. The samplings were taken at our Itasca facility at 750 Rohlwing Road in Itasca, Illinois.

The survey results indicated that our employees were not exposed to concentrations that exceed the OSHA PEL (Permissible Exposure Limit).

The results of the survey have been posted along with a copy of Appendix D 29 CFR 1910.134. Employees wearing respirators where same is not required have been made aware of the advisory information contained in Appendix D.

This facility is scheduled to close in August, 2003. Current operations conducted at this location will be moved to our Bloomingdale, Illinois operation at that time.

If you have any questions, please contact me at (630) 871 – 7609 ext 165 or by e-mail at dschneider@ficamerica.com.

Yours truly,

Daniel C. Schneider
Safety Engineer

Encl.: Air Sampling results

485 East Lies Road Carol Stream, IL 60188
Telephone 630-871-7609. Facsimile 630-871-2631

U.S. DEPARTMENT OF LABOR
Occupational Safety and Health Administration
365 Smoke Tree Plaza
North Aurora, IL 60542-1798
(630) 896-8700 Fax: (630) 892-2160

June 18, 2003

Mr. Daniel C. Schneider
Safety Engineer
FIC America Corp.
485 E. Lies Rd.
Carol Stream, IL 60188

Complaint 204113039

Dear Mr. Schneider:

Thank you for your response to the above complaints. It was received in our office on June 13, 2003. Your response was reviewed and appeared to be adequate to resolve the safety/health hazards.

You may consider this matter closed, unless the complainant disputes the response, suggesting that the problem still exists. The complainant has 10 business days to respond to our correspondence.

Thank you for your concern for a safe and healthy workplace. Your prompt response was appreciated.

Sincerely,

Charles J. Shields

Charles J. Shields
Area Director

lcg

ATTACHMENT

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PROOF OF SERVICE

I, the undersigned, do hereby state on oath that I served the foregoing **MOTION TO SUPPLEMENT THE REPLY OF RESPONDENT IN SUPPORT OF ITS MOTION TO DISMISS OR, IN THE ALTERNATIVE, STRIKE** upon Carey S. Rosemarin, Law Offices of Carey S. Rosemarin, P.C. 500 Skokie Boulevard, Suite 510, Northbrook, IL 60062 by placing a copy of the same in a properly addressed, postage prepaid, envelopes and depositing the same in the U.S. Mail Chute at 203 N. LaSalle Street Suite 2500, Chicago, Illinois 60601 on this 10 day of February, 2004.

Subscribed and sworn to before me this 10 day of February, 2004.

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OFFICIAL SEAL
KATHLEEN E BARRY
NOTARY PUBLIC STATE OF ILLINOIS
MY COMMISSION EXP. MAY 10,2004