

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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CLERK'S OFFICE

SEP 26 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 REPLY TO RESPONDENTS FEDERAL DIE CASTING, CO., FEDERAL CHICAGO CORP., AND CROSS' ANSWER AND

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

Dated: September 22nd, 2003

Respectfully submitted,

GREENBERG TRAUIG, P.C.

By: 

Craig V. Richardson

Attorneys for Complainant 2222 Elston LLC

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#77456

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Respondents.)

2222 ELSTON LLC'S REPLY TO RESPONDENTS FEDERAL DIE CASTING, CO., FEDERAL CHICAGO CORP., AND CROSS' ANSWER TO COMPLAINT AND AFFIRMATIVE DEFENSES

Complainant 2222 Elston LLC ("Elston"), by and through its attorneys, Greenberg Traurig, LLP, for its reply to Respondents Federal Die Casting, Co., Federal Chicago Corp., and Cross' Answer and Affirmative Defenses (filed on August 21, 2003), responds as follows:

GENERAL AFFIRMATIVE DEFENSES

FIRST GENERAL AFFIRMATIVE DEFENSE:

The Complaint is barred, in whole or in part, by the doctrine of waiver and/or equitable estoppel. In January 2000, Elston made an informed business decision to purchase a Brownfield property that it knew to a certainty required investigation and/or remediation. Elston explicitly agreed that, if it chose to consummate the transaction, the Seller's environmental liability would be limited to \$50,000 (which money Federal Respondents have already paid). After acquiring the property, Elston reneged on the deal it had cut, ignored the fact that part of the consideration paid to the Seller was Elston's agreement to limit the Federal Respondents' liability to \$50,000

and brought the instant action. Furthermore, Elston's failure to conduct the investigation required by the purchase agreement is the proximate and but for cause of this Complaint.

RESPONSE:

Elston denies the allegations stated in Respondents' First General Affirmative Defense.

Responding further, Elston alleges in the Complaint that the contract referred to by Respondents is between Elston and Respondent Lakeside. *See* Compl. ¶¶ 28-40. As such, Elston had no contract with any other Respondents, and it therefore had no contractual rights to waive vis-à-vis Respondents Cross, Federal Die Casting Co. and Federal Chicago Corp.

Responding further, Elston objects to Respondents' assertion of an equitable estoppel defense inasmuch as Respondents have failed to plead the elements of such a defense with the requisite specificity. In order to plead an affirmative defense of equitable estoppel, Respondents 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).

Respondents have 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 Respondents' 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, Inc.*, No. PCB 01-7, at 5 (striking affirmative defense of waiver.). Elston has not intentionally waived any right. The arguments raised by Respondents fail to state an affirmative defense inasmuch as they speak to the issue of the penalty and not the cause of action. *Id.*

SECOND GENERAL AFFIRMATIVE DEFENSE

The Complaint fails to state a claim against any of the Federal Respondents, as none of the Federal Respondents ever conducted any operations, committed any affirmative act, or allowed any act of disposal to occur with regard to the Underground Storage Tanks at the Site. Thus, none of the damages can be said to have been proximately caused by any act or omission of FCC.

RESPONSE:

Elston denies the allegations stated in Respondents' Second General Affirmative Defense. Responding further, Elston objects to Respondents' Second General 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.).

THIRD GENERAL AFFIRMATIVE DEFENSE

The Complaint fails to state a claim against Raymond E. Cross, as Mr. Cross never owned the property at issue, although he formerly owned the adjacent property over 19 years ago in his individual capacity. Mr. Cross' alleged status as a shareholder, officer, or director of FDC is insufficient to establish liability under the act, and there are no facts alleged which would justify piercing the corporate veil.

RESPONSE:

Elston denies that Mr. Cross never owned the property at issue. As defined by Elston, the "Site" includes portions of Lots 1 through 5. *See Compl.* ¶ 1. Elston alleges Mr. Cross owned

Lot 5 in his individual capacity. *Id.* ¶¶ 10, 28-34. In addition, Elston alleges that Mr. Cross is liable, in part, in his capacity as beneficiary of various Illinois land trusts which owned and operated the property under Mr. Cross' exclusive direction. *Id.* Elston further denies that Mr. Cross' status as shareholder, officer, or director of any of the corporate Respondents is insufficient to establish liability under the Act, or that there are no facts alleged which would justify piercing the corporate veil. Elston denies each and every other allegation contained in Respondents' Third General Affirmative Defense.

Responding further, Elston further objects to Respondents' Second General 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., Wood River, PCB 99-120, at 9* (striking affirmative defense simply refuting allegations of complaint.).

FOURTH GENERAL AFFIRMATIVE DEFENSE

The Complaint is barred under the doctrine of laches. Complainant was aware of the soil and/or ground water conditions since before if purchased the Site in January 2000. Nonetheless, Complainant waited almost three years to bring this complaint, during which time Complainant dramatically increased any costs which may have been necessary to address threats to human health or the environment.

RESPONSE:

Elston denies the allegations stated in Respondents' Fourth General Affirmative Defense.

FIFTH GENERAL AFFIRMATIVE DEFENSE

This Complaint fails because the remedies requested would work an arbitrary and unreasonable hardship upon the Federal Respondents. There is no evidence that the Federal Respondents contributed at all to the alleged contamination of the Site, and there is ample evidence that the Complainant is equally if not more at fault compared to the Federal Respondents, given the Complainants knowledge at the time of purchase, lack of due diligence in investigating the scope of the potential pollution risk, specific waiver, incompetent and/or negligent remediation and tank removal, acts, omissions, and/or other affirmative participation in causing the contamination of the Site. Moreover, the imposition of cost recovery upon the

Federal Respondents would work an unreasonable financial hardship on the Federal Respondents.

RESPONSE:

Elston denies the allegations stated in Respondents' Fifth General Affirmative Defense. Responding further, Elston objects to Respondents' assertion of an affirmative defense that compliance with the Act would cause an unreasonable hardship. The Board has previously held that: "Whether compliance would be deemed arbitrary or cause an unreasonable hardship is simply a matter to be considered in mitigation when determining whether to assess monetary penalties." *Cole Taylor Bank v. Rowe Indus., Inc.*, No. PCB 01-173 (June 6, 2002), at 8 (striking affirmative defense that compliance with the Act would cause an unreasonable hardship.). Elston further objects to Respondents' 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).

SIXTH GENERAL AFFIRMATIVE DEFENSE

The Complaint is barred against the Federal Respondents because the alleged acts of contamination occurred by the act or acts of third parties, including prior owners, lessors, and/or successors-in-interest to the Federal Respondents, without the knowledge or consent of the Federal Respondents.

RESPONSE:

Elston denies the allegations stated in Respondents' Sixth General Affirmative Defense. Responding further, Elston objects to Respondents' assertion of an affirmative defense based on Section 22.2(j) of the Act, including that contamination was caused by third parties. The Board has previously held that such a "third party" defense may not be raised in actions brought pursuant to Section 31(d), but rather apply only to actions brought pursuant to Section 22.2 of the

Act. *Cole Taylor*, No. PCB 01-173, at 6 (striking affirmative defense based “third party” defense set forth at Section 22.2(j) of the Act.).

COUNT-SPECIFIC AFFIRMATIVE DEFENSES

Count I. Count I fails to state a claim because the Federal Respondents did not perform any affirmative act of “consolidation” of any refuse or waste at the Site. The alleged ownership of buried USTs not utilized by Federal Respondents is not “open dumping” as defined under 415 ILCS 5/21(a).

RESPONSE:

Elston denies the allegations stated in Respondents’ Count-Specific Affirmative Defense directed at Count I of the Complaint. Responding further, Elston objects to Respondents’ Second General 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., Wood River*, PCB 99-120, at 9 (striking affirmative defense simply refuting allegations of complaint.).

Count II. Count II fails to state a claim because the Federal Respondents did not perform any affirmative act of “abandon[ing], dump[ing], or deposit[ing]” any waste upon public highways at or near the Site, as required to prove a violation under 415 ILCS 5/21(b).

RESPONSE:

Elston denies the allegations stated in Respondents’ Count-Specific Affirmative Defense directed at Count II of the Complaint. Responding further, Elston objects to Respondents’ Second General 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., Wood River*, PCB 99-120, at 9 (striking affirmative defense simply refuting allegations of complaint.).

Count III. Count III fails to state a claim because the Federal Respondents did not conduct any waste storage, treatment, or disposal operations as required to prove a violation under 415 ILCS 5/12(d).

RESPONSE:

Elston denies the allegations stated in Respondents' Count-Specific Affirmative Defense directed at Count III of the Complaint. Responding further, Elston objects to Respondents' Second General 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., Wood River*, PCB 99-120, at 9 (striking affirmative defense simply refuting allegations of complaint.).

Count V. Count V fails to state a claim because the Federal Respondents did not conduct any waste storage, treatment, or disposal operations as required to prove a violation under 415 ILCS 5/21(d).

RESPONSE:

Elston denies the allegations stated in Respondents' Count-Specific Affirmative Defense directed at Count V of the Complaint. Responding further, Elston objects to Respondents' Second General 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., Wood River*, PCB 99-120, at 9 (striking affirmative defense simply refuting allegations of complaint.).

Count VII. Count VII fails to state a claim because the Federal Respondents did not perform any affirmative act of "deposit[ing]" hazardous waste upon the land as required to prove a violation of 415 ILCS 5/12(d).

RESPONSE:

Elston denies the allegations stated in Respondents' Count-Specific Affirmative Defense directed at Count VII of the Complaint. Responding further, Elston objects to Respondents' Second General 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

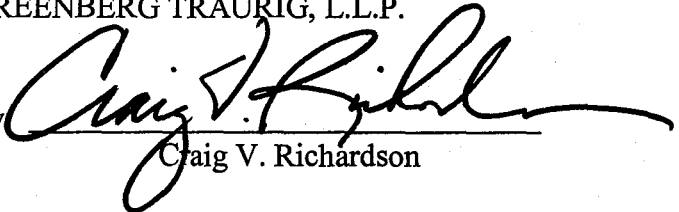
Complaint. *See, e.g., Wood River*, PCB 99-120, at 9 (striking affirmative defense simply refuting allegations of complaint.).

Dated: September 22, 2003

Respectfully submitted,

GREENBERG TRAURIG, L.L.P.

By



Craig V. Richardson

Attorneys for Complainant 2222 Elston LLC

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Respondents.)

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 RESPONDENTS FEDERAL DIE CASTING, CO., FEDERAL CHICAGO CORP., AND CROSS' ANSWER AND AFFIRMATIVE DEFENSES**, and **NOTICE OF FILING** upon the Respondents on September 22nd, 2003, by:

- certified mail
- registered mail
- messenger service
- personal service
- U.S. Mail

at the addresses below:

For Purex Industries, Inc.:

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