

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)	
by LISA MADIGAN, Attorney General)	
of the State of Illinois)	
)	
Complainant,)	
)	PCB No. 11-79
v.)	
)	
INVERSE INVESTMENTS, L.L.C.,)	
an Illinois Limited Liability Company,)	
)	
Respondent.)	

NOTICE OF FILING

TO: Krystyna Bednarczyk	Bradley P. Halloran
Assistant Attorney General	Hearing Officer
Environmental Bureau	Illinois Pollution Control Board
69 West Washington Street, 18 th Floor	100 West Randolph Street, Suite 11-500
Chicago, IL 60602	Chicago, IL 60601

PLEASE TAKE NOTICE that I have electronically filed today with the Office of the Clerk of the Pollution Control Board Respondent's Response to Complainant's Motion to Strike Affirmative Defenses, a copy of which is attached hereto and herewith served upon you.

Dated: April 18, 2012

INVERSE INVESTMENTS, L.L.C.

By: /s/ Jennifer T. Nijman
Jennifer T. Nijman

Jennifer T. Nijman
NIJMAN FRANZETTI LLP
10 S. LaSalle St., Suite 3600
Chicago, IL 60603
(312) 251-5255

CERTIFICATE OF SERVICE

The undersigned certifies that on this 18th day of April, 2012, she caused to be served electronically the attached Respondent's Response to Complainant's Motion to Strike

Affirmative Defenses upon the following person:

John Therriault, Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, IL 60601

and by U.S. Mail, first class postage prepaid, to the following persons:

Krystyna Bednarczyk
Assistant Attorney General
Environmental Bureau
69 West Washington Street, 18th Floor
Chicago, IL 60602

Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
100 West Randolph Street, Suite 11-500
Chicago, IL 60601

/s/ Jennifer T. Nijman
Jennifer T. Nijman

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PEOPLE OF THE STATE OF ILLINOIS,)	
by LISA MADIGAN, Attorney)	
General of the State Illinois,)	
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Complainant,)	
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v.)	PCB No. 11-79
)	Enforcement - Water
INVERSE INVESTMENTS L.L.C.,)	
an Illinois limited liability company,)	
)	
Respondent.)	

**RESPONDENT'S RESPONSE TO COMPLAINANT'S
MOTION TO STRIKE AFFIRMATIVE DEFENSES**

Respondent, INVERSE INVESTMENTS L.L.C., by its undersigned attorneys, submits its Response to Complainant's Motion to Strike the Affirmative Defenses and states as follows:

I. INTRODUCTION

On May 4, 2011, Complainant, People of the State of Illinois, filed a complaint against Respondent. On September 21, 2011, Respondent filed a Motion to Dismiss and Memorandum in Support of its Motion to Dismiss. The Illinois Pollution Control Board ("Board") denied that motion on February 16, 2011. On March 9, 2012, Respondent filed its Answer and Defenses to Complaint for Injunction and Civil Penalties. On March 30, 2012, Complainant filed a Motion to Strike Respondent's Affirmative Defenses. On April 4, 2012 Respondent requested that Complainant withdraw its motion because it was inapplicable in that Respondent did not file any "affirmative" defenses. Complainant refused.

Respondent respectfully requests the Board to deny Complainant's motion because:

- (a) Respondent did not plead an *affirmative* defense, it filed a "defense";
- (b) the Illinois Code of Civil Procedure requires a "defense" to be set forth in a party's answer in order to provide notice;

(c) the Board's denial of Respondent's Motion to Dismiss was not a decision on the merits regarding the defense; and (d) Respondent sufficiently pled its defense.

II. ARGUMENT

A. Respondent Pled a Defense, Not an Affirmative Defense

There is no question that Respondent pled a "defense" to the alleged violations, not an "affirmative" defense. *See* Respondent's Answer and Defenses to Complaint for Injunction and Civil Penalties, p. 12 (captioned "Respondent's Defense to the Complaint"). Respondent properly included the defense in its Answer to specify the disputed legal issues and inform the Complainant and the Board of the legal theories that will arise. 735 ILCS 5/2-613(d), *Handelman v. London Time Ltd.*, 124 Ill.App.3d 318, 464 N.E.2d 710, 79 Ill.Dec. 806 (1st Dist. 1984). Complainant's motion to strike improperly focused on *affirmative* defenses and failed to recognize that Respondent did not assert an affirmative defense. Complainant's motion is inapplicable and should be denied.

A "defense" is a "defendant's stated reason why the [Complainant] has no valid case." Black's Law Dictionary 430 (7th ed. 1999). An "affirmative defense" is a "defendant's assertion raising new facts and arguments that, if true, will defeat the [Complainant's] claim, even if all allegations in the complaint are true." *Id.* In its defense, Respondent stated that it did not cause or allow water pollution to show that Complainant has no valid case. Respondent's defense does not admit the allegations in the complaint are true and, in fact, specifically disputes the allegations that it "caused or allowed" pollution. In fact, Complainant admits that Respondent's defense is not an affirmative defense when it states that Inverse "fails to admit the truth of the claim asserted by the State." *See* Complainant's Motion to Strike, p. 4. Respondent's pleading is a "defense" which Respondent specifically captioned as a "defense" and not an "affirmative defense."

B. Any Defense Must Be Plainly Set Forth in the Answer

Respondent plainly stated its defense in the Answer to meet the requirements of Section 2-613(d) of the Illinois Code of Civil Procedure. 735 ILCS 5/2-613(d).¹ Section 2-613(d) states “...any ground or defense, *whether affirmative or not*, which if not expressly stated in the pleading, would be likely to take the opposite party by surprise, must be plainly set forth in the answer or reply.” 735 ILCS 5/2-613(d) (emphasis added). The purpose of this language is “to specify the disputed legal issues before trial” and inform the parties of the legal theories presented by the respective opponents. *Handelman*, 124 Ill.App.3d at 320, 464 N.E.2d at 712, 79 Ill.Dec.at 808. “This is the prime function of pleading.” *Id.* The Board agrees with this reasoning and has stated it “believes the better route is to allow liberal pleading of defenses.” *People of the State of Illinois v. Midwest Grain Products of Illinois, Inc.*, PCB 97-179, slip op. at p. 3 (Aug. 21, 1997). In *Midwest Grain*, the Board found that “[a]llowing pleading of defenses which may include legal conclusions will serve to inform parties of the legal theories to be presented by their opponents, as well as preventing any confusion as to whether a defense has been waived by not having been raised.” *Id.*; *see also Antol v. Chavez-Pereda*, 284 Ill.App.3d 561, 566, 672 N.E.2d 320, 324 (1st Dist. 1996) (a party may not raise on appeal defenses not inserted in its answer).

In this case, Respondent pled the defense to state the disputed issues before a hearing in this matter to avoid taking the Complainant or the Board by surprise and to avoid any argument of waiver. Moreover, any statements contained in the defense were included to inform the Complainant and the Board of the legal theories that will be presented, which was acceptable in *Midwest Grain*. Respondent intended to prevent any confusion as to whether a defense had been

¹ Although the Illinois Code of Civil Procedure does not expressly apply to the Board proceedings, the Board may look to them for guidance where the Board’s procedural rules are silent. 35 Ill. Adm. Code 101.100(b). Section 103.204(d) of the Board’s Enforcement Procedures is regarding affirmative defenses. 35 Ill. Adm. Code 103.204(d). The Board rules are silent as to defenses.

raised and to maintain its ability to assert those defenses in any future proceedings. Thus, Respondent properly pled its defense to Complainant's allegations and Complainant's attempt to strike the defense should be summarily denied.

C. The Board's Denial of the Motion to Dismiss Is Not a Decision on the Merits of the Defense

Contrary to Complainant's suggestion, the Board's previous decision on Respondent's Motion to Dismiss was not a rejection of Respondent's arguments or defenses. Complainant's Motion to Strike, at pp. 2-3, 9. The Board's decision was based only "on the pleadings, taking all well-pled allegations as true, and drawing all reasonable inferences from them in favor of [Complainant]." *People of the State of Illinois v. Inverse Investments, LLC*, PCB 11-79, slip op. at p. 10 (February 16, 2012). A party may raise the same defenses again in a subsequent motion, "unless the court has disposed of the motion on its merits." *Makowski v. City of Naperville*, 249 Ill.App.3d 110, 117, 617 N.E.2d 1251, 1257 (2nd Dist. 1993). Merely denying a motion to dismiss, without more, "does not show that the court disposed of the motion on its merits." *Id.* In its Order, the Board did not state that its decision was based on the merits, only that in evaluating the Complainant's Complaint, the Complainant may be able to establish the facts it alleged. *Inverse Investments, LLC*, PCB 11-79, slip op. at p. 10. Thus, the Board did not reject nor even opine upon the defense presented by Respondent.

D. Respondent Sufficiently Pled Facts

Respondent pled sufficient facts in its defense to provide notice to the Complainant to respond. "No pleading is in bad substance which contains such information as reasonably informs the opposite party of the nature of the claim or defense which he or she is called upon to meet." 735 ILCS 5/2-612(b).² A respondent need not prove the merits of the defense at the time

² As stated in footnote 1, pursuant to §101.100(b) the Board may look to the Illinois Code of Civil Procedure for guidance. 35 Ill. Adm. Code 101.100(b).

of filing the defenses, but only needs to provide sufficient notice to the complainant to respond to the defenses. *People of the State of Illinois v. Aargus Plastics, Inc.*, PCB 04-09 slip op. at p. 8, (May 20, 2004). Respondent included sufficient, undisputed facts in its defense, including: its recent acquisition of the property by inheritance (Complainant's Complaint similarly states that Inverse only owned the property only as of 2003[sic]), Complaint at ¶3; and the historic nature of the contaminants (Complainant's Complaint states that "the historic use of dry cleaning solvents at the Site resulted in the contamination..."), Complaint at ¶¶6-9. Respondent's defense alleges that the historic contamination meant that Respondent lacked control over the contaminants. Respondent's defense is properly pled so as to provide sufficient notice and should not be stricken.

III. CONCLUSION

Respondent requests that the Board deny the Complainant's Motion to Strike Affirmative Defenses and for other relief as the Board deems just and proper.

Respectfully submitted,

INVERSE INVESTMENTS, L.L.C.

By /s/Jennifer T. Nijman
One of Its Attorneys

Jennifer T. Nijman
NIJMAN FRANZETTI LLP
10 South LaSalle Street, Suite 3600
Chicago, IL 60603
312-251-5255