BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB No. 15-112
	)	(Enforcement – Air)
INCOBRASA INDUSTRIES, LTD., an Illinois corporation,	)	
	)	
	)	
Respondent.	)	

NOTICE OF ELECTRONIC FILING

To: **By U.S. Mail**
LaDonna Driver
Edward Dwyer
Matthew C. Read
Melissa S. Brown
Hodge Dwyer & Driver
3150 Roland Avenue
Springfield, Illinois 62703

PLEASE TAKE NOTICE that on January 7, 2016, the Complainant in the above-captioned matter electronically filed with the Office of the Clerk of the Pollution Control Board Complainant's Motion to Strike Respondent's Affirmative Defenses, a copy of which is attached hereto and hereby served upon you.

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. LISA MADIGAN, Attorney General
of the State of Illinois

By: _____

Ryan G. Rudich
Assistant Attorney General
Environmental Bureau
69 W. Washington St., 18th Floor
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(312) 814-1511
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DATE: January 7, 2016

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COMPLAINANT'S MOTION TO STRIKE RESPONDENT'S AFFIRMATIVE DEFENSES

NOW COMES the Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, and hereby moves, pursuant to Section 101.500 of the Illinois Pollution Control Board ("Board") regulations, 35 Ill. Adm. Code 101.500, and Section 2-615 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-615 (2014), to strike Respondent INCOBRASA INDUSTRIES, LTD.'s Affirmative Defenses to the First Amended Complaint. In support of its motion, the Complainant states as follows:

I. INTRODUCTION

On July 7, 2015, the Board granted Complainant's motion for leave to file its First Amended Complaint ("Amended Complaint") against Respondent. The Amended Complaint alleges that Respondent violated the Illinois Environmental Protection Act, 415 ILCS 5/1 *et seq.* ("Act"), and Board regulations by failing to install and operate a continuous emissions monitoring system (Count I); failing to submit excess emissions reports (Count II); failing to maintain a written episode action plan (Count III); failing to submit NESHAP notifications (Count IV); failing to keep records (Count V); violating CAAPP permit conditions (Count VI); causing emissions in excess of CAAPP permit fee limits (Count VII); and violating construction

permit conditions (Count VIII). Respondent filed its Answer to the First Amended Complaint ("Answer") on December 8, 2015. The Answer contained 13 affirmative defenses ("Affirmative Defenses").

II. ARGUMENT

A. Legal Standards for Motions to Strike Affirmative Defenses

Section 2-615(a) of the Illinois Code of Civil Procedure, 735 ILCS 5/2-615(a) (2014), provides as follows:

> Motions with respect to pleadings.
>
> (a) All objections to pleadings shall be raised by motion. The motion shall point out specifically the defects complained of, and shall ask for appropriate relief, such as: that a pleading or portion thereof be stricken because substantially insufficient in law, or that the action be dismissed or that a pleading be made more definite and certain in a specified particular, or that designated immaterial matter be stricken out, or that necessary parties be added, or that designated misjoined parties be dismissed, and so forth.

Complainant's motion is brought pursuant to Section 2-615(a) in order to challenge – and strike – Respondent's Affirmative Defenses because they are legally and factually insufficient.

The assertion of affirmative defenses is governed by Section 2-613(d) of the Illinois Code of Civil Procedure, 735 ILCS 5/2-613(d) (2014), which provides as follows:

> Separate counts and defenses.
>
> (d) The facts constituting any affirmative defense, such as payment, release, satisfaction, discharge, license, fraud, duress, estoppel, laches, statute of frauds, illegality, that the negligence of a complaining party contributed in whole or in part to the injury of which he complains, that an instrument or transaction is either void or voidable in point of law, or cannot be recovered upon by reason of any statute or by reason of nondelivery, want or failure of consideration in whole or in part, and any defense which by other affirmative matter seeks to avoid the legal effect of or defeat the cause of action set forth in the complaint, counterclaim, or third-party complaint, in whole or in part, and 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.

An affirmative defense is defined as "[a] defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all the allegations in the complaint are true." Black's Law Dictionary (9th ed. 2009). Under Illinois law, "[t]he criteria to be applied in determining if a defense is or is not of an affirmative nature is whether, by the raising of it, a defendant gives color to his opponents claim and then asserts new matters by which the apparent right is defeated." *Horst v. Morand Bros. Beverage Co.*, 96 Ill. App. 2d 68, 80 (1st Dist. 1968), citing *Cunningham v. City of Sullivan*, 15 Ill. App. 2d 561, 567 (3rd Dist. 1958).

The Illinois Supreme Court has interpreted the pleading standards for affirmative defenses as follows:

> An affirmative defense does not negate the essential elements of the plaintiff's cause of action. To the contrary, it admits the legal sufficiency of that cause of action. It assumes that the defendant would otherwise be liable, if the facts alleged are true, but asserts new matter by which the plaintiff's apparent right to recovery is defeated.

Vroegh v. J & M Forklift, 165 Ill.2d 523, 530 (1995) (internal citations omitted). An affirmative defense must do more than merely refute or deny well-pleaded facts in a complaint. If the pleading does not admit the apparent right to the claim and instead merely attacks the sufficiency of the claim, it is not a valid affirmative defense. *Worner Agency, Inc. v. Doyle*, 121 Ill. App. 3d 219, 222-223 (4th Dist. 1984). An assertion by a defendant that a complaint fails to state a claim is properly raised in a motion to dismiss, rather than as an affirmative defense. *Corbett v. Devon Bank*, 12 Ill.App.3d 559, 569-70 (1st Dist. 1973).

B. Respondent's First Affirmative Defense Must be Stricken Because it is Legally Insufficient

In its first affirmative defense, Respondent claims that the portion of Count VI of the Amended Complaint that alleges a violation related to failure to keep records of SO_2 emissions from Boiler A is barred because "Respondent maintained records of monthly SO_2 emissions." **Aff. Def. 1, Answer at p. 45.** Respondent's first affirmative defense does not admit the legal sufficiency of the Complainant's allegations and assert a new matter that would defeat its right to prevail. *Vroegh*, 165 Ill.2d at 530. Rather, it is a denial of the Amended Complaint's allegation. It is therefore an improper affirmative defense and must be stricken.

C. Respondent's Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Eleventh, Twelfth, and Thirteenth Affirmative Defenses Must be Stricken Because they are Factually and Legally Insufficient

In Respondent's second, third, fourth, sixth, seventh, eighth, ninth, eleventh, twelfth and thirteenth affirmative defenses, it asserts that it is not liable for the CAAPP permit condition violations alleged by Complainant because those conditions do not specify that records must be kept on a rolling 12-month basis. As a result, Respondent's claim, Complainant "fails to state a cause of action." **Aff. Def. 2, 3, 4, 6, 7, 8, 9, 11, 12, 13, Answer at pp. 45-48.**

These affirmative defenses are improper because they fail to give color to the Complainant's claims and then assert a new matter that defeats those claims. *Horst*, 96 Ill. App. 2d at 80. They are instead denials that the claims have legal merit to begin with. Moreover, they do not set forth any new facts that are relevant to the Complainant's allegations of failing to maintain the records as required by Respondent's CAAPP permit. *See* 735 ILCS 5/2-613(d) (2014) ("the *facts* constituting any affirmative defense... must be plainly set forth in the answer or reply") (emphasis added). They are therefore not proper affirmative defenses and must be stricken. Respondent's contention that the Complainant's allegations as pled fail to state a cause

of action is appropriately raised at this stage only in a motion to dismiss. *See Corbett*, 12 Ill.App.3d at 569-70.

D. Respondent's Fifth Affirmative Defense Must be Stricken Because it is Factually and Legally Insufficient

Respondent's fifth affirmative defense is that Complainant "fails to state a cause of action" with regard to Respondent's failure to maintain proper records of equipment condition and key operating parameters of air pollution control equipment. Similar to Respondent's position in affirmative defenses, 2, 3, 4, 6, 7, 8, 9, 11, 12 and 13, it asserts in affirmative defense five that the relevant CAAPP permit condition does not require the records Complainant alleges Respondent failed to keep. For the same reason given in Section C above, Respondent's fifth affirmative defense must be stricken. It does not give color to the Complainant's allegations and assert a new matter that defeats it; it merely denies that Complainant has stated a valid cause of action, which does not constitute an affirmative defense.

E. Respondent's Tenth Affirmative Defense Must be Stricken Because it is Factually and Legally Insufficient

Respondent's tenth affirmative defense is that Complainant's claims that the facility exceeded its permissible particulate matter ("PM") and volatile organic material ("VOM") emissions fee limits in certain years is barred because the facility did not also exceed its aggregate pollutant emissions fee limits. Rather than concede that emitting PM and VOM in quantities above the explicit, pollutant specific limits contained in the facility's permit is a violation of that permit, Respondent advocates an interpretation of the permit in which those limits have no effect whatsoever. Respondent therefore does not "admit the apparent right to the claim and instead merely attacks the sufficiency of the claim." *Worner Agency, Inc.*, 121 Ill. App. 3d at 222-223. Moreover, the tenth affirmative defense does not plead any facts in addition

to those alleged by Complainant. It is therefore an improper affirmative defense and must be stricken.

WHEREFORE, Complainant, PEOPLE OF THE STATE OF ILLINOIS, respectfully requests that the Board issue an order in favor of Complainant and against Respondent striking Respondent's affirmative defenses in their entirety and granting such other relief as the Board deems appropriate and just.

RESPECTFULLY SUBMITTED:

PEOPLE OF THE STATE OF ILLINOIS
ex rel. LISA MADIGAN, Attorney General
of the State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
Litigation Division

BY: _____

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Assistant Attorney General
Environmental Bureau
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(312) 814-1511

CERTIFICATE OF SERVICE

I, Ryan G. Rudich, an Assistant Attorney General, certify that on the 7th day of January, 2016, I caused to be served by U.S. Mail the foregoing Notice of Electronic Filing and Complainant's Motion to Strike Respondent's Affirmative Defenses on the people listed in the Notice of Electronic Filing at the address listed on the Notice of Electronic Filing, by depositing same in a postage prepaid envelope with the United States Postal Service located at 100 West Randolph Street, Chicago, Illinois 60601.

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