UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
Carbon Injection Systems LLC,	)	**Docket No. RCRA-05-2011-0009**
Scott Forster,	)	
and Eric Lofquist,	)	
	)	
Respondents.	)	

RESPONDENTS CARBON INJECTION SYSTEMS LLC, SCOTT FORSTER AND ERIC LOFQUIST'S OPPOSITION TO COMPLAINANT'S MOTION TO STRIKE RESPONDENTS' AFFIRMATIVE DEFENSES

Respondents Carbon Injection Systems LLC ("CIS"), Scott Forster and Eric Lofquist ("Respondents"), through counsel, oppose Complainant's Motion to Strike Respondents' Affirmative Defenses. For the reasons set out below, Respondents respectfully request that the Presiding Administrative Law Judge deny Complainant's Motion to Strike Respondents' Affirmative Defenses.

Complainant filed an administrative penalty case against Respondents on May 13, 2011, alleging violations of various regulations promulgated pursuant to sections 3002, 3003 and 3004 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§6922, 6923 and 6924, codified at 40 C.F.R. Parts 260 through 279. Respondents filed their Answer to the Complaint on July 21, 2011. As provided for in Rule 22.15(b) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties ("Consolidated Rules"), Respondents included the following affirmative defenses, noted in sufficient detail, in their Answer:

1. Complainant has failed to join a party or parties necessary for the just and equitable adjudication of U.S. EPA's claims in this administrative proceeding.

2. Complainant's claims are barred by its failure to provide adequate notice.

3. The Complainant's claims are barred on grounds that they were brought for improper motive, arise out of malice or ill will, and amount to an abuse of U.S EPA's enforcement discretion.

4. The Complainant's claims are estopped because they are arbitrary and capricious and inconsistent with other actions and inactions of U.S. EPA that involve the same products that are the subject of this administrative proceeding.

5. Complainant's claims are barred by the doctrine of selective enforcement.

6. Complainant's demand for the assessment of a civil penalty should be denied on grounds that Respondents, or some of them, are not able to pay all or some of the penalty claimed.

7. To the extent that Complainant's allegations are proven true (which Respondents deny), Respondents were without sufficient knowledge or ability to properly characterize the material in question and/or were otherwise misled with respect to the nature of the material.

Respondents provided additional detail regarding their affirmative defenses in their Prehearing Exchange, which was filed on November 3, 2011. Specifically, Respondents described the bases for all of their affirmative defenses on pages 17 and 18. The discussion on these pages provides U.S. EPA with additional detail regarding the circumstances and arguments Respondents will rely on for their seven affirmative defenses.[1]

[1] Respondents previously withdrew, in part, their Sixth Affirmative Defense as it pertains to Scott Forster and Eric Lofquist. As noted in the Prehearing Exchange, "Respondents do not intend to present any evidence at the hearing regarding Scott Forster's or Eric Lofquist's ability to pay a civil penalty." Respondents' Prehearing Exchange, p. 18. Respondent CIS maintains its ability to pay affirmative defense. U.S. EPA has not moved to strike the Sixth Affirmative Defense as it pertains to CIS.

Law and Argument

As Complainant acknowledges in its Motion, motions to strike generally are disfavored by courts as they are considered a "drastic measure...sought by the moving party as a dilatory tactic" and often are only used as a measure to delay proceedings. *In the Matter of Aguakem Caribe, Inc.,* Docket No. RCRA-02-2009-7110, 2010 WL 2470250 (E.P.A.) at 6 (June 2, 2010) and *United States v. 416.81 Acres of Land,* 514 F.2d 627, 631 (7th Cir. 1975). Such a remedy is considered contrary to the general principal that pleadings should be treated liberally and that a party should have the opportunity to present its arguments at trial. See *In the Matter of Dearborn Refining Co.,* Docket No. RCRA-05-2001-0019, 2003 WL 402868 (E.P.A.) (Jan. 3, 2003) (Motion to strike affirmative defenses accurately characterized as "quick and dirty" responses to the complaint was nonetheless denied).

The Consolidated Rules require that affirmative defenses "state the circumstances or arguments which are alleged to constitute the grounds of any defense...." 40 C.F.R. 22.15(b). This rule suggests that the primary purpose of the answer is for the respondent to indentify the points in dispute through the factual challenges and the circumstances and arguments used as grounds for a defense. *Dearborn Refining Co.,* 2003 WL 402868, at 4. The rule does not require the answer to include a detailed recitation of specific facts in support of the defense; rather, the respondent must set forth only the "circumstances" and "arguments" which make up any affirmative defense. See *In the Matter of Strong Steel Products, LLC,* Docket No. RCRA 5-2001-0016, 2003 WL 22534560 (E.P.A.) at 8 (Oct. 27, 2003). As a general principle, "administrative pleadings are liberally construed and easily amended." *In re Lazarus, Inc.*, TSCA Appeal No. 95-2, 7 E.A.D. 318, 334 (EAB 1997). The objective of pleading

is to facilitate a decision based on the merits of a controversy. *Id.* at 333-34; *In the Matter of Behnke Lubricants, Inc.*, Docket No. FIFRA-05-2007-0025, 2008 WL 711033 (E.P.A. Mar. 5, 2008)(Motion to strike denied).

In administrative proceedings, defenses have been held to be inappropriate subjects for motions to strike, if there is any possibility that the defenses could be made out at trial. *Dearborn Refining Co.,* 2003 WL 402868, at 4, (citing *In the Matter of Wooten Oil Company*, Docket No. CAA-94-H001, 1996 EPA ALJ LEXIS 119 at *5 (Jan. 31, 1996)). Even arguments that do not constitute complete defenses to liability should not be barred since they may be relevant to determination of penalty. *Id.* (citing *In the Matter of Nibco,* Docket No. RCRA VI-209-H, 1996 EPA ALJ LEXIS 73 at *40 (May 29, 1996)). As such, motions to strike should not be granted if the "insufficiency of the defense is not clearly apparent, or if it raises factual issues that should be determined at a hearing on the merits." *Id.* (citing *In the Matter of Waterville Industries,* Docket No. RCRA-I-87-1086, 1988 EPA ALJ LEXIS 8 at *4 (June 23, 1988)). "If the defense depends on disputed questions of law or fact, the motion to strike should be denied." *In the Matter of Century Aluminum of W. Va, Inc.*, Docket No. CAA-III-116, 1999 EPA ALJ LEXIS 26, at *2 ("Order Granting Complainant's Motion to Strike Affirmative Defenses," June 25, 1999).

Complainant's motion, brought pursuant to Rule 12(f) of the Federal Rules of Civil Procedure complains that Respondents' affirmative defenses were not sufficiently pled as a matter of law and that certain affirmative defenses are redundant. Respondents, of course, are not required to support their affirmative defenses in detail in their opposition to such a motion. Rather, Respondents must only show their affirmative defenses were sufficiently pled to provide Complainant with fair notice as a matter of

law. *In the Matter of San Pedro Forklift*, Docket CWA-09-2009-0006, 2010 WL 3324918 (E.P.A), at 4 (Aug. 11, 2010). As this response will show, Respondents affirmative defenses were sufficiently pled to provide notice of the circumstances and arguments relied upon for each defense. Accordingly, Complainant's motion to strike should be denied.

1. Respondents' Affirmative Defenses Are Sufficient as a Matter of Law and Should Not be Stricken From Respondents' Answer.

Respondents' affirmative defenses were set forth in Respondents' Answer, and were further explained in Respondents' Prehearing Exchange, in detail sufficient to provide Complainant with notice of the points in dispute and should not be stricken from Respondents' Answer. It is black letter law that "an affirmative defense may be plead in general terms and will be held to be sufficient...as long as it gives plaintiff fair notice of the nature of the defense. *Lawrence v. Chabot,* 182 Fed.Appx 442, 456 (6th Cir. 2006 (Mich.)), (citing 5 Wright & Miller, *Federal Practice and Procedure* § 1274). An affirmative defense is legally insufficient only if, as a matter of law, it cannot succeed under any circumstances. Complainant is attempting to place a heightened pleading standard on Respondents' affirmative defenses that is not supported by law.

Complainant argues that the United States Supreme Court decisions in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 554 (2007) and *Ashcroft v. Iqbal,* 556 U.S. 662 (2009) should be applied to the pleading of affirmative defenses in administrative hearings, particularly to Respondents' third, fourth, and fifth affirmative defenses. There is no case authority providing for application of the pleading standards defined in *Twombly* and *Iqbal* in administrative penalty claims. In fact, as Complainant acknowledges, in *San Pedro Forklift*, 2010 WL 3324918 (E.P.A), at 9, *Twombly* and *Iqbal* were considered and found not to apply to the pleading of affirmative defenses in

administrative cases. See Complainant Motion to Strike, p. 10. Rather, in *San Pedro Forklift,* the administrative law judge noted that whether *Twombly* and *Iqbal* apply to pleading affirmative defenses in federal court cases is still unsettled, but in any event, the Consolidated Rules provide a clear standard so reference to federal civil procedure is unnecessary. *Id.* at 4-5. As such, there is no authority providing for the application of this heightened pleading standard to Respondent's affirmative defenses.

The Consolidated Rules provide an unambiguous pleading standard requiring the answer to state "the circumstances or arguments which are alleged to constitute the grounds of any defense." 40 C.F.R. 22.15(b). With a clear standard, not involving the "linguistic distinctions at issue in *Twombly* or subsequent cases" there is no reason to consult federal court practice or regulations for guidance. *San Pedro Forklift*, 2010 WL 3324918, at 5. It is sufficient for Respondents to state the circumstances or arguments that constitute the affirmative defenses pled. Respondents have sufficiently pled their seven affirmative defenses by providing fair notice to the Complainant of the defenses. Respondents are not required to provide detailed facts and arguments of their affirmative defenses in their answer. As stated above, Respondents should have the opportunity to present their full affirmative defense arguments at the hearing because fair notice of the nature of the defenses has been provided. See *Dearborn Refining Co.* 2003 WL 402868 at 6.

Additionally, the record for this case is largely undeveloped and any evidence relating to the defenses also may be relevant to the determination of a penalty; therefore, such evidence should be heard. *In the Matter of Franklin and Leonhardt Excavating Co.,* Docket No. CAA-98-011, 1998 WL 1006472 (E.P.A.) (Dec. 7, 1998). For example, as Respondents previously have pointed out in their prehearing exchange, U.S. EPA has

pursued a fundamentally unfair strategy of "divide and conquer" by separately pursuing Respondents for accepting material that allegedly should have been characterized as hazardous waste, rather than in joint proceedings against the generators, who alone would be in possession of information regarding the proper identification and characterization of the materials in question. U.S. EPA also, arbitrarily, has selected Respondents for enforcement, but has chosen not to bring enforcement actions against the other parties to the exact same transactions which U.S. EPA claims violated RCRA. U.S. EPA's strategy, its determination to prohibit discovery from such third parties in this matter, and its complete lack of notice to Respondents regarding its determination that IFF's products were wastes, have severely prejudiced Respondents' ability to defend this case and amount to a denial of due process. Respondents should be entitled to explore U.S. EPA's rationale for its selective enforcement at the hearing.

Further, Complainant has advised Respondents, as well as the Presiding Administrative Law Judge's staff attorney, Steven Sarno, that Complainant expects to amend its complaint in order to revise its penalty demand. Thus, any motions to strike the affirmative defenses ought to be deemed premature as Complainant itself has yet to finalize its case against Respondents.

2. Respondents' Affirmative Defenses are Not Redundant and Should Not Be Stricken From Respondents' Answer.

Respondents' first, fourth, fifth and seventh affirmative defenses are not redundant and should not be stricken. Complainant's argument that these four affirmative defenses deal with the same issue, namely, EPA's decision only to pursue an enforcement action against CIS, Scott Forster, and Eric Lofquist for the alleged violations, is incorrect. A clear reading of the four defenses shows clear factual distinctions and differing legal standards. However, even if the defenses are redundant,

as Complainant alleges, there will be no prejudice to Complainant in allowing Respondents to maintain such defenses; therefore, the motion to strike these defenses should be denied. Absent "a showing of prejudice by the moving party" a motion to strike should be denied. *California Department of Toxic Substances Control v. Alco Pacific, Inc.*, 217 F.Supp.2d 1028 (C.D. Cal. 2002). Here, even if the defenses are redundant, this would not cause any increase in time, expense or complexity of the hearing or other prejudice such as would warrant granting the Complainant's motion to strike. See *Strong Steel Products,* 2003 WL 22534560 at 9.

As noted above, this case remains largely undeveloped. Although the prehearing exchanges have been completed there is still substantial information expected from third parties that will be relevant to the outcome of this matter. Until this information is obtained, the record is insufficient to allow a decision on the redundancy of the affirmative defenses. See *In the Matter of Environmental Protection Services, Inc.*, Docket no. TSCA-03-2001-0331, 2003 WL 21213217 (E.P.A. Feb. 28, 2003)(Motion to strike affirmative defense of selective enforcement was denied where respondent was still developing proof of its defenses).

Conclusion

For the reasons set forth above, Respondents respectfully request Complainant's Motion to Strike Respondents' Affirmative Defenses be denied. In the alternative, should the Presiding Administrative Law Judge find any of Respondents' affirmative defenses insufficiently pled, Respondents request the opportunity to re-plead the defense, rather than have the affirmative defense stricken with prejudice.

Respectfully submitted,

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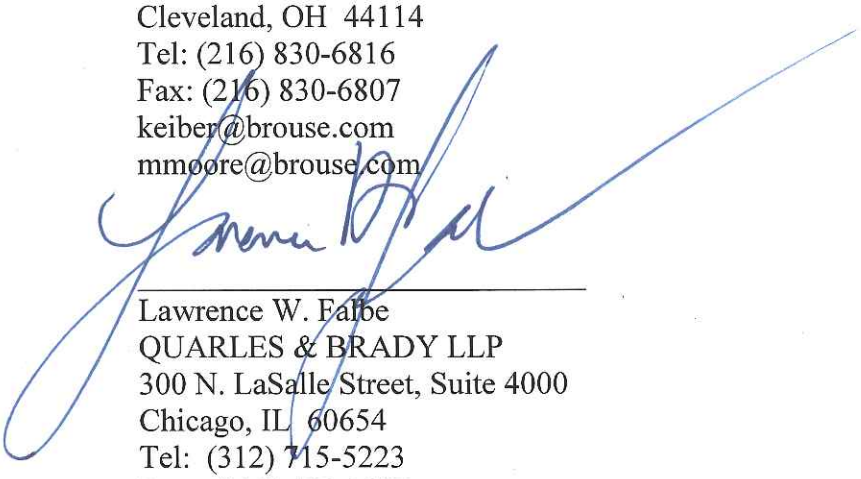

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In the Matter of: Carbon Injection Systems LLC, Scott Forster, and Eric Lofquist, Respondents, Docket No. RCRA-05-2011-0009

CERTIFICATE OF SERVICE

I, Lawrence W. Falbe, an attorney, hereby certify that the foregoing Respondents Carbon Injection Systems LLC, Scott Forster and Eric Lofquist's Response to Complainant's Motion to Strike Respondents' Affirmative Defenses was sent on December 27, 2011, in the manner indicated, to the following:

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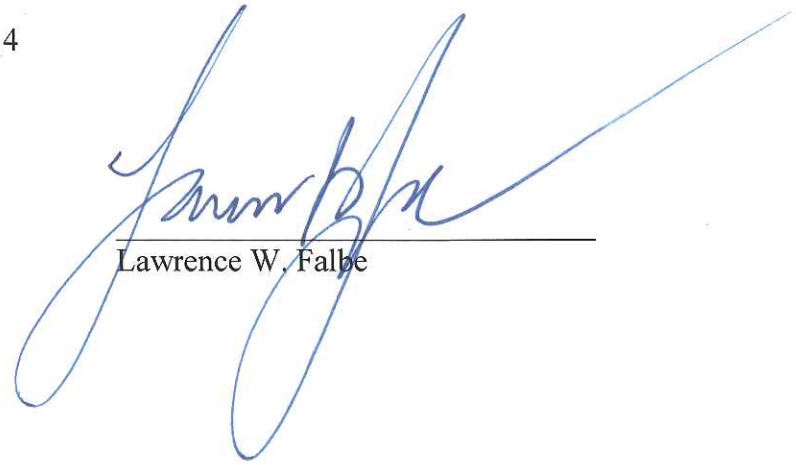

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December 27, 2011