UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
Carbon Injection Systems LLC,	)	**COMPLAINANT'S MOTION TO**
Scott Forster,	)	**STRIKE RESPONDENTS'**
and Eric Lofquist,	)	**AFFIRMATIVE DEFENSES**
	)	
Respondents.	)	**Docket No. RCRA-05-2011-0009**
	)	

COMPLAINANT'S MOTION TO STRIKE RESPONDENTS' AFFIRMATIVE DEFENSES

Comes now Complainant, the United States Environmental Protection Agency, Region 5 (Complainant or EPA), by and through its counsel, pursuant to Rule 22.16(a) of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits* (Consolidated Rules or Rules), hereby moves to strike Respondents' affirmative defenses. 40 C.F.R. § 22.16. Pursuant to the EPA Office of Administrative Law Judges Practice Manual, EPA informed Respondents of its intention to file the current Motion. In reply, Respondents informed EPA that they oppose the Motion except for a portion of Respondents' sixth affirmative defense. Respondents waive the defense of inability to pay with respect to Respondent Forster and Respondent Lofquist. In support of this Motion, Complainant states as follows:

I. BACKGROUND

On May 13, 2011, EPA filed a civil administrative Complaint against Respondents Carbon Injection Systems LLC, Scott Forster and Eric Lofquist (collectively "Respondents"),

alleging, *inter alia*, the storage and treatment of hazardous waste without a permit in violation of the Resource Conservation and Recovery Act, as amended ("RCRA"), 42 U.S.C. § 6928(a).

On July 21, 2011, Respondents filed their Answer to the Complaint. In their Answer, Respondents raised the following seven affirmative defenses:

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.

CX 41 at EPA 17131. Respondents elaborated somewhat on all but the third and fourth affirmative defenses in their Initial Joint Prehearing Exchange, dated November 3, 2011. In consideration of the December 6, 2011 Preliminary Prehearing Conference and this Court's desire to reduce the time necessary to conduct this proceeding, EPA hereby attempts to eliminate insufficient defenses and further narrow the issues for hearing.

II. LEGAL STANDAND

Rule 22.15 of the Consolidated Rules governs the content of an answer to a complaint. 40 C.F.R. §22.15. Rule 22.15(b) states, in part, that the answer shall state "the circumstances or arguments which are alleged to constitute the grounds of any defense. *Id.* In Respondents' Answer, none of the affirmative defenses were pleaded sufficiently as a matter of law.

"[M]otions to strike . . . are the appropriate remedy for the elimination of impertinent or redundant matter in any pleading, and are the primary procedure for objecting to an insufficient defense." *In the Matter of Dearborn Refining*, Docket No. RCRA-05-2001-0019, 2003 EPA ALJ LEXIS 10, at *6 (Jan. 3, 2003).[1] While motions to strike are not addressed in the Consolidated Rules, this Court may look to the Federal Rule of Civil Procedure ("FRCP") 12(f) for guidance. *See In the Matter of Valimet, Inc.*, Docket No. EPCRA-09-2007-0021, 2008 EPA ALJ LEXIS 38, at *10 (Nov. 6, 2008). FRCP 12(f) provides that a "court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter." In articulating the scope of FRCP 12(f), Federal courts have looked to whether the pleading "gives fair notice of the nature of the defense." *Ciancone v. City of Akron*,

[1] EPA acknowledges that a motion to strike is typically viewed with disfavor by courts. In general, courts view striking a portion of a pleading as a "drastic measure" because it is "often sought by the moving party as a dilatory tactic." *In the Matter of Aguachem Caribe, Inc.*, Docket No. RCRA-02-2009-7110, 2010 EPA ALJ LEXIS 9, at *19 (June 2, 2010) (citations omitted). Moreover, several courts note that "pleadings should be treated liberally and that a party should have the opportunity to present its arguments at trial." *Id.* (citing *In the Matter of Dearborn Refining*, 2003 EPA ALJ LEXIS 10, at *6-8). EPA contends, however, that it is appropriate to strike Respondents' affirmative defenses in this instance.

No. 5:11CV337, 2011 U.S. Dist. LEXIS 108444, at *6 (N.D. Ohio Sep. 23, 2011) (citing *Lawrence v. Chabot*, 182 Fed. Appx. 442, 456 (6th Cir. 2006). Furthermore, the purpose of a motion to strike is to "remove unnecessary clutter from the litigation." *Cassetica Software, Inc. v. Computer Science Corp.*, No. 11 C 2187, 2011 U.S. Dist. LEXIS 108646, at *11 (N.D. Ill. Sep. 22, 2011) (citing *Heller Fin., Inc. v. Midwhey Powder Co.*, 883 F.2d 1286, 1294 (7th Cir.1989)). Federal courts and Administrative Law Judges have recognized that, where a defense is insufficient as a matter of law, a motion to strike actually serves to avoid delay, and should be granted. *See Isringhausen Imports, Inc. v. Nissan North America, Inc.,* No. 10-CV-3253, 2011 U.S. Dist. LEXIS 140056, at *4 (C.D. Ill. Dec. 5, 2011) (citing *Heller Fin., Inc.* 883 F.2d at 1294); *see also In the Matter of Valimet, Inc.*, 2008 EPA ALJ LEXIS 38. Finally, it is well recognized that courts enjoy "considerable discretion" to strike filings under FRCP 12(f) as they deem appropriate. *Delta Consulting Group, Inc. v. R. Randle Constr., Inc.*, 554 F.3d 1133, 1141 (7th Cir. 2009).

III. ARGUMENT

EPA contends that Respondents' affirmative defenses are insufficient as a matter of law and should be stricken from Respondents' Answer.

A. Respondent's First Affirmative Defense

In their first affirmative defense, Respondents assert that "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." The first affirmative defense is legally insufficient because Administrative Law Judges have no authority to implead parties under RCRA.

The Presiding Officer in this matter has no authority to implead a third party as Respondents suggest. In *In the Matter of Frank Acierno, Christian Town Center, LLC and CTC*

Phase II, LLC (Frank Acierno), the respondents argued that the complainant failed to name two indispensible parties. Docket No. CWA-03-2005-0376, 2007 EPA ALJ LEXIS 9 at *7 (Feb. 28, 2007). In granting a motion to strike that affirmative defense, the court explained that the authority to issue and amend administrative complaints lies solely with the Administrator and her delegates – not Administrative Law Judges. *Id.* at *47. *See also In the Matter of Roger Barber d/b/a Barber Trucking*, Docket No. CWA-05-2005-0004, 2005 EPA ALJ LEXIS 43 at *6 (August 16, 2005)(ruling that Administrative Law Judges do not have the authority to implead third parties under the Clean Water Act, relevant delegations, or the Consolidated Rules). Similarly, Section 3008 of RCRA, 42 U.S.C. § 6928, provides that the Administrator of EPA may issue an order assessing civil penalties and may also require compliance of a person who has violated or is violating the requirements of RCRA. The EPA Delegation Manual, 8-9-A, delegated such authority to the Regional Administrators. CX 88. The Regional Administrator of Region 5 delegated its authority to Complainant. CX 89. Administrative Law Judges are not included under Delegation of Authority 8-9-A and therefore have no authority to issue complaints or implead third parties under RCRA. In conclusion, the first affirmative defense is legally insufficient.

B. Respondents' Second Affirmative Defense

In their second affirmative defense, Respondents assert that "Complainant's claims are barred by its failure to provide adequate notice." The second affirmative defense is legally insufficient because RCRA does not legally require EPA to issue a notice of violation.

Generally, an affirmative defense raising an adequate notice argument concerns constitutional due process. For example, a respondent will argue that the complainant failed to draft permitting requirements with clarity sufficient to place a reasonable person on notice of

those requirements. *See In the Matter of San Pedro Forklift*, Docket No. CWA-09-2009-0006, 2010 EPA ALJ LEXIS 17, at *18 (Aug. 11, 2010). This is not the type of notice to which Respondents are referring. Although Respondents failed to specify in their Answer, they clarified in their Initial Joint Prehearing Exchange that the second affirmative defense alleges that EPA failed to notify Respondents that hazardous waste received from International Flavors and Fragrances, LLC (IFF) provided partial basis for the present action.

Respondents' second affirmative defense is legally insufficient because RCRA does not require EPA to issue a notice of violation. Section 3008(a)(1) of RCRA, 42 U.S.C. § 6928(a) provides in part that:

> whenever on the basis of any information the Administrator determines that any person has violated or is in violation of any requirement of this subchapter, the Administrator may issue an order assessing a civil penalty for any past or current violation, requiring compliance immediately or within a specified time period, or both, or . . .

42 U.S.C. § 6928(a)(1). The only limitation on issuing an order is found in Section 3008(a)(2) of RCRA, 42 U.S.C. § 6928(a)(1), where EPA is directed to give notice to the relevant state prior to issuing the order (if the relevant state is authorized to carry out the hazardous waste program). EPA adhered to this single requirement through its letters to the Ohio Environmental Protection Agency, dated August 31, 2010, October 26, 2010, and November 9, 2010. *See* CX 42, 43 and 44. RCRA does not require EPA to issue a Notice of Violation (NOV) or a Notice of Intent to File.[2] Because Respondents are requesting relief to which they are not legally entitled, their pleading is insufficient as a matter of law.

---

[2] To serve as an example of an instance in which EPA is required to provide a notice of violation, Complainant directs the Court to Section 113 of the Clean Air Act, 42 U.S.C. § 7413. Section 113 explicitly requires EPA to notify the respondent and provide an opportunity to confer with

C. Respondents' Third Affirmative Defense

In their third affirmative defense, Respondents assert that "[t]he 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." No further explanation of this affirmative defense was given in Respondents' Initial Joint Prehearing Exchange. The third affirmative defense is legally insufficient because it fails to provide EPA with fair notice of the nature of the defense.

In formulating an Answer to a Complaint in an administrative proceeding, the respondent is required to state the "circumstances or arguments which are alleged to constitute the grounds of any defense" and the "basis for opposing any proposed relief". 40 C.F.R. § 22.15(b). To further clarify the pleading requirements of the Consolidated Rules, Administrative Law Judges may consult the Federal Rules of Civil Procedure ("FRCP") for guidance. *In the Matter of Liphatech, Inc.,* Docket No. FIFRA-05-2010-0016, 2011 EPA ALJ LEXIS 7, at *22 (June 2, 2011).

FRCP 8 contains the general rules of pleading, and FRCP 8(b) specifically governs the pleading of defenses. Under FRCP 8(b), a party, in responding to a pleading, must "state in short and plain terms its defenses to each claim asserted against it." Federal courts generally have held that in pleading an affirmative defense, a defendant complies with FRCP 8's requirement by giving "fair notice of what is being alleged." *Reimer v. Chase Bank USA, N.A.,* 274 F.R.D. 637, 640 (N.D. Ill. 2011).

---

the Administrator about the alleged violations before any order shall take effect. RCRA contains no such provision.

FRCP 8(a) governs the pleading of claims for relief. FRCP 8(a) requires that "a pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." Although an Answer differs from pleadings of claims for relief (such as a complaint), the case law regarding motions to dismiss complaints is nonetheless instructive. The United States Supreme Court recently made clear that while a complaint need not contain detailed factual allegations, to survive a motion to dismiss under FRCP 12(b)(6) a complaint must contain sufficient factual information to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (displacing the often quoted standard under *Conley v. Gibson*, 355 U.S. 41 (1957), that a complaint "should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."). *Twombly* further held that while it does not require "detailed factual allegations," FRCP 8(a) does require more than labels and conclusions, and a "formulaic recitation of the elements of a cause of action will not do." *Id.* at 555. Under *Twombly*, a complaint must contain some alleged facts "that are enough to raise a right to relief above the speculative level." *Id.* at 555-56. A complaint must achieve facial plausibility by containing sufficient factual allegations to support an inference that the defendant is liable for the misconduct alleged. *Id.*

Further, in ruling on a motion to dismiss, the court must distinguish between factual allegations, which the court must assume as true, and mere legal conclusions offered as factual assertions. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (2009). In searching for facts that show facial plausibility, courts are "free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegation." *Monson v. DEA*, 589 F. 3d 952, 961 (8th Cir. 2009); *see Lewis v. ACB Business Services, Inc.*,

135 F.3d 389, 405 (6th Cir.1998) (explaining that the court need not accept as true mere legal conclusions unsupported by facts and unwarranted inferences of facts). In *Iqbal*, the Supreme Court said:

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." A claim has facial plausibility when the Plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it stops short of the line between possibility and plausibility of 'entitlement to relief.'"

129 S. Ct. at 1949-50 (internal citation omitted).

Very recently, a number of the federal courts have addressed whether the heightened pleading standards set out in *Twombly* and *Iqbal* also apply to the pleading of affirmative defenses under FRCP 8(b). While no court of appeals has addressed this matter, a majority of the federal district courts have determined that the heightened standards are applicable to all pleadings, including affirmative defenses. *See Microsoft Corp v. Lutian*, No 1: 10 CV 1373, 2011 WL 4496531 (N.D. Ohio Sep. 27, 2011).[3]

---

[3] *Nixson v. Health Alliance*, 2010 U.S. Dist. LEXIS 133177 (S.D. Ohio Dec. 15, 2010); *Monster Daddy LLC v. Monster Cable Prods.*, 2010 U.S. Dist. LEXIS 124922 (D.S.C. Nov. 23, 2010); *Francisco v. Verizon South, Inc.*, 2010 U.S. Dist. LEXIS 77083 (E.D. Va. July 29, 2010); Bradshaw *v. Hilco Receivables, LLC,* 2010 U.S. Dist. LEXIS 75553 (D. Md. July 27, 2010); *Palmer v. Oakland Farms, Inc.*, 2010 U.S. Dist. LEXIS 63265 (W.D. Va. June 24, 2010); *Barnes v. AT&T Pension Benefit Plan,* 718 F. Supp. 2d 1167 (N.D. Cal. 2010); *Local 165 v. DEM/EX Group Inc.*, 2010 U.S. Dist. LEXIS 22707 (C.D. Ill. Mar. 11, 2010); *Tara Prods., Inc. v. Hollywood Gadgets, Inc.*, 2009 U.S. Dist. LEXIS 121709 (S.D. Fla. Dec. 11, 2009); *Burget v.*

Capital W. Secs., Inc., 2009 U.S. Dist. LEXIS 114304 (W.D. Okla. Dec. 8, 2009); *Bank of Montreal v. SK Foods, LLC*, 2009 U.S. Dist. LEXIS 106577 (N.D. Ill. Nov. 13, 2009); *Tracy v. NVR, Inc.*, 667 F. Supp. 2d 244 (W.D.N.Y. 2009); *Kaufmann v. Prudential Ins. Co. of Am.*, 2009 U.S. Dist. LEXIS 68800 (D. Mass. Aug 6, 2009); *Shinew v. Wszola*, 2009 U.S. Dist. LEXIS 33226 (E.D. Mich. Apr. 21, 2009); *Greenheck Fan Corp, v. Loren Cook Co.*, 200S U.S. Dist. LEXIS 75147 (W.D. Wis. Sept. 25, 2008); *Stoffels ex rel. SBC Tel. Concession Plan v. SBC Commc'ns, Inc.*, 2008 U.S. Dist. LEXIS 83135 (W.D. Tex. Sept. 22, 2008); *Aspex Eyewear, Inc. v. Clariti Eyewear, Inc.*, 531 F. Supp. 2d 620, 623 (S.D.N.Y. 2005). However, it is worth noting that the court in *In the Matter of San Pedro Forklift* found it unnecessary to decide whether *Twombly* governs affirmative defenses. 2010 EPA ALJ LEXIS 17, at * 9. The court reasoned that 40 C.F.R. §22.15 adequately addressed the standard for pleading defenses in administrative proceedings; therefore, there was no reason to construe the linguistic distinctions in the federal pleading standards. *Id.* at *9-10. The court noted that, in assessing the sufficiency of an affirmative defense, it is most important that the pleading provides the complainant with fair notice of the affirmative defense in order to allow the complainant sufficient opportunity to prepare to meet those defenses. *Id.* at *10. However, EPA asserts that the Consolidated Rules are ambiguous as to pleading standards for affirmative defenses and the Federal Rules can provide guidance. Section 22.15(b) requires only that the respondent state the "circumstances or arguments which are alleged to constitute the grounds of any defense". The Consolidated Rules fail to define the point at which the "circumstances" provided (if any) adequately notify the complainant of the nature of the defense. Because federal courts have wrestled with defining the appropriate standard for pleadings for some time, it is helpful to look to the Federal Rules and the courts' interpretations of those rules for guidance.

To justify this analysis, the federal courts have recognized the similarity in language between FRCPs 8(a) and (b) – both require a "short and plain" statement of the claim or defense. *Hayne v. Green Ford Sales, Inc.,* 263 F.R.D. 647, 650 (D. Kan. Dec. 22, 2009). Federal courts have also acknowledged that applying the same standard to claims and affirmative defenses promotes fairness. For instance, courts have reasoned that

> It makes neither sense nor is it fair to require a plaintiff to provide the defendant with enough notice that there is a plausible, factual basis for her claim under one pleading standard and then permit a defendant under another pleading standard simply to suggest that some defense may possibly apply in the case.

Palmer v. Oakland Farms, Inc., No. 5: 10 CV 00029, 2010 U.S. Dist. LEXIS 63265, at *13 (W.D. Va. June 24, 2010) (quoting *United States v. Quadrini*, 2007 U.S. Dist. LEXIS 89722, at *11-12 (E.D. Mich. 2007). The courts also reason that "[i]n both instances, the purpose of the pleading requirements is to provide enough notice to the opposing party that indeed there is some plausible, factual basis for the assertion and not simply a suggestion of possibility that it may apply to the case." *Hayne,* 263 F.R.D. at 650.

Even if this Court determines that the standards laid out in *Twombly* and *Iqbal* are not applicable to the pleading of affirmative defenses, federal courts have consistently determined that affirmative defenses comprised of bare legal conclusions are insufficiently pleaded. *See Heller Fin., Inc.,* 883 F.2d at 1294. An affirmative defense is insufficiently pleaded if the respondent fails to offer any allegations in support of that defense and has not provided any minimal specifics in its pleading. *Sloan Valve Co. v. Zurn Industries, Inc.*, 712 F. Supp. 2d. 743, 755 (N.D. Ill. 2010). Further, the pleading must provide the complainant with "notice of how and in what way [respondent's] defense arises." *Id. See also Reimer*, 274 F.R.D. at 640 (explaining that defenses that represent nothing more than statements fail to satisfy the pre-*Twombly* pleading standards); *In the Matter of San Pedro Forklift,* 2010 EPA ALJ LEXIS 17, at

* 10 (declining to address the extension of *Twombly* to affirmative defenses, but requiring that affirmative defenses provide the complainant with fair notice of the defense in order to allow the complainant an opportunity to prepare a response).

In *In the Matter of USA Remediation Services*, Docket No. CAA-03-2002-0159, 2003 EPA ALJ LEXIS 6, at *14 (Feb. 10, 2003), this Court granted a motion to strike affirmative defenses, because the respondent had not proffered any evidence in support of their defenses in their prehearing exchange. Similarly, in the present case, Respondents failed to provide factual support for their third affirmative defense. The claim that EPA acted with improper motive and ill will is a mere conclusion, unsupported by any facts in the pleading or prehearing exchange, and the defense fails to display plausibility that Respondents are entitled to the relief they seek. Therefore, Respondents' third affirmative defense is legally insufficient and should be stricken.

Furthermore, EPA is allowed broad discretion in managing its enforcement activities. In reviewing this broad prosecutorial discretion, Courts often note that "the decision to prosecute is particularly ill-suited to judicial review." *Wayte v. United States*, 470 U.S. 598, 607 (1985). Due to limited enforcement budgets, government regulators must make difficult decisions about who to pursue in enforcing the law. *Futernick v. Sumpter Township*, 78 F.3d 1051, 1058 (6th Cir.), *cert. denied*, 519 U.S. 928 (1996); *In re B & R Oil Co.*, 8 E.A.D. 39, 52-53 (EAB 1998). In exercising this discretion, prosecutors are allowed to consider a multitude of factors, including "the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's ultimate enforcement plan." *Id.* While EPA's enforcement discretion is very broad, "it is not 'unfettered.'" *Id.* at 608. Selectivity in prosecutorial enforcement is limited by constitutional restraints. *Id.* (citing *United States v. Batchelder*, 442 U.S. 114, 125 (1979). In the present case, Respondents' pleading fails

to specify the constitutional bounds to which EPA allegedly failed to adhere. Without establishing any constitutional basis for EPA's alleged abuse of discretion, Respondents cannot assert that they have demonstrated the plausibility of their entitlement to relief, as required by *Iqbal*. Consequently, Respondents' third affirmative defense should be stricken.

D. Respondents' Fourth Affirmative Defense

In their fourth affirmative defense, Respondents assert that "[t]he 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." Respondents' fourth affirmative defense is legally insufficient because it (1) fails to provide EPA with fair notice of the nature of the defense and (2) it is redundant.

First, as discussed in detail in relation to Respondents' third affirmative defense, when pleading affirmative defenses, the respondent must include sufficient facts to demonstrate the facial plausibility of its defense. *See Iqbal*, 129 S. Ct. at 1949-50. Here, Respondents fourth affirmative defense is vague and fails to include minimal specifics. Instead of listing those actions which Respondents allege were arbitrary or capricious, Respondents merely define the actions as "inconsistent with other actions or inactions of the U.S. EPA". EPA is left guessing as to which actions Respondents are referring, effectively unable to respond to this pleading. Because Respondents failed to provide fair notice as to the nature of their fourth affirmative defense, it is legally insufficient and must be stricken.

Respondents' fourth affirmative defense is also redundant. As stated above, a court may order stricken any redundant pleading. Fed. R. Civ. P. 12(f). Respondents' first, fourth, fifth and seventh affirmative defenses are difficult to distinguish because they all relate to EPA's decision to name only Respondents CIS, Forster and Lofquist in the present action. For example, the

doctrine of selective enforcement, the legal theory invoked in Respondents' fifth affirmative defense, is indistinguishable from the assertion that "actions and inactions of EPA that involve the same products" are inconsistent. In essence, they are two ways of wording one criticism - "why us and not them?" If this Court were to agree with Respondents on any one of those four defenses and accord relief, that relief would satisfy all four. Even Respondents, when attempting to bolster their affirmative defenses in their Initial Joint Prehearing Exchange, address their first, fifth, and seventh affirmative defenses collectively and fail to demonstrate the factual plausibility for each defense, independently. By repeating the defense, Respondents attempt to confuscate the issues material to this adjudication. Therefore, EPA requests that Respondents' fourth affirmative defense is stricken on the basis of its redundancy. EPA also extends this request to Respondents' first, fifth and seventh affirmative defenses.

E. Respondents' Fifth Affirmative Defense

In their fifth affirmative defense, Respondents assert that "Complainant's claims are barred by the doctrine of selective enforcement." Respondents' fifth affirmative defense is legally insufficient because it fails to provide EPA with fair notice of the nature of that defense. As explained in detail above, a "formulaic recitation" of the elements of a pleading alone is legally insufficient. *Twombly*, 550 U.S. at 555. As all of Respondents' affirmative defenses are no longer than one sentence, Respondents' fifth affirmative defense fails to say little more than the name of the legal principle that they attempt to assert. While Respondents did refer to their fifth affirmative defense in their Initial Prehearing Exchange and attempted to provide a factual basis for their first, fifth, and seventh affirmative defenses collectively, they failed to provide any factual support that EPA selected them for enforcement on some constitutionally impermissible basis.

As explained above, EPA is allowed broad prosecutorial discretion. *Wayte* 470 U.S. at 607. "[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). However, this discretion is limited by constitutional constraints. *Wayte*, 470 U.S. at 608. To establish a prima facia case under the doctrine of selective enforcement, Respondents must demonstrate that (1) they have been singled out while other similarly situated violators were untouched, and (2) that EPA selected them for prosecution invidiously or in bad faith, specifically upon impermissible consideration of race religion, or the desire to prevent the exercise of their constitutional right. *United States v. Production Plated Plastics*, 742 F. Supp. 956, 962 (W.D. Mich. 1990), *opinion adopted by* 955 F. 2d 45 (6th Cir. 1990), *cert denied*, 506 U.S. 820 (1992). To satisfy the pleading standards of *Twombly* and *Iqbal*, Respondents must, at the very least, identify the constitutional rights that EPA allegedly sought to inhibit. Without doing so, Respondents fail to demonstrate the facial plausibility of their defense, and they significantly inhibit EPA's ability to effectively respond to this pleading. Because Respondents failed to bolster their fifth affirmative defense with minimal specifics, it was insufficiently pleaded and must be stricken.

F. Respondent's Sixth Affirmative Defense

In their sixth affirmative defense, Respondents assert that "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." A portion of Respondents' sixth affirmative defense should be stricken because Respondents Forster and Lofquist have failed to provide adequate information to support this claim. For any affirmative defense, including a

claim of inability to pay, the respondent bears the burdens of presentation and persuasion. 40 C.F.R. § 22.24. Therefore, if the respondent does not provide adequate financial information to support his claim, "the presiding officer may conclude that any objection to the penalty based on ability to pay has been waived under the Agency's procedural rules ..." *In the Matter of City of St. Charles (City of St. Charles)*, Docket No. CAA-05-2008-0003, 2008 EPA ALJ LEXIS 25, at *15 (June 30, 2008) (citing *In the Matter of New Waterbury*, Ltd., 5. E.A.D. 529, 541-542, 1994 EPA App. LEXIS 15 (EAB 1994)); and (citing 40 C.F.R. § 22.19(a)(2) and (a)(3)). As this Court explained in *City of St. Charles*, the Consolidated Rules require the respondent "to submit evidence to *support* its claim *as part of the pre-hearing exchange*." 2008 EPA ALJ LEXIS 25, at *16 (emphasis in original) (citing *In the Matter of New Waterbury*, Ltd., 5. E.A.D. 529, 541-542, 1994 EPA App. LEXIS 15 (EAB 1994). In the present case, Respondents' Initial Joint Prehearing Exchange, dated November 3, 2011, stated that Respondents "do not intend to present any evidence at hearing regarding Scott Forster's or Eric Lofquist's ability to pay a civil penalty." Because Respondents have waived their sixth affirmative defense as it relates to Respondents Forster and Lofquist, the relevant portion of their sixth affirmative defense should be stricken accordingly.

G. Respondents' Seventh Affirmative Defense

In their seventh affirmative defense, Respondents assert that "[t]o 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' seventh affirmative defense is legally insufficient because it is immaterial as to liability.[4]

Pursuant to FRCP 12(f), this court may strike any pleading that is immaterial. Respondents' seventh affirmative defense is immaterial because RCRA provides for strict liability. *United States v. Production Plated Plastics, Inc.*, 742 F. Supp. 956, 960 (W.D. Mich. 1990) (finding that RCRA was a "remedial strict liability statute" to be liberally construed), *aff'd* 955 F.2d 45 (6th Cir. 1992), *cert. denied* 506 U.S. 820 (1992). Even in a criminal matter, which utilizes the heightened knowing standard, it is unnecessary to prove that the defendant knew the hazardous substance was defined as a hazardous waste by the EPA. *United States v. Wagner*, 29 F.3d 264, 265-66 (7th Cir. 1994). The government need prove only that the defendant knew the nature of the hazardous waste with which he dealt. *United States v. Laughlin*, 10 F.3d 961, 966 (2nd Cir. 1993). Because RCRA is a strict liability statute and the matter at issue is a civil matter, Respondents' mental state is irrelevant in determining their liability. Such arguments should be considered only in determining a civil penalty. Therefore, in an effort to narrow the issues for hearing, Respondents' seventh affirmative defense should be limited accordingly.

---

[4] EPA notes that the assertions in the Seventh Affirmative defense may be relevant to the question of the appropriate penalty amount in this matter, as the RCRA statute requires consideration of the Respondents' "good faith effort to comply with applicable requirements" when determining the penalty amount. 42 U.S.C. § 6928(a)(3).

III. CONCLUSION

For all of the reasons set forth above, EPA respectfully requests that the Presiding Administrative Law Judge grant Complainant's Motion to Strike Respondents' affirmative defenses.

Respectfully submitted,

Counsel for EPA:

J. Matthew Moore, Assistant Regional Counsel
Office of Regional Counsel
U.S. EPA Region 5
77 West Jackson Blvd.
Chicago, IL 60622
PH (312) 886-5932
Email: moore.matthew@epa.gov

Catherine Garypie, Associate Regional Counsel
Office of Regional Counsel
U.S. EPA Region 5
77 West Jackson Blvd.
Chicago, IL 60622
PH (312) 886-5825
Email: garypie.catherine@epa.gov

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

CERTIFICATE OF SERVICE

I certify that the foregoing "Complainant's Motion to Strike Respondents' Affirmative Defenses" dated December 9, 2011, was sent this day in the following manner to the addressees listed below:

Original and one copy hand-delivered to:

Regional Hearing Clerk
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

Copy via Regular Mail to:

Attorneys for Respondents:

Carbon Injection Systems LLC, Scott Forster, Eric Lofquist
c/o Lawrence W. Falbe
Quarles & Brady LLP
300 N. LaSalle Street, Suite 4000
Chicago, IL 60654

Carbon Injection Systems LLC, Scott Forster, Eric Lofquist
c/o Keven D. Eiber
Brouse McDowell
600 Superior Avenue East
Suite 1600
Cleveland, OH 44114

Presiding Judge:

The Honorable Susan L. Biro, Chief Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W., Mail Code 1900L
Washington, DC 20460

12-9-11
Date

Charles Rodriguez, Student Aide