UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 1

In the Matter of:	)	
ISP Freetown Fine Chemicals, Inc. 238 South Main Street Assonet, MA 02702-1699	)	Docket No. RCRA-01-2018-0062
MAR000009605	)	
Proceeding under Section 3008(a) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(a)	)	

COMPLAINANT'S REPLY TO RESPONDENT'S OPPOSITION TO MOTION TO STRIKE

Complainant EPA submits this reply to Respondent's brief in opposition to the motion to strike defenses, filed on August 23, 2019. ("Resp. Opp. Br"). In Respondent's Answer, the third and sixteenth affirmative defenses raise purely legal arguments that are identical to the legal arguments raised in Respondent's motion to dismiss. Respondent, through its motion to dismiss counts two through eight of the Complaint, has asked this Tribunal to rule on the legal issues raised by those defenses. To the extent that such a ruling is based on the merits of Respondent's arguments, it is entirely appropriate that this Tribunal strike those defenses should they be found to be legally insufficient.[1]

As both parties have demonstrated, where the Consolidated Rules of Practice in 40 C.F.R. Part 22 do not expressly provide for particular procedural motions, administrative law judges nonetheless look for guidance to the Federal Rules of Civil Procedure and federal court

[1] It is possible that the Presiding Officer could deny the motion to strike without reaching the merits of Respondent's arguments. Complainant's motion to strike is premised upon the Presiding Officer ruling against Respondent on the merits of those arguments; in that circumstance, striking those defenses from the case is entirely appropriate.

decisions interpreting those rules. *See, e.g.,Carbon Injection Systems LLC*, RCRA 05-2011-009 at 2 (EPA ALJ February 14, 2012). Rule 12(f) of the Federal Rules of Civil Procedure (F.R.C.P.) provides that "a court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." A defense may be found insufficient either because of its inability as a matter of law to defeat the particular charges alleged in a complaint or because it is insufficiently pleaded. *Carbon Injection Systems LLC,* at 2.

Courts may grant a motion to strike an affirmative defense under F.R.C.P. 12(f) upon a finding that (1) there is no question of fact or law that might allow the challenged defense to succeed; (2) under no set of circumstances would the defense succeed, regardless of what evidence could be marshaled to support it; and (3) prejudice would result from the defense remaining in the case. *See Tardif v. City of New York*, 302 F.R.D. 31, 32 (S.D.N.Y. 2014); *see also Regions Bank v. SoFHA Real Estate, Inc.*, 2010 WL 3341869, at *12 (E.D. Tenn. Aug. 25, 2010 ("It has been recognized, however, that if a defendant's affirmative defense cannot withstand a Rule 12(b)(6) challenge, the defense may be stricken as legally insufficient."); *S.E.C. v. Thorn*, 2002 WL 31412440, at *2 (S.D. Ohio Sept. 30, 2002) (A motion to strike may be granted "if it aids in eliminating spurious issues before trial, thereby streamlining the litigation.").

Here, the above standard is satisfied. First, Respondent's affirmative defenses raise purely legal issues. There are no facts that need to be developed or resolved related to these affirmative defenses. In fact, Respondent does not claim that that these defenses turn on any factual matters in dispute and concedes that its defenses "raise fundamental questions of law." Resp. Opp. Brief at 15. If the legal issues raised by Respondent are resolved by a ruling on the merits denying Respondent's motion (*i.e.*, a ruling that Respondent's claims are insufficient as a

legal matter to defeat the allegations in the Complaint), there will be no further legal issues for consideration that might allow the challenged defenses to succeed. In short, there will be nothing further to litigate with respect to these claims.[2]

Similarly, there is no set of circumstances under which Respondent's defenses would succeed at a later time and Respondent has not presented any such circumstances. In the event of a ruling on the merits of these legal issues in favor of Complainant, this Tribunal's determination will become "the law of the case" and there will be no rationale for re-litigating these issues. *See infra note 3.* In addition, courts have recognized that where defenses raised in support of motions to dismiss are unsuccessful, striking those affirmative defenses is proper. *See, e.g., Heller Fin., Inc. v. Midwhey Powder Co.,* 883 F.2d 1286, 1293-4 (7th Cir. 1989).

Finally, the prejudice that would result from Respondent's defenses remaining in the case is the additional expense and resources that would be required to re-litigate these legal issues again, and the likely delay in the progress of this case. Respondent is represented by sophisticated counsel and has already had two opportunities to fully brief the relevant legal issues to this Tribunal. Respondent has presented, or should have presented, all arguments in support of its legal position in these briefs. In order to narrow the issues for resolution, this Tribunal should reach the merits of Respondent's arguments, deny the motion to dismiss, and grant the Complainant's motion to strike so that the substance of Complainant's claims and the compliance order may be considered and resolved. By granting Complainant's motion to strike, this Tribunal will " 'avoid the expenditure of time and money that must arise from litigating

[2] Respondent argues that it should not be denied an opportunity to offer additional "affirmative proof" should it decide to raise these same defenses later in this case. Resp. Opp. Brief at 13, 15. But Respondent chose to litigate these defenses now to support its motion to dismiss. To the extent Respondent has withheld additional proof or supporting information that would assist this Tribunal in deciding the issues Respondent has raised, it has done so at its own peril and its perplexing decision to do so should not serve as the basis to deny the motion to strike.

spurious issues by dispensing with those issues prior to trial. . . .' " *Fantasy, Inc. v. Fogerty*, 984 F. 2d 1524, 1527 (9th Cir. 1993), *rev'd on other grounds*, 510 U.S. 517 (1994), *quoting from Sidney-Vinstein v. A.H. Robins Co.*, 697 F. 2d 880, 885 (9th Cir. 1983).

Respondent claims that Complainant is conflating differing burdens regarding the motion to dismiss and the motion to strike. Resp. Opp. Brief at 13. But Respondent misses the point: if the Presiding Officer finds that as a matter of law the arguments supporting the motion to dismiss are without merit (*i.e.*, that the RCRA air regulations have remained in effect in Massachusetts), there is no second bite at the same apple given to Respondent to re-litigate those same arguments (and no separate burden the Presiding Officer would apply if Respondent were to raise them later in the case).[3]

Respondent also misses the mark in arguing that it would be premature to strike the defenses at this point in the proceeding. Respondent dutifully cites to cases to support that proposition, that striking defenses before Respondent has had an opportunity to develop and present them is disfavored. Complainant does not dispute that there are cases and circumstances when it is certainly premature to strike defenses. Leaving aside the possibility that Respondent has not yet submitted all relevant information (including "affirmative proof") that would assist in the litigation of the issues raised by its motion to dismiss (*see supra note* 2), those are not the circumstances here. Respondent has chosen to litigate the merits of those defenses now, and the

[3] The motion to strike could be viewed as unnecessary because in the event this Tribunal rules against Respondent on the merits of its arguments, the "law of the case doctrine" may very well apply to preclude Respondent from raising these defenses later in this proceeding. *See Black's Law Dictionary*, (11th ed., 2019) (where a point or question arising in the course of a lawsuit has been finally decided, the legal rule or principle announced as applicable to the facts governs the lawsuit in all its later stages and developments). However, Complainant believes that the affirmative decision to formally strike defenses found to be legally insufficient provides clarity and certainty and saves the parties from litigating about preclusion later in the proceeding.

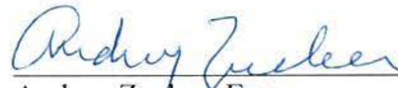
notion that it can do so and that if those defenses are found to be legally insufficient, the defenses should somehow be preserved to be re-litigated later in the case must be rejected.

Conclusion

For the foregoing reasons, Complainant reasserts that if this Tribunal finds the claims submitted to support the motion to dismiss are without merit, the Third and Sixteenth Defenses from Respondent's Answer should be struck from the pleadings.

Dated: September 27, 2019

Respectfully submitted,



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Docket No. RCRA-01-2018-0062

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Complainant's Reply to Respondent's Opposition to Motion to Strike was served this 27th day of September, 2019 in the following matter on the parties listed below:

By OALJ E-Filing System:

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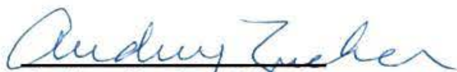

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Dated: September 27, 2019