

State of Illinois
Pollution Control Board
James R. Thompson Center
100 W. Randolph Street, Suite 11-500
Chicago, Illinois 60601

In the Matter of:)
CASEYVILLE SPORT CHOICE, LLC,)
An Illinois Limited Liability Company,)
Complainant,)
vs.) PCB 208-030
ERMA I. SEIBER, ADMINISTRATRIX)
OF THE ESTATE OF JAMES A. SEIBER,)
DECEASED, AND ERMA I. SEIBER,)
IN HER INDIVIDUAL CAPACITY,)
Respondent.)

RESPONSE TO MOTION TO DISMISS

Comes now the complainant, Caseyville Sport Choice, LLC, by its attorneys, Belsheim & Bruckert, L.L.C., and – for its response to the *Motion to Dismiss* filed by the respondents, Erma I. Seiber, Individually, and Erma I. Seiber, in her capacity as Administratrix of the Estate of James A. Seiber, Deceased – states the following:

1. The respondents assert that – in view of the complainant’s filing (on the same day on which the complainant filed its Formal Complaint before the Board) a complaint in the United States District Court for the Southern District of Illinois alleging the common law theories of breach of contract and fraud against the respondents – the complainant’s Formal Complaint before the Board is either “duplicative” or “frivolous” within the meaning of Section 31(d) of the Environmental Protection Act (415 ILCS 5/31(d)) and Section 101.202 of the Board’s Procedural Rules (35 Ill. Adm. Code 101.202).

2. The complainant's Formal Complaint before the Board is based strictly upon the provisions of the Illinois Environmental Protection Act (415 ILCS 5/1 *et seq.*).

3. The complainant's complaint in the United States District Court for the Southern District of Illinois is not based upon, and does not mention, the Illinois Environmental Protection Act (415 ILCS 5/1 *et seq.*). Rather, the complainant's complaint in the United States District Court is based entirely upon common law theories of breach of contract and fraud. *See* a copy of the complainant's *Complaint and Demand for Jury Trial* in the United States District Court, attached to the respondents' *Motion to Dismiss*.

4. The Board has twice held that a complainant's Formal Complaint before the Board under the Illinois Environmental Protection Act, seeking a recovery of cleanup costs, is not rendered "duplicative or frivolous" by the complainant's filing a complaint in a United States District Court against the same respondent, based upon common law theories rather than the Illinois Environmental Protection Act. *See Dayton Hudson Corporation vs. Cardinal Industries, Inc.*, 1997 WL 530523 (PCB 97-134, Aug. 21, 1997); *Lake County Forest Preserve District vs. Ostro*, 1992 WL 196684 (PCB 92-80, July 30, 1992); *see also Scott and Shelly Behrmann vs. Okawville Farmers Elevator – St. Libory*, 1998 WL 820943 (PCB 98-84, Nov. 19, 1998)(similar holding involving the complainants' complaint, based upon common law theories of trespass and nuisance, and upon the St. Libory zoning code, filed in an Illinois circuit court rather than a United States District Court).

5. Consequently, the complainant's filing its *Complaint and Demand for Jury Trial* in the United States District Court for the Southern District of Illinois, based upon the common law theories of breach of contract and fraud, against the respondents, does not render its Formal Complaint before the Board, based strictly upon the Illinois Environmental Protection Act, either

“duplicative or frivolous.” See *Dayton Hudson Corporation vs. Cardinal Industries, Inc.*, 1997 WL 530523 (PCB 97-134, Aug. 21, 1997); *Lake County Forest Preserve District vs. Ostro*, 1992 WL 196684 (PCB 92-80, July 30, 1992); see also *Scott and Shelly Behrmann vs. Okawville Farmers Elevator – St. Libory*, 1998 WL 820943 (PCB 98-84, Nov. 19, 1998).

WHEREFORE, the complainant, Caseyville Sport Choice, LLC, prays that the Board will deny the *Motion to Dismiss* filed by the respondents, Erma I. Seiber, Individually, and Erma I. Seiber, in her capacity as Administratrix of the Estate of James A. Seiber, Deceased.

CASEYVILLE SPORT CHOICE, LLC,
An Illinois Limited Liability Company,

By /s/ John P. Long
John P. Long #1687832
Belsheim & Bruckert, L.L.C.
1002 E. Wesley Drive, Suite 100
O’Fallon, Illinois 62269
618-624-4221/618-624-1812 Fax
Attorney for Complainant

CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served a copy of the foregoing document by depositing the copy of the document in the United States mail at the post office in O'Fallon, Illinois, on October 22, 2007, enclosed in an envelope, with first-class postage thereon fully prepaid, plainly addressed to:

Donald Urban
Sprague and Urban
Attorneys at Law
26 E. Washington Street
Belleville, IL 62220

/s/ John P. Long
John P. Long #1687832
Belsheim & Bruckert, L.L.C.
1002 E. Wesley Drive, Suite 100
O'Fallon, Illinois 62269
618-624-4221/618-624-1812 Fax
Attorney for Complainant