

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

ORIGINAL RECEIVED
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FEB 05 2009
STATE OF ILLINOIS
Pollution Control Board

In the Matter of:)
CASEYVILLE SPORT CHOICE, LLC,)
An Illinois Limited Liability Company,)
Complainant,)
vs.)
ERMA I. SEIBER, ADMINISTRATRIX)
OF THE ESTATE OF JAMES A. SEIBER,)
DECEASED, AND ERMA I. SEIBER,)
IN HER INDIVIDUAL CAPACITY, AND)
FAIRMOUNT PARK, INC.,)
A Delaware Corporation)
Respondents.)

PCB 2008-030

MOTION TO DISMISS COUNTERCLAIM
OF RESPONDENT/CROSS-CLAIMANT FAIRMOUNT PARK, INC.

Comes now the complainant, Caseyville Sport Choice, LLC, by its attorneys, Belsheim & Bruckert, L.L.C., and moves this honorable Board to dismiss the *Counterclaim Against Plaintiff Caseyville Sport Choice* filed by the respondent/counterclaimant Fairmount Park, Inc., against the complainant, with prejudice. In support of its motion, the complainant states the following:

1. The respondent/counterclaimant Fairmount Park, Inc., mailed out its *Counterclaim Against Plaintiff Caseyville Sport Choice* on January 5, 2009, according to the certificate of service attached thereto.

2. The *Counterclaim Against Plaintiff Caseyville Sport Choice* consists of 12 numbered paragraphs.

3. Of those 12 numbered paragraphs, paragraphs three through ten set forth purported affirmative defenses with respect to the complainant's cause of action alleged in Count II of its *First Amended Formal Complaint* against the respondent Fairmount Park, Inc., and do not set forth a claim for relief against the complainant.

4. Paragraphs 11 and 12 seek an award of attorneys' fees from the complainant to reimburse the respondent/counterclaimant Fairmount Park, Inc., for the expense of defending itself against the complainant's cause of action alleged in Count II of the *First Amended Formal Complaint*.

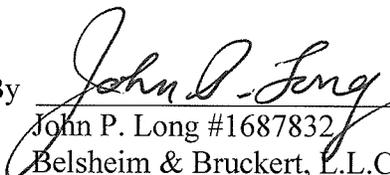
5. Nothing in the Illinois Pollution Control Board's *Procedural Rules* (35 Illinois Administrative Code Part 103, Subtitle A) nor the Illinois Environmental Protection Act (415 ILCS 5/) allows the awarding of attorneys' fees in a civil enforcement action brought pursuant to §31(d)(1) of the Illinois Environmental Protection Act (415 ILCS 5/31(d)(1)).

6. The only relief which the respondent/counterclaimant Fairmount Park, Inc., seeks against the complainant – an award of attorneys' fees – is thus not available to the respondent/counterplaintiff under any circumstances.

7. Consequently, the respondent/counterclaimant Fairmount Park, Inc.'s *Counterclaim Against Plaintiff Caseyville Sport Choice* fails to state a claim for relief against the complainant which is cognizable by the Illinois Pollution Control Board under either the Illinois Environmental Protection Act (415 ILCS 5/) or the Illinois Pollution Control Board's *Procedural Rules* (35 Illinois Administrative Code Part 103, Subtitle A) .

WHEREFORE, the complainant, Caseyville Sport Choice, LLC, prays that the Illinois Pollution Control Board will dismiss with prejudice the *Counterclaim Against Plaintiff Caseyville Sport Choice* filed by the respondent/counterclaimant Fairmount Park, Inc., against the complainant.

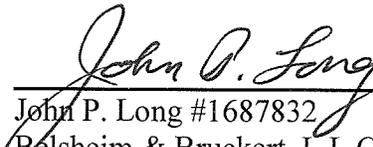
CASEYVILLE SPORT CHOICE, LLC,
An Illinois Limited Liability Company,

By 
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 February 2, 2009, enclosed in envelopes, 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	Penni S. Livingston Charles Hamilton, of counsel Livingston Law Firm 5701 Perrin Road Fairvies Heights, IL 62208
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John P. Long #1687832
Belsheim & Bruckert, L.L.C.
1002 E. Wesley Drive, Suite 100
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REPLIES TO AFFIRMATIVE DEFENSES
OF RESPONDENT FAIRMOUNT PARK, INC.

Comes now the complainant, Caseyville Sport Choice, LLC, by its attorneys, Belsheim & Bruckert, L.L.C., and – for its replies to the Affirmative Defenses set forth in the respondent Fairmount Park, Inc.'s *Answer Including Affirmative Defenses* – states the following:

1. *Reply to First Affirmative Defense.* The complainant denies the allegations set forth in the first sentence of the respondent's First Affirmative Defense. The complainant admits that James Seiber was responsible for the violations of law, but denies the implicit assertion that the respondent bears no responsibility for the violations of law in question. The complainant denies that its *First Amended Formal Complaint* against the respondent (that is, Count II thereof) should be dismissed.

2. *Reply to Second Affirmative Defense.* The complainant admits that the “defendant Seiber’s activities were in violation of the Environmental Protection Act.” The complainant denies the other allegations set forth in the first four sentences of the respondent’s Second Affirmative Defense. The complainant denies that the question – whether a third party may be responsible to the complainant for having made an incorrect environmental assessment – is relevant to the respondent’s liability to reimburse the complainant for the clean-up costs. To the extent that there are other allegations in the fifth sentence of the Second Affirmative Defense, the complainant denies those allegations. The complainant denies the allegations set forth in the sixth sentence in the Second Affirmative Defense.

3. *Reply to Third Affirmative Defense.* The complainant denies the allegations set forth in the respondent’s Third Affirmative Defense.

4. *Reply to Fourth Affirmative Defense.* The complainant denies the allegations set forth in the respondent’s Fourth Affirmative Defense.

5. *Reply to Fifth Affirmative Defense.* The complainant denies the allegations set forth in the respondent’s Fifth Affirmative Defense.

6. *Reply to Sixth Affirmative Defense.* The complainant denies the allegations set forth in the respondent’s Sixth Affirmative Defense.

7. *Reply to Seventh Affirmative Defense.* The complainant denies the allegations set forth in the respondent’s Seventh Affirmative Defense.

8. *Reply to Eighth Affirmative Defense.* The complainant denies the allegations set forth in the respondent’s Eighth Affirmative Defense.

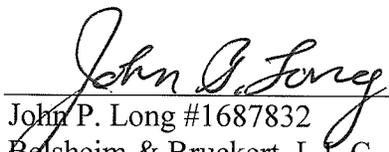
9. *Reply to Ninth Affirmative Defense.* The complainant denies the allegations set forth in the respondent’s Ninth Affirmative Defense.

10. *Reply to Tenth Affirmative Defense.* The complainant denies that it failed to mitigate its damages. As to the propriety of the clean-up chosen by the complainant, in order to remediate the site, the complainant considered the alternative of on-site separation/screening and land application of the massive quantity of horse manure and intermixed "municipal trash," but found that that alternative would have been significantly more expensive than excavation and landfill disposal. The complainant denies the other allegations set forth in the Tenth Affirmative Defense.

11. *Reply to Eleventh Affirmative Defense.* The complainant denies the allegations set forth in the respondent's Eleventh Affirmative Defense.

WHEREFORE, the complainant, Caseyville Sport Choice, LLC, having fully replied to the Affirmative Defenses set forth in the respondent Fairmount Park, Inc.'s *Answer Including Affirmative Defenses*, prays that the Board will enter an order in the complainant's favor, and against the respondent Fairmount Park, Inc., on Count II of the complainant's *First Amended Formal Complaint* requiring the respondent Fairmount Park, Inc., to reimburse the complainant for its cleanup costs in the amount of Four Million Five Hundred and Twenty-eight Thousand Five Hundred and Eighty-nine Dollars and Ten Cents (\$4,528,589.10).

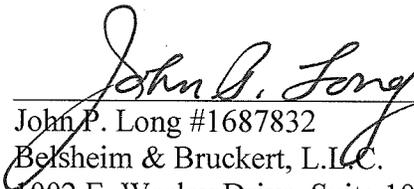
CASEYVILLE SPORT CHOICE, LLC,
An Illinois Limited Liability Company,

By 
John P. Long #1687832
Belsheim & Bruckert, L.L.C.
1002 E. Wesley Drive, Suite 100
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Attorney for Complainant

BELSHEIM & BRUCKERT, L.L.C.

ATTORNEYS AND COUNSELORS AT LAW

Harold G. Belsheim
Terry I. Bruckert
John P. Long
Douglas C. Gruenke

1002 East Wesley Drive
Suite 100
O'Fallon, Illinois 62269

February 2, 2009

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John Therriault
Clerk of the Illinois Pollution Control Board
100 W. Randolph Street, Suite 11-500
Chicago, IL 60610

*RE: Caseyville Sport Choice, LLC vs. Erma I. Seiber, Administratrix of the
Estate of James Seiber, Deceased, and Erma I. Seiber, Individually;
PCB 2008-030*

Dear Sir:

Enclosed are the following documents that I would ask that you file in the above captioned matter:

1. Motion to Dismiss Counterclaim of Respondent/Cross-Claimant Fairmount Park, Inc.; and
2. Replies to Affirmative Defenses of Respondent Fairmount Park, Inc.

Yours respectfully,


JOHN LONG

JL:clh

Encls

Cc: Carol Webb, Hearing Officer

Cc: Donald Urban

Cc: Penni S. Livingston