BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:	)	
	)	
CASEYVILLE SPORT CHOICE, LLC,	)	
an Illinois Limited Liability Company	)	
	)	
Complainant,	)	
	)	
v.	)	**PCB 2008-030**
	)	
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.	)	

FAIRMOUNT PARK INC.'S MOTION FOR SUMMARY JUDGMENT

NOW COMES the Respondent, FAIRMOUNT PARK, INC. by and through one of its attorneys, Penni S. Livingston, and respectfully Motions this honorable Board for Summary Judgment on Count II of the Plaintiffs' Complaint as follows. Count I is against the Seiber Estate and Mrs. Seiber and not against Fairmount Park. In support of its Motion for Summary Judgment or Alternatively Motion to Dismiss for Failure to State a claim upon which the Board can grant Requested Relief, Respondent Fairmount Park Inc. states as follows:

1. The Complaint in this case was brought pursuant to the Illinois Environmental Protection Act's prohibition on open dumping of waste. Complainant does not seek injunctive relief to compel compliance with the Illinois Environmental Protection Act ("Act") nor does it seek civil penalties for purposes allowed under the Act pursuant to Section 33(c) or 42(h). Instead the Complainant confuses this Board's authority under the Act with one of common law courts when it improperly seeks reimbursement for $4 million in expenses it incurred to remove waste materials from property previously owned by Mr. Seiber, now deceased, that it allegedly did not discover during its due

diligence efforts prior to purchase. Furthermore, reimbursement is directly sought from a party, Fairmount Park, who did not cause or allow the alleged open dumping.

2. All discovery has been completed in this case for sometime with all requested written documents produced and reviewed. The following individuals were deposed with transcripts available for use: Michael Egan, John Nicholson, Glenn Hierlmeier, and Don Ferris for Complainant; Erma Seiber and James Seiber, Jr. for the Seibers; and Bryan Zander, Frank Killian, and Fred Haida for Fairmount Park. These were all the witnesses each side determine to be useful and/or necessary for pursuing this action to completion. As can be seen by the transcripts, all of the lawyers and the parties were respectful and no obstructive behavior was present on anyone's part. Therefore, all of the evidence that could be developed for presenting at a hearing with witnesses and documents has been developed and is available, making this matter ripe for Summary disposal.

Contracts required Compliance with the Law

3. The evidence shows that Mr. Seiber had an on-going contractual relationship with Fairmount Park from 1981 to sometime in 1994 when his services were terminated and no new contract was entered into. Negotiations were breaking down and Fairmount looked elsewhere for these services. In fact, Mr. Seiber unsuccessfully sued Fairmount in 1998 for failing to renew his contract. For the last 16 years since 1994, Fairmount has had a contractual relationship with Keller Farms who land applies Fairmount Park horse manure at agronomic rates to contribute to better crop growth with no incidents of any allegations of environmental non-compliance and no opportunity for "hidden" disposal of such materials.

4. Although Fairmount had a contractual relationship with Mr. Seiber from 1981 to early1994, they never "caused" or "allowed" him to open dump horse manure and other waste. Absolutely no evidence exists to say otherwise. The Complainant will not be able to cite the Board

to any evidence of actual knowledge on Fairmount's part that Mr. Seiber had not properly land applied nor properly disposed of a large amount of horse manure and had buried a smaller amount of trash and debris. They cannot carry the burden of proof that Fairmount caused or allowed open dumping as Fairmount did not cause of allow open dumping and they did not know of any illegal activities by Mr. Seiber. Going after the Race Track to pay a second time for proper disposal of their materials after discovering that Mr. Seiber buried horse manure on his own land with varied topography instead of disposing of it at the nearby landfill as he was paid and contractually obligated to do is like suing municipal customers for violations caused by a landfill that accepts their waste- how would these citizens know that the landfill wasn't properly maintaining leachate control or meeting the standards of the law? When no knowledge exists and the contract that covers the matter was being unknowingly breached, no purpose of the Act is served by requiring Fairmount Park to reimburse the property purchasers $4 million for Mr. Seiber's past profitable sins in violation of a contract that ended 14 years prior to the filing of this action.

5. The contract between Mr. Seiber and Fairmount Park was for the purpose as stated: "To furnish all equipment and manpower necessary to collect, store, and remove manure and trash at and from Fairmount Park Race Track in Collinsville, Illinois." See Exhibit #1 for contracts. In fact the very first proposal for services drafted by Mr. Seiber found at the beginning of Exhibit #1 shows that Mr. Seiber agrees to "furnish landfill for dumping trash and manure." The Race Track paid Mr. Seiber varying amounts over time but for example, in the first formal written contract located that was entered into on July 14, 1982, the cost of services was $15,000 per month or $180,000 per year- nearly 30 years ago. This was not a nominal amount but was enough to pay for proper disposal at a nearby landfill if Mr. Seiber could not find land to properly apply the manure at agronomic rates, which would have made his profit even higher in addition to his job as a teamster at the track. The

contract terms were not draconian and would in no way lead one to believe it was a sham contract.

6. Each contract also provided that all manure collected or stored in containers provided by Mr. Seiber shall become the exclusive property of Seiber. There is no evidence that these terms should lead to liability on the part of Fairmount Park or that the amount paid would lead to open dumping. Most importantly is the provision (found frequently as paragraph 4 or paragraph 7) that: "Seiber shall dispose of all manure and trash in dumping places or landfills approved by any and all appropriate agencies of the State of Illinois." Every annual contract entered into was very specific about compliance with Illinois law.

7. Although a new agreement was not reached with Mr. Seiber, when Fairmount Park learned of Mr. Seiber's illegal dumping activity brought to issue by Illinois EPA Ken Mensing including the issuance of the June 1993 Permanent Inunction entered by Judge James Radcliff in St. Clair County Court, (See Exhibit #2 for Court Order) Fairmount attempted to get more specific in their contract terms with Mr. Seiber when they drafted paragraph 4 (See Exhibit #3) which states:

> "Seiber shall dispose of all trash and manure collected at Fairmount Park in strict compliance with all applicable laws and the order of permanent injunction issued by the Circuit Court of St. Clair County, Illinois. Seiber shall be permitted to compost and windrow at such locations as may be designated by Ogden, it being clearly understood that all such procedures shall be in compliance with applicable regulations and guidelines of the Illinois Environmental Protection Agency, and subject to the 'hold harmless' provision set forth in Paragraph 8 of this Agreement."

8. Every contract entered into stated that Mr. Seiber shall properly dispose of the materials as approved by the State of Illinois. This was Mr. Seiber's responsibility under the contract through which he was paid handsomely for his services. In the end, Fairmount found a more trustworthy independent contractor and so they ended their contractual relations with Mr. Seiber 16 years ago. See Exhibit #4 for contract with Keller Farms starting in 1994. While Fairmount has always required compliance with Illinois laws and proper disposal that they paid for in fulfilling their

contract obligations, Mr. Seiber, on the other hand, knowingly buried manure on his property at rates that were not authorized as agronomic but that would appear to be well hidden open dumping. His deliberate acts are his and his alone to bear. The law does not support otherwise.

No Evidence of Fairmount having Knowledge of Seiber's Alledged Illegal Activity

9. While Section 45 of the Act is inapplicable to third party actions for cost recovery unless there is a state action as addressed later in this Motion, Section 45 requires "actual" knowledge to hold a third party accountable for clean up of another's action. Mr. Fred Haida, a retired police officer who became director of Operations and Security at Fairmount Park when asked if he has any knowledge whether manure and trash had been dumped by Seiber on Seiber farm property prior to the injunction order issued by St. Clair County, Mr. Haida indicated 'No." (See Exhibit #5 pages 11-12). See also where on page 13 of the deposition Mr. Haida says "I assume Seiber was doing his job." Mr. Haida testified that there were different color containers for horse manure and for trash. Horse manure was kept separate and allowed sometimes to accumulate in a specific area if rain prevented hauling. (See Exhibit #5 Haida Depo pages 33 and 34). As he points out several times, paragraph 4 of the contract required proper disposal.

10. Testimony was also taken from Track Superintendent Frank Killian. Mr. Killian's testimony points out that Mr. Seiber had two different trucks that were different colors, one to pick up manure and one to pick up trash. (See Exhibit #6 Killian Depo page17-18).[1] Full discussions in these depositions show that Mr. Seiber had new horse owners written up by management if they did not properly sort trash from bedding material. Fairmount had no actual knowledge as to any illegal disposal or illegal activity by Seiber, nor are they responsible for any lack of forthrightness

[1] There is a whole discussion in this deposition about Mr. Seiber's attempts to compost the manure on site and efforts undertaken to come up with alternatives to disposal. No knowledge of illegal disposal is present anywhere in the deposition testimony of any Fairmount witness.

in what he told the purchasers of his property. As the testimony of the Fairmount Park witnesses indicates, none of the Fairmount people were aware that Mr. Seiber was illegally disposing any manure until the 1993 Court Order.[2]

11. Fairmount Park had no knowledge that Mr. Seiber had not rectified any illegal activity through compliance with the June 1993 Court Ordered permanent injunction. No evidence suggests otherwise. There is no genuine issue of fact as to Fairmount's lack of knowledge as to Mr. Seiber's apprarent previous burying of horse manure and trash. It was reasonable for the government to hold Mr. Seiber responsible for clean up of material he open dumped on his property for profit just as it was reasonable for Fairmount Park to believe that all materials discovered by IEPA in 1993 had been removed and properly disposed of in accordance with Illinois EPA standards. It was further reasonable for Fairmount to believe that all materials at the Seiber property had been not only removed but had been discovered by IEPA as that was also the belief of IEPA's Ken Mensing and the St. Clair County State's Attorney's office.[3] No actual knowledge means no liability for Seiber's actions in a third party suit.

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There was a Court Order entered against Seiber by Caseyville that also involved a letter sent from IEPA to Fairmount in 1981 but Mr. Zander testified that he thought the matter was taken care of. The contracts indicate Fairmount's insistence on compliance with the law. That Court Order would lead one to believe such since it was a permanent injunction. See Exhibit #7 for that Court Order. This is a public record obtainable merely by searching Mr. Seiber's name.

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A Petition for Adjudication of Indirect Civil Contempt would have been immediately filed against Mr. Seiber as in any other case of non-compliance with a court order in the over 8 years this attorney was the environmental prosecutor in St. Clair County- including the prosecutor who obtained the permanent injunction against Mr. Seiber in June 1993 through a hotly contested hearing 6 months into the job. Fairmount was not brought into that case as it was clear Mr. Seiber was acting on his own outside of the scope of the contract. Mr. Mensing's testimony was that he discovered enough manure and bedding material near Little Canteen Creek on Mr. Seiber's property to fill the 5 story courthouse ten times. That known material was removed and properly disposed of prior to the closing of the enforcement case.

The Purpose of the Act is Not Served by Punishing Fairmount Park for James Seiber's Hidden Open Dumping on His $1.46 million Property

12. While the *Park Crematory* case law has long since established that the purpose of the Act in civil enforcement is not to punish (although it would seem most appropriate to punish wrong doers for harming our environmental resources), no purpose of the Act is furthered by punishing Fairmount Park for the actions of Mr. Seiber. This is particularly obvious when the Complainant is not asking for a remedy that enhances, restores or protects the environment but is instead seeking a common law remedy of reimbursement for damages suffered because of the acts of Mr. Seiber including perhaps breach of the purchase contract between Seiber and Complainant, an issue that is one of damages for a court, not this administrative agency. A mere look at Section 33(c) and 42(h) factors shows the inappropriateness of penalizing Fairmount for Mr. Seiber's actions and the Complainant's own lack of due diligence in the purchase of the property that they paid Mr. Seiber $1.46 million to purchase. Fairmount has in no way profited from the "wholly past" alleged illegal activities of Mr. Seiber but instead has incurred costs of defense over activities of an independent contractor that they ceased doing business with 16 years ago and whom they thought the government had achieved compliance from. Mr. Seiber decided all by himself to break the law and hide the extent of his burying from IEPA.[4]

[4] While EPA was not made aware of Mr. Seiber's additional illegal disposal as found by the Complainants, Mr. Seiber did send a faxed letter to the consultants that were hired by Complainant in 1999 indicting that he had "straw and bedding material burying on one part of the farm from Fairmount Race Tract. We will be glad to show you at any time you desire." He went on to say that it was ok by a man named Dale Blockempt that he calls an EPA agricultural engineer. Dale testified about the requirements for land application at agronomic rates at the 1993 trial and did not authorize burying of manure in any way. All manure was to be removed and properly disposed of as can be seen in the resulting Court Order found as Exhibit #2. These are common law issues of potential fraud or ripe for a defense of lack of due diligence but not appropriate for environmental enforcement under the Act nor do they in any way implicate liability of Fairmount for these parties' dealings with each other. See Exhibit #8 for faxed letter.

Complainant had Knowledge of Manure Disposal on Seiber Land from August 2003- Prior to its purchase of Such Land for $1.46 Million

13. Fairmount had no knowledge of illegal activities and as a matter of law Fairmount did not "cause" or "allow" Mr. Seiber to open dump horse manure and trash on his property. The Complainant did have knowledge, however. Mr. Glen Hierlmeirer, President of Caseyville Sport Choice, visited the site in August 2003. (See Exhibit # 9 Deposition of Glen Hierlmeier pages 14-15 and pages 62 -63). Mr. Hierlmeier saw distressed vegetation when he was on site in August 2003 and had areas identified to him as having manure in them. (See Exhibit #9 pages 82 and 63 and perhaps other places). Mr. Heirlmeier further testified that they thought they could sell the manure material that was on site. (See Exhibit #9 page 63). This mistaken belief does not make Fairmount liable to Complainant as though Fairmount had somehow violated the prohibition against open dumping in the Act, as Fairmount never violated the Act as a matter of law.

Proper Due Diligence Prior to Purchasing This "Blighted" Property Includes Performance of a Phase II Environmental Assessment Lacking Here

14. Clearly, the Complainant did not know the extent of volume of materials buried at the property as Mr. Seiber did; however the Complainant toured Mr. Seiber's land and hired consultants to perform an environmental assessment which recommended "Additional research, including invasive testing, can reduce your risks, but no techniques now commonly employed can eliminate risks altogether." See Exhibit #10 letter. See also Exhibit #10 attachment page 12 of the report dated September 8, 2004 that identifies on James Seiber's property "Straw and bedding material from Fairmount Race Track is buried on property" and Exhibit #11 on page 8 for discussions with Ken Mensing and the Health Department. See also Exhibit #12 showing the photos of the property purchased in this TIF District. With $9 million being put into the purchase of all the connected properties and given what the property looked like on the surface including the observed distressed

vegetation in parts of the property, a Phase II environmental Assessment was needed prior to purchase as part of an "all appropriate inquiry" that should have and would have included "invasive testing" that would have revealed the extent of horse manure and trash buried on the property. Illinois law only grants status for TIF subsidies to developers when the property is "blighted" and this property clearly was and Complainant knew that the property was blighted going into the seemingly lucrative transaction.

15. While it is not at all clear why the environmental consultants did not strongly recommend a Phase II Environmental Assessment in writing to Caseyville Sport Choice when those same consultants had recommended it to a former potential buyer (not just mentioning it as eliminating risk) and the circumstances had not changed, Mr. Seiber did send a faxed hand written letter stating that horse manure and bedding materials were buried on site and he would show anyone where they were. (See Exhibit #8). Apparently no one took him up on that offer or when they did, he did not show all the areas to them. We don't know the answer on that issue and it does not involve Fairmount Park. Complainant received all environmental reports before closing including those from the previous environmental assessment showing manure and bedding material (see Exhibit #9 page 81). Complainant's consultant, Mr. Ferris' confirmed this as well. See Exhibit # 13 page 17 and page 35; see also 18-19 showing no Phase II was in fact performed. And see pages 49 and 50 about discussion of knowing about manure on site and consideration of selling it.

16. Given what we all know now, the now deceased Mr. Seiber was in violation of the prohibition against open dumping in the Illinois Environmental Protection Act and was in breach of his contract with Fairmount Park, which paid Mr. Seiber $15,000 per month for such services. The evidence shows that horse manure and debris were disposed of on Mr. Seiber's property that he sold to the Complainant for $1.46 million of the total $9 million they paid for the underlying

"blighted" land upon which they placed their development. (See Exhibit # 9 page 41). Proper due diligence and all appropriate inquiry were not performed as no Phase II was performed in spite of the photos and identification of issues galore. Any way you look at it, the Complainant knew of existence of horse manure and bedding material. They were certainly surprised by the extent of it which could have been flushed out by a proper environmental assessment, follow up on conversations, or walking the whole site. [5]

As A Matter of Law Fairmount Park Did Not Open Dump any Waste

17. No evidence exists (so it cannot be presented and discovery is complete) to suggest that Fairmount Park open dumped any waste ever or encouraged open dumping of waste in any way by Mr. Seiber or even had knowledge of open dumping of waste by Mr. Seiber except and until 1993 when the government informed them and pursued a case against Mr. Seiber that did not include Fairmount, as they had a contract that Mr. Seiber was breaching and were not responsible for his actions that he was paid handsomely to perform in accordance with the law. The government thought all of the manure that had been placed on the land was cleaned up through the Permanent Injunction entered in June 1993 as did Fairmount Park. Fairmount cannot be held responsible for Mr. Seiber's actions from what must have been nearly 2 decades ago and that were in clear violation of his contract with Fairmount Park.

18. The hiding of the improper burying of horse manure in Mr. Seiber's large tract of hilly land is also a direct violation of the real estate contract he entered into with Complainant where Mr. Seiber "represents and warrants" that neither seller nor seller's agents, has received any notice from any . . . governmental authority or agency of any violation of any . . . environmental, pollution, safety or health laws, ordinances, rules, regulations or requirements [like those in the 1993 Court

[5] See page 62 of Exhibit #9 where Mr. Heirlmeier states "... they said that that vegetation was different because there was some manure that had been dumped there. And then they demonstrated to me that, you know, it was wet that day and that if you walked down it was squishy and you got shit on your shoes."

Ordered clean up of the horse manure] with respect to the Premises which have not been corrected;" (See Exhibit # 14 page1 para 3). Obviously correction did not occur and this potential misrepresentation was Mr. Seiber's alone and was never within the knowledge or intent of Fairmount Park or the enforcing agency. While Mr. Seiber had written a letter he faxed in 1999 to the same consultants hired by Complainant offering to show where the straw and bedding material was buried, the Complainant wishes to put Mr. Seiber's action and their own so called lack of knowledge (any of which is from a lack of due diligence) off onto Fairmount Park to the tune of $4 million, when Fairmount did not violate the law. Also Fairmount in no way benefitted from Mr. Seiber's illegal activity, having paid an appropriate price to have the material properly disposed of. Obviously, Fairmount Park had no knowledge of the extent of Mr. Seiber's breach of contract. After discovering information from IEPA in 1993, they stopped contracting with Mr. Seiber in early1994 when it was time for contract renewal, an action they were later sued for by Mr. Seiber. Instead of continuing to use Mr. Seiber, Fairmount Park contracted with Keller farms to land apply the horse manure at agronomic rates which has occurred very close to the IEPA Regional Office in Collinsville without incident for 16 years now.

19. Fairmount had absolutely no knowledge of Mr. Seiber dumping manure and/or trash on his property and burying it and there is no evidence whatsoever that the Complainant can present to say that Fairmount knew or acquiesced in Mr. Seiber's violations of law. The contract provisions are enforceable as law as well and those provisions make clear that Mr. Seiber must comply with applicable law and perform proper disposal. As a matter of law, Fairmount Park did not cause or allow open dumping of waste in Illinois. Additionally, according to the United States Supreme Court, statutes providing citizens suits against persons "alleged to be in violation of a provision of a statute do not create a cause of action for wholly past violations." *Gwaltney v. Chesapeake Bay Foundation, Inc*. (1987) 484 US 49. This action is therefore frivolous and must be dismissed

through summary judgment or dismissal.

20. Mr. Seiber's violations are "wholly past" as they are from before 1993. They were not on going when this matter was filed as the materials were cleaned up and an NFR was issued. The Supreme Court determined that violations are of an ongoing nature (under RCRA) where there is "a reasonable likelihood that a past polluter will continue to pollute in the future." Id. 693. Mr. Seiber is dead and Fairmount contracted with another company 16 years ago. There is no reasonable likelihood a past polluter will continue to pollute in this case and the violations sued for are "wholly past" where the only remedy is common law damages- against Mr. Seiber.[6] Dismissal as frivolous is appropriate given the uncontested or incontestable known facts.

As a Matter of Law No Authority Exists to Grant Relief Requested

21. Given that the land is already cleaned up, this is not an action to compel compliance. Complainant obtained relief from Illinois EPA by obtaining a No Further Remediation Letter through the Site Remediation Program, a voluntary program. (See Exhibit # 15 for report submitted to IEPA for NFR). There is no state enforcement action to allow the bringing in of a third party to account for someone else's conduct- generator of the material or not. Only the government has the power to bring in third parties to clean up or pay for the sins of others in accordance with Section 45 of the Act. No other authority exists in the statute that gives the Board its enabling power.

22. Furthermore, horse manure, not being hazardous waste, there is no cost recovery action allowed in the Act by citizens. That is the domain of a private action for a court of law in determining damages, not an administrative action to benefit the public through enforcement of the Act. There is nothing left to enforce under the Act. Complainant does not seek penalties for the government here either. Even if it had, it cannot prove Fairmount open dumped waste because they

[6] There was a case apparently pending in Federal Court against the Seiber estate by Complainants but as Fairmount Park has not been involved in that at all the status is unknown.

did not and penalties against Fairmount would be inappropriate under the provisions of Section 33(c). For specifics of the entire argument as to the law on these points, please see Fairmount Park's Motion to Dismiss filed at the same time as this Motion for Summary Judgment. The Act is the law and as a matter of law, this case must be disposed of without remedy from the Board as the Act does not authorize the only remedy requested here, reimbursement of clean up costs from the actions of another.

Summary Judgment is Appropriate

23 . No genuine issues of *material* fact exist in this case and therefore Fairmount Park seeks to enhance judicial economy and obtain relieve with uncontradicted documentary evidence including transcripts of testimony obtained through discovery. If what is contained in pleadings and affidavits [or sworn testimony recorded in transcripts] would have constituted all of the evidence before the court [here the Board], and upon such evidence there would be nothing left to be decided by the trier of fact, then summary judgment is appropriate. Skipper Marine Electronics, Inc. v. United Parcel Service, Inc., (1991) 569 N.E. 2d 55. A motion for summary judgment is to be granted only if "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." as stated in the Code of Civil Procedure 735 ILCS 5/2-1005(c). All the facts regarding Mr. Seiber's open dumping are known and there is no need for a hearing to know those facts and determine their meaning under the law.

23. As cited by the Board many times, "Summary judgment is appropriate when there are no genuine issues of fact for the trier of fact to consider and the movant is entitled to judgment as a matter of law." *Jackson Jordan, Inc. V. Leydig, Voit & Mayer,* (1994) 158 Ill. 2d 240, 249, 633 N.E. 2d 627, 630; *Sherex Chemical v. IEPA,* (July 30, 1992), PCB 91-202; *Williams Adhesives, Inc. V. IEPA,* (August 22, 1991), PCB 91-112. The Complainant will not contest the facts as

enumerated herein as they are all backed by supporting transcripts and/or attached documentation. The only facts that Complainant can rely upon are that Mr. Seiber apparently open dumped more horse manure than anyone knew; he did not clean it up as ordered by a Court; and he offered to show folks where it was located. Fairmount had a contract with Mr. Seiber to haul and properly dispose of such horse manure from at least 1982 to the end of 1993 or the beginning of 1994. Plaintiff spent $ 4 million for excavation, hauling and proper disposal of waste materials it determined could not be sifted and land applied. These are the only facts Complainant can rely for a request for relief against Fairmount Park.[7] Clearly it would be unjust and not serve the purpose of the Act to hold Fairmount accountable for the actions of an independent contractor when no knowledge of the illegal activity is shown and where such activity was also in breach of the very contractual relationship apparently relied upon for the arguments of causing or allowing open dumping.

No Relief Can Be Granted by the Board as Requested

24. No remedy may be given in this matter as against this Respondent. Pursuant to Section 33(b) of the Act, the Board may direct a Respondent to cease and desist from violations of the Act and/or the Board may impose civil penalties in accord with Section 42 of the Act. Neither of these remedies would be appropriate here as there is nothing to cease and desist from committing and a penalty would be unjust and not further the purposes of the Act. No authority exists for the Board to issue the remedy requested by the Complainant in ordering remedial action costs. The Board cannot, under the law, grant the relief that the Plaintiff here requests as there is no authority for such in the statute or in the case law. Complainant seeks to obtain relief in the form of reimbursement

[7] Before Fairmount was involved in this suit and had representation, there was a vague accusation by Mr. Seiber's heir to the estate that Fairmount knew what Mr. Seiber was doing and wanted to save money for landfill fees. The later depositions of Fairmount management show this is not true and the contracts make this lie known for its self-serving nature since Fairmount did not pay tipping fees as part of the contract. The contract price accounted for the costs of landfilling when the contract is for $15,000 a month. Mr. Seiber decided to save tipping fees by burying some of the manure and trash.

of cleanup costs incurred. See Paragraphs 8 and 9 of Caseyville Sport Choice's Complaint.

25. Section 45 (d) of the Illinois Environmental Protection Act (415 ILCS 5/45) only provides reimbursement for cleanup costs if the State brings an action under the Act. Section 45(d), in pertinent part, states:

> "If the State brings an action under this Act against a person with an interest in real property upon which the person is alleged to have allowed open dumping or open burning by a third party in violation of this Act, which action seeks to compel the Respondent to remove the waste or otherwise cleanup the site, the Respondent may, in the manner provided by law for third-party complaints, bring in as a third-party Respondent a person who with actual knowledge caused or contributed to the illegal open dumping or open burning, or who is or may be liable for all or part of the removal and cleanup costs. The court may include any of the parties which it determines to have, with actual knowledge, allowed, caused or contributed to the illegal open dumping or open burning in any order that it may issue to compel removal of the waste and cleanup of the site, and may apportion the removal and cleanup costs among such parties, as it deems appropriate."

26. No other provision in the Act provides similar relief. Even if there were actual knowledge on the part of Fairmount, which there is none and no evidence to say there is (other than self-serving conjecture by Mr. Seiber's heir), there is no State action here. Complainant seeks relief which cannot be awarded. The State did not bring an action under the Act against Complainant to compel the cleanup as described in the Complaint. Caseyville Sport Choice cleaned up the land on its own volition and apparently obtained an Environmental No Further Remediation Letter. This is somewhat reminiscent of the Supreme Court's *Cooper v. Aviall* (2004) 543 US 157. The State has to sue the Complainant for the Complainant to seek reimbursement under this Act. At no time was Fairmount brought in as a third-party Respondent in an enforcement action against Caseyville Sport Choice for the cleanup of the property in question or against Mr. Seiber. This case must be dismissed without relief as a matter of law.

27. As a matter of law, the Illinois Pollution Control Board cannot grant relief of reimbursing the Complainant $4 million for removal and proper disposal of any waste that is not

hazardous waste. As a matter of law, horse manure is not hazardous waste. Complainant has sought relief not only from one party who is not responsible under the Act to the Complainant but from a forum that cannot give the relief it seeks. There is just no authorization in law to do what has been requested by the Complainant here. Only a Court can give the remedy requested and under the theories founded in breach of contract or in tort but not under the Act's prohibition against open dumping. Exhaustion of administrative remedies in an attempt to do the government's job of enforcing the Act does not apply to the private remedy situation here. Picking the right forum that can give the relief requested would have been much wiser as the Board is not that forum.

28. Section 101.500(a) of the Illinois Pollution Control Board procedural rules states that "[t]he Board may entertain any motion the parties wish to file that is permissible under the Act or other applicable law, these rules, or the Illinois Code of Civil Procedure." (35 Ill. Adm. Code 101.500). Pursuant to Section 5/2-619 (a)(9) of the Illinois Code of Civil Procedure, dismissal based upon a claim that is barred by other affirmative matter avoiding the legal effect of or defeating the claim is allowed. (735 ILCS 5/2-619(a)(9)). And of course, summary judgment is an appropriate motion when there are no issues of material fact, including the lack of authority to grant the relief Complainant requests in its pleading.

29. Complainant is not entitled to the requested relief from this Respondent and as bad as Mr. Seiber was in his hidden disposal activities, the Complainant is not entitled to relief from Mr. Seiber in this case either as the Act does not allow the relief requested. The relief sought by the Complainant is not allowed under the Illinois Environmental Protection Act. The cause of action brought in this case as against these Respondents is barred by the cost assignment provisions of Section 58.9 of the Act. No offer of proof can ever show that Fairmount Park was the proximate cause of releases of anything, let alone regulated substances, which are not involved in this case. No authority exists for the Board to issue the remedy requested by the Complainant in ordering

remedial action costs.

30. Section 58.9 applies only to regulated substances of which horse manure is not but it gives answers to how this case must be dismissed. Section 58.9 of the Act specifically states that

> "Notwithstanding any other provision of this Act to the contrary, including subsection (f) of Section 22.2 [entitled Hazardous Waste Fees] in no event may the Agency, the State of Illinois, or any person bring an action pursuant to this Act of the Groundwater Protection Act to require any persons to conduct remedial action or to seek recovery of costs for remedial activity conducted by the State of Illinois or any person beyond the remediation of releases of regulated substances that may be attributed to being proximately caused by such person's act of omission or beyond such person;'s proportionate degree of responsibility for costs of remedial action of releases of regulated substances that were proximately cause of contributed to by 2 or more persons."

31. The purposes of the Act cannot be effectuated by penalizing this third party for the action of another on his own land and from which the other profited. The Complainant is further barred from recovery as against this Respondent by the provision is Section 2 of the Illinois Environmental Protection Act that states that it is the purpose of the Act "to assure that adverse effects upon the environment are fully considered and borne by those who cause them." See 415ILCS 5/2(b). As a matter of law, based on all the facts developed, Fairmount Park did not cause any violations of the law and they did not "allow" them either. Furthermore, there is no public interest here as the remedy of compliance has been achieved. This is a private right of action for reimbursement being pursued in the wrong forum and under the wrong theories.

32. No proper citation is given by Complainants in their complaint to applicable law allowing reimbursement of clean up costs for improper disposal of manure and general waste as there is none. Attempting to mudding up facts in a response will not help them either as the facts are simple and known. No hazardous waste was found and no provisions of RCRA or CERCLA apply or were alleged here. Furthermore, this Respondent did not cause the expense to be incurred. Any

Civil penalty requested through amendment or otherwise would be to improperly punish this Respondent for the actions of another that occurred more than seventeen years ago. This case must be summarily dismissed with judgement granted in favor of the Respondents.

Affirmative Defenses

33. The Complainant fails to state a cause of action upon which relief can be granted as to this Respondent as no allegations of fact are made making this Respondent responsible for the actions of another. At all times, the Respondent acted with due care with respect to proper hauling and disposal of waste by requiring compliance with all laws in the contract, by having a contract price capable of supporting proper disposal, and by fully cooperating with Illinois EPA. To the extent any environmental assessment was performed that did not detect these "visually" observable open dumps, those parties are responsible to the Complainant, not Fairmount Park, who never dumped anything anywhere nor knew of any information that would lead one to believe that the issue had not been properly dealt with in the context of the IEPA enforcement action resulting in the June 1993 Court Order against Mr. Seiber for the very issues being complained of here. Fairmount did not violate the Environmental Protection Act and no evidence exists to suggest otherwise.

34. Complainant comes to the Board with unclean hands in either failing to perform due diligence through a proper Phase II environmental assessment prior to purchase or by knowing the information as disclosed to the entity performing 1998 Phase I Environmental Site Assessment, provided to Respondent by the Complainant in discovery or through observations at the site visits as admitted to in deposition. The Complainant knew or should have known about disposal of manure on the property prior to purchase such that they could have negotiated clean up or a diminution in the price from the responsible party, Mr. Seiber, the original Respondent or they could have chosen not to purchase, given the expenses. Complainant's "Comprehensive Site Investigation" of the Seiber property relies on "visual observations of changes in surface features"

as a reliable indicator of solid waste dump locations. (See Exhibit #15). Timely due diligence would have disclosed Mr. Seiber's activities on his land. Knowledge on the part of Caseyville Sport Choice was previously addressed at length in this Motion with citation to the record and that knowledge makes this case against Fairmount Park inappropriate and frivolous.

35. Due diligence is required prior to the purchase of property. Failure to perform such inquiry is an assumption of the risk. Either no appropriate inquiry was made or the all appropriate inquiry made alerted the Complainant to the truth of the situation existing on the property before it purchased said property, which is in a Tax Increment Financing District and was therefore known to the Complainant to be "blighted" land. Either way, Complainant is responsible for its own property loss or expenses as it assumed the risk (i.e. when Mr. Heilmeier got the materials on his shoes). No responsibility attaches to a third party who had a contractual relationship with the same party that Complainant had a contractual relationship with for purchase of the property. No privity of contract exists here between Complainant and Fairmount Park. Complainant's unclean hands can also be seen in the fact that this property was bought with the benefit of being in a Tax Increment Financing District which means the Complainant was put on notice that the land was "blighted" ergo the legal standard for getting the millions of dollars in tax breaks.

Right to Summary Judgment must be Clear

36. The right to summary judgment must be clear beyond question and the benefit of all doubt will go to the party resisting the motion. Di Battista v. Centennial Ins. Co., 201 N.E. 2d 466. As all parties and witnesses in this case agree that Mr. Seiber open dumped horse manure that he obtained from the race track under a contract with fair compensation and that the Complainant has already removed and properly disposed of the waste under the Site Remediation Program and obtained an "NFR", there is nothing for the Board to do for this Complainant under the Illinois

Environmental Protection Act. Any other relief Complainant may seek must be done under theories lying in tort and contract, not administrative remedies that have already occurred. The right of summary judgment must be clear beyond question, and when deciding this question, a court must construe pleadings, depositions, and affidavits most strongly against the moving party and most liberally in favor of the opponent. Newell v. Field Enterprises, Inc. (1980) 415 N.E. 2d 434.

37. A court has a duty to construe evidence strictly against the moving party and liberally in favor of opponent, and the right to summary judgement must be free from doubt and determinable solely as an question of law. Hill v. Durkin, (1978) 34474 N.E. 2d 1147. If what is contained in pleadings and affidavits would have constituted all of the evidence before the court, and upon such evidence there would be nothing left to be decided by the trier of fact, then summary judgment is appropriate. Skipper Marine Electronics, Inc. v. United Parcel Service, Inc., (1991) 569 N.E. 2d 55. There are no issues of fact in dispute that would deny that the Complainant cannot have relief that is not authorized by the Act. The Board cannot act as a Court as it does not have common law jurisdiction to decide matters of private rights of action. Damages is what this case is about as clean up has occurred. As a matter of law, the Board cannot grant relief to this Complainant as there is no authority to do so; no violations of law are in need of remedy. The violations were remedied before Complainant ever filed suit so they should have filed in a court under common law seeking damages.

38. Here Summary Judgment is appropriate as all the evidence before the Board now and in response to this motion is what would be before the Board at an enforcement hearing. The issues to be decided are of interpretation of law applied to the known uncontested or incontestable facts. Complainant can only show that Mr. Seiber open dumped waste on land he sold to them and that they paid to properly dispose of it. Any issue of damages they incurred is a civil dispute that belongs in a court of law as it does not fall under the administrative purview of the Illinois Pollution

Control Board for as a matter of law, the Environmental Protection Act does not allow the relief Complainant has requested.

39. As a matter of law, the purpose of the Act cannot be effectuate in the way this case is framed and given the fact that clean up is long since and "wholly" past. Pursuant to Section 2(b) of the Illinois Environmental Protection Act, "It is the purpose of this Act, as more specifically described in later sections, to establish a unified, state-wide program supplemented by private remedies, to restore, protect and enhance the quality of the environment, and to assure that adverse effects upon the environment are fully considered and borne by those who cause them." If there is an issue here, it belongs to "private remedies" that supplement enforcement of the Act. Dismissal and/or summary judgment is appropriate.

40. The issue of third party cost recovery is one whose time has come for definitive decision as a matter of law. In performing researching for this Motion, it was noted that there were times, for example in *Union Oil v. Barge Way* PCB 98-169 when Dr. Ronald Flemal[8] respectfully dissented "because I do not believe the Environmental Protection Act grants the Board the authority to hear third-party cost recovery cases." While the facts of that case are likely distinguishable from this much simpler matter, Dr. Flemal would be correct when applying the law to this case. No law can be cited to give a contrary view. The statute speaks for itself and non-existent language cannot be subject to interpretation. If Summary Judgment and/or Dismissal are not granted, Respondent respectfully requests interlocutory appeal to have this issue dealt with appropriately without the expenditure of resources for a contested evidentiary hearing.

[8] A delightful professor of geology whom this attorney clerked for during last semester law school 1987.

WHEREFORE, for all these reasons and as the uncontroverted evidence supports, Respondent, Fairmount Park, Inc. respectfully requests that the Illinois Pollution Control Board find that as a matter of law Fairmount Park did not violate the Illinois Environmental Protection Act, that Fairmount cannot be held accountable to Complainant, and that as a matter of law the relief as requested cannot be granted and that therefore the cause is frivolous such that the Board GRANTS this Motion for Summary Judgement, disposing of the matter completely.

Respectfully submitted this 13th day of July:

Fairmount Park, Inc.

By: /s/ Penni S. Livingston

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:	)	
	)	
CASEYVILLE SPORT CHOICE, LLC,	)	
an Illinois Limited Liability Company	)	
	)	
Complainant,	)	
	)	
v.	)	**PCB 2008-030**
	)	
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.	)	

Exhibit List for Fairmount Park's Motion for Summary Judgment

Exhibit #	Description of Document
1	Contracts entered between Fairmount Park and Mr. Seiber
2	Injunctive Court Order from St. Clair County 1993
3	Last contract negotiated but not entered into after 1993 Court Order
4	Contract with Keller Farms for land application in 1995
5	Deposition of Fred Haida
6	Deposition of Frank Killian
7	Court Order from 1981 against Seiber
8	Seiber's faxed note indicating he buried manure and will show where it is
9	Deposition of Glen Hiermeier of Caseyville Sport Choice
10	Letter to Don Ferris from Geotecnology dated September 8, 2004 with Phase I Environmental Assessment attached including identification of "straw and bedding buried" on 12

11	Geotechnology letter to Burns and McDonald dated December 1998 indicating need for Phase II with Phase I Environmental Assessment attached
12	Photos of the environmental issues on the property purchased in this TIF District identified as Blight and Environmental Sites
13	Deposition of Don Ferris
14	Real Estate Sales Contract between Caseyville Sport Choice and Mr. Seiber siigned May 20, 2004 and June 23, 2004
15	Letter and Comprehensive Site Investigation by Horizon dated June 14, 2006

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I caused to be mailed on the 13th day of July, 2010, the foregoing Motion for Summary Judgment to the attorneys of record by depositing the same with the Fairview Heights, Illinois branch of the United States Postal Service with first class postage in place.

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