

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

E.R. 1, LLC, assignee of CASEYVILLE)	
SPORT CHOICE, LLC)	
)	
Complainant,)	
)	
v.)	PCB 08-30
)	(Citizens Enforcement-Land)
ERMA I. SEIBER, ADMINISTRATRIX OF)	
THE ESTATE OF JAMES A. SEIBER,)	
DECEASED, ERMA I. SEIBER,)	
INDIVIDUALLY, and FAIRMOUNT PARK,)	
INC.,)	
)	
Respondents.)	

**MOTION TO DISMISS SECOND COUNTERCLAIM OF
RESPONDENT FAIRMOUNT PARK**

COMES NOW Complainant E.R. 1, LLC, an assignee of Complainant Caseyville Sport Choice, LLC (“Caseyville”), and moves this Illinois Pollution Control Board (“Board”) to dismiss Fairmount Park, Inc.’s (“Fairmount”) second Counterclaim against Caseyville (“Fairmount’s Second Counterclaim”), with prejudice.

1. On or around January 5, 2009, Fairmount submitted its *Answer Including Affirmative Defenses and Counterclaims* to Caseyville (“Fairmount’s First Counterclaim”).

2. On February 5, 2009, Caseyville filed a *Motion to Dismiss the Counterclaim of Respondent/Cross-Claimant Fairmount Park, Inc.* (“Caseyville’s First Motion to Dismiss”). See Exhibit A, a copy of Caseyville’s First Motion to Dismiss.

3. In Caseyville’s First Motion to Dismiss, Caseyville argued that Fairmount did not set forth a claim for relief against Caseyville in Fairmount’s First Counterclaim. Specifically, the only relief which Fairmount sought against Caseyville was an award of attorneys’ fees -- relief which clearly is not available to Fairmount in this matter. See Exhibit A, p. 2.

4. On April 16, 2009, the Board dismissed Fairmount's First Counterclaim. The Board agreed with Caseyville:

Because the counterclaim seeks relief that the Board is not authorized to grant pursuant to the Act and Board regulations, the Board grants Caseyville's Motion to Dismiss the Counterclaim of Fairmount Park. Therefore, the Board dismisses the Fairmount Park counterclaim as frivolous.

See Exhibit B, a copy of the Board's April 16, 2009 Order, p. 2.

5. On or around April 29, 2013, Fairmount submitted Fairmount's Second Counterclaim to Caseyville entitled *Answer to Second Amended Formal Complaint Including Affirmative Defenses and Counterclaims*.

6. Fairmount's Second Counterclaim to Caseyville is identical to Fairmount's First Counterclaim. Fairmount has reproduced the exact same arguments for relief.

7. In Fairmount's Second Counterclaim, Fairmount continues to attempt to set forth a claim for relief against Caseyville for attorneys' fees. Caseyville expressly adopts and incorporates all of the arguments that it made in Caseyville's First Motion to Dismiss. *See* Exhibit A. Fairmount's Second Counterclaim is frivolous because the Board does not have the authority to award attorney's fees in a citizen's enforcement case or as a sanction. *See* Exhibit B, p. 2. Accordingly, the Board should dismiss Fairmount's Second Counterclaim for the same reasons it dismissed Fairmount's First Counterclaim.

8. Moreover, Fairmount's Second Counterclaim does not assert any affirmative claims for relief. Rather, the counterclaim is nothing more than a series of (purported) disguised defenses. On this basis too, the Board should dismiss Fairmount's Second Counterclaim.

WHEREFORE, E.R. 1, LLC, an assignee of Complainant Caseyville Sport Choice, LLC, respectfully requests that the Board dismiss with prejudice Fairmount's Second Counterclaim against Caseyville and for any other and further relief as the Board deems appropriate.

Dated: May 20, 2013

Respectfully Submitted,

BRYAN CAVE LLP

By: John R. Kindschuh /mls
Daniel Nester (ARDC No. 6208872)
Steven J. Poplawski (ARDC No. 6193897)
John R. Kindschuh (ARDC No. 6284933)
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Telefax: (314) 259-2020

*Attorneys for E.R. 1, LLC, As Assignee
Of Caseyville Sport Choice, LLC*

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing motion was electronically filed with the Office of the Clerk and was served upon the following parties via U.S. mail on the 20th day of May, 2013:

David J. Gerber
Attorney at Law
241 North Main Street
Belleville, IL 62025
Attorney for Caseyville Sport Choice, LLC

Donald W. Urban
Sprague and Urban
26 E. Washington Street
Belleville, IL 62220
Attorneys for Erma I. Seiber

Penni S. Livingston
Attorney At Law
5701 Perrin Road
Fairview Heights, IL 62208
Attorney for Fairmount Park, Inc.



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

ORIGINAL RECEIVED
CLERK'S OFFICE
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.

Exhibit A

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*.

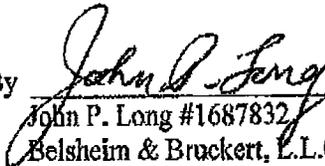
5. Nothing in the Illinois Pollution Control Board's *Procedural Rules* (35 Illinois Administrative Code Part 103, Subtitle A) nor the Illinois Environmental Protection Act (415 ILCS 5/) allows the awarding of attorneys' fees in a civil enforcement action brought pursuant to §31(d)(1) of the Illinois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

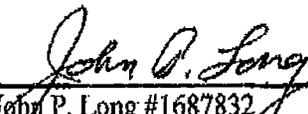
CASEYVILLE SPORT CHOICE, LLC,
An Illinois Limited Liability Company,

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 Fairview Heights, IL 62208
--	--



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

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

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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.)

ORIGINAL

PCB 2008-030

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.

Exhibit A

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 complaint 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).

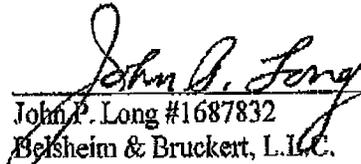
CASEYVILLE SPORT CHOICE, LLC,
An Illinois Limited Liability Company,

By John P. Long
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:

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--	--



John P. Long #1687832
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Attorney for Complainant

BELSHEIM & BRUCKERT, L.L.C.

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

ATTORNEYS AND COUNSELORS AT LAW

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

February 2, 2009

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FEB 05 2009

STATE OF ILLINOIS
Pollution Control Board

ORIGINAL

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
JOHN LONG

JL:clh
Encls

Cc: Carol Webb, Hearing Officer
Cc: Donald Urban
Cc: Penni S. Livingston

ILLINOIS POLLUTION CONTROL BOARD

April 16, 2009

CASEYVILLE SPORT CHOICE, LLC,)	
)	
Complainant,)	
)	
v.)	PCB 08-030
)	(Citizens Enforcement - Land)
ERMA I. SEIBER, ADMINISTRATRIX OF)	
THE ESTATE OF JAMES A. SEIBER,)	
DECEASED, AND ERMA I. SEIBER, IN)	
HER INDIVIDUAL CAPACITY, AND)	
FAIRMOUNT PARK, INC.,)	
)	
Respondents.)	

ORDER OF THE BOARD (by G.T. Girard):

This citizen's enforcement concerns the disposal of manure and municipal waste on three parcels of land in St. Clair County. The case is before the Board today on a Motion to Dismiss the Counterclaim filed by Caseyville Sport Choice, LLC (Caseyville). Caseyville filed the motion to dismiss the counterclaim of respondent/counterclaimant Fairmount Park, Inc. (Fairmount). Co-respondent Erma I. Seiber, Administratrix of the estate of James A. Seiber, did not file a motion to dismiss a counterclaim filed against the estate of James A. Seiber by Fairmount. For the reasons below, the Board grants Caseyville's motion to dismiss Fairmount's counterclaim against Caseyville. The Board finds Fairmount's counterclaim is frivolous as the claim requests relief that the Board does not have the authority to grant.

Below, the Board will provide the procedural history of the case before ruling on the motion.

PROCEDURAL HISTORY

On August 26, 2008, Caseyville filed an amended two-count complaint against Fairmount, and Erma I. Seiber in her individual capacity and as administratrix of the estate of James A. Seiber (Seiber), alleging violations of the Illinois Environmental Protection Act (Act). On January 5, 2009, respondent Fairmount filed an answer (Frmt. Ans.) to the amended complaint, whereby that included a counterclaim against Caseyville. Fairmount's counterclaim alleges that Caseyville "filed a frivolous claim against...Fairmount Park, knowing that other entities are responsible for the alleged violations." Frmt. Ans. at 13.

On February 3, 2009, Seiber filed an answer to Fairmount Park's counterclaim, including replies to Fairmount Park's asserted affirmative defenses. On February 5, 2009, Caseyville timely filed a Motion to Dismiss the Fairmount Park Counterclaim (Mot. to Dis.), which also included answers to Fairmount Park's asserted affirmative defenses. 35 Ill. Adm. Code 101.506.

Exhibit B

On February 18, 2009, Fairmount Park filed a response (Frmt. Res.) to Caseyville's motion to dismiss the counterclaim.

CASEYVILLE'S MOTION TO DISMISS

Caseyville argues that the only relief that Fairmount Park requests is an award of attorney's fees from Caseyville in order to reimburse Fairmount for litigation costs. Mot. to Dis., at 1. Caseyville further argues that nothing in the Board's procedural rules or the Act allows the Board to award attorney's fees in a citizen's enforcement. *Id.*

FAIRMOUNT PARK'S RESPONSE

Fairmount Park asserts in response to Caseyville's motion to dismiss that an award of attorney's fees is a "fair and proportionate approximation of damages incurred by [it] in an action wherein its participation is both unnecessary and improper." Frmt. Res., at 1. Fairmount also re-asserts the affirmative defenses as a basis for denial of Caseyville's motion to dismiss. *Id.*, at 2.

DISCUSSION

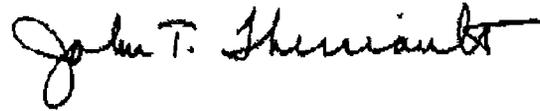
Under the Illinois Environmental Protection Act (Act), "any person may file with the Board a complaint,...against any person allegedly violating this Act, [or] any rule or regulation adopted under this Act...." 415 ILCS 5/31(d)(1)(2006). In this case, Fairmount Park included a counterclaim within its answer to Caseyville's amended complaint. Frmt. Ans. at 10-14. The Board treats this counterclaim as a new complaint and examines the sufficiency under Section 31(d)(1) of the Act, which requires that a complaint not be "duplicative or frivolous." 415 ILCS 5/31(d)(1) (2006).

Section 101.202 of the Board's procedural rules defines "frivolous" as "a request for relief that the Board does not have the authority to grant...." 35 Ill. Adm. Code 101.202. Fairmount Park's counterclaim requests the Board to "hold...Caseyville accountable for all costs of litigation including attorney's fees...." Frmt. Ans. at 14. Neither the Act nor the Board's procedural rules authorize the Board to award attorney's fees in a citizen's enforcement case, a fact which Fairmount does not dispute. *See* 35 Ill. Adm. Code 103 and 415 ILCS 5/1 *et. seq.* (2006); *See also*, Frmt. Res. at 1. Also, the Board's procedural rules do not include the awarding of attorney's fees or costs as a sanction. *See* 35 Ill. Adm. Code 101.800 and 101.802. Further, the Illinois Appellate Court's Third District has affirmed that "where the inherent power of a court is not exercised, the absence of specific authority permitting an award of attorney's fees prevents the shifting of fees to another party." *See ESG Watts v. IPCB & IEPA*, 286 Ill. Ap. 3d 325, 676 N.E.2d 299 (1997).

Because the counterclaim seeks relief that the Board is not authorized to grant pursuant to the Act and Board regulations, the Board grants Caseyville's Motion to Dismiss the Counterclaim of Fairmount Park. Therefore, the Board dismisses the Fairmount Park counterclaim as frivolous. This matter has previously been accepted for hearing, and the Board directs the hearing officer to proceed.

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on April 16, 2009, by a vote of 5-0.



John Therriault, Assistant Clerk
Illinois Pollution Control Board