

RECEIVED
CLERK'S OFFICE

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

FEB 04 2005

STATE OF ILLINOIS
Pollution Control Board

PEOPLE OF THE STATE OF ILLINOIS,)
by LISA MADIGAN, Attorney)
General of the State of Illinois,)
Complainant,)
-vs-)
EDWARD PRUIM, an individual, and)
ROBERT PRUIM, an individual,)
Respondents.)

PCB No. 04-207
(Enforcement)

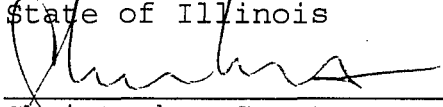
NOTICE OF FILING

PLEASE TAKE NOTICE that I have today, February 4, 2005, filed with the Clerk of the Illinois Pollution Control Board, Complainant's Reply and Motion to Strike Affirmative Defenses, a copy of which is attached and herewith served upon you.

Respectfully Submitted,

LISA MADIGAN
Attorney General of the
State of Illinois

By:


Christopher Grant
Assistant Attorney General
Environmental Bureau
188 West Randolph, #2001
Chicago, IL 60601
312-814-5388

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD FEB 04 2005

PEOPLE OF THE STATE OF ILLINOIS,)
by LISA MADIGAN, Attorney)
General of the State of Illinois,)
)
Complainant,)
)
-vs-)
)
EDWARD PRUIM, an individual, and)
ROBERT PRUIM, an individual,)
)
Respondents.)

STATE OF ILLINOIS
Pollution Control Board

PCB No. 04-207
(Enforcement)

**COMPLAINANT'S REPLY AND MOTION TO STRIKE RESPONDENTS
EDWARD PRUIM AND ROBERT PRUIM'S AFFIRMATIVE DEFENSES**

Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, pursuant to Section 101.506 of the Board's Procedural Rules and Section 2-615 of the Illinois Code of Civil Procedure, now replies to Respondents, EDWARD PRUIM and ROBERT PRUIM'S First Affirmative Defense, and moves for an order striking and dismissing the Respondents' Second Affirmative Defense. In support thereof, Complainant states as follows:

1. On May 21, 2004, Complainant filed its complaint against the Respondents. The Respondents subsequently moved to dismiss the complaint on various grounds. On November 4, 2004, the Board denied Respondents' motion, and directed the case to proceed to hearing.

2. On January 4, 2005, Respondents Edward Pruum and Robert

Pruim filed separate answers to the Complaint. Each answer included two affirmative defenses. The Affirmative Defenses are identical in both pleadings. In the interest of economy, Complainant requests that the Board allow it to reply to the First Affirmative Defense in both Answers, and moves to Strike the Second Affirmative Defense in both, in a single Reply/Motion to Strike.

I. LEGAL STANDARD FOR AFFIRMATIVE DEFENSES

3. An affirmative defense is "matter asserted by a defendant which, **assuming the complaint to be true**, constitutes a defense to it." BLACK'S LAW DICTIONARY 60 (6th ed. 1990) (emphasis added). In other words, an affirmative defense must give color to the opposing party's claim and then assert new matter by which the apparent right is defeated. *Ferris Elevator Company, Inc. v. Neffco, Inc.*, 285 Ill. App. 3d 350,354 (3rd Dist. 1996). An affirmative defense confesses or admits the cause of action alleged by the Complainant, then seeks to avoid it by asserting a new matter not contained in the complaint and answer. *Worner Agency, Inc. v. Doyle*, 121 Ill. App. 3d 219,222-223, (4th Dist. 1984). In addition, the facts in an affirmative defense must be pled with the same specificity as required by Complainant's pleading to establish a cause of action. *International Insurance Co. v. Sargent & Lundy*, 242 Ill. App. 3d 614, 630, (1st Dist. 1993).

II. REPLY TO RESPONDENTS' FIRST AFFIRMATIVE DEFENSE

4. Edward Pruum and Robert Pruum's first affirmative defenses each provide:

This complaint is barred because it is prejudicial to Respondent, is not timely filed and the allegations in the complaint are nearly identical to the allegations contained in the Second Amended Complaint, of the related case, People v. Community Landfill Company, PCB 97-197 (Enforcement). The allegations in this Complaint are based on documents that have been in the possession of the Illinois Environmental Protection Agency since 1993, 1995, and 1996. The Allegations in this Complainant were known to the Complainant when the 1997 Complaint was filed. Respondents have been the owners of CLC since the inception of the 1997 Complaint. All facts alleged in this Complaint were known to the Complainant since the related Complaint was filed in 1997.

5. Although the Respondents do not identify it as such, they appear to allege the affirmative defense of Laches. The elements of Laches have been described by the Board as a lack of diligence by the party asserting the claim, and prejudice to the opposing party. *People v. John Crane, Inc.*, PCB 01-76 (May 17, 2001, slip op. at 8). Although recognizing the defense, the Board notes that it is applicable to government enforcement actions only under compelling circumstances. *Id.* The Illinois Supreme court has held that equitable defenses [such as Laches] do not apply to public bodies under usual circumstances. *Hickey v. Illinois Central Railroad Co.*, 35 Ill. 2d 414, 425 [1966]. And the State cannot be estopped from exercise of its police powers. *Id.* (citing *People v. Levy Circulating Co.*, 17 Ill. 2d

168 [1959]).

REPLY: The Complainant denies that either Respondent has been prejudiced by any delay in filing this Complaint, and notes that Respondents admit that they own the Respondent in PCB 97-193. As owners they are fully aware of the allegations and facts related to that earlier-filed matter, and to those of this case.

Moreover, Complainant denies that the facts stated in Respondents' First Affirmative Defense arise to the 'compelling circumstances' required under *Hickey*.

III. MOTION TO STRIKE SECOND AFFIRMATIVE DEFENSE

6. Edward Pruiim and Robert Pruiim's Second Affirmative Defenses each provide:

This complaint is barred because Complainant has failed to state a claim for personal liability under the Act by failing to allege sufficient facts establishing that Respondent had personal involvement or active participation in the acts resulting in liability. Complainant has merely set forth allegations of Respondent's involvement and participation in the management of the corporation, which are insufficient to establish personal liability under the Act.

7. The Respondents' Second Affirmative Defense attacks the legal sufficiency of the complaint, and is nothing more than a restatement of its Motion to Dismiss, already denied by the Board. Raising the same pleading issue as an 'affirmative defense' is improper, and legally insufficient.

8. Respondents' September 10, 2004 Motion to Dismiss [excerpts attached as 'Exhibit A'] provides, in pertinent part:

3.B. Complainant has Failed to Allege Facts Establishing that the Respondents had Personal Involvement or Active Participation in the Acts Resulting in Liability.

9. Through Motion to Dismiss, Response, and Reply, the parties fully briefed this same issue. On November 4, 2004, the Board considered and rejected the same argument now propounded as an 'affirmative defense'. In its decision, the Board held, in part:

"The Board need look no further than the first 17 paragraphs of count I, which are incorporated into the remaining counts, to establish that the complaint is sufficient...the Board finds that the facts pled in the complaint are sufficient to establish [personal liability]" PCB 04-207, November 4, 2004, slip op. at 7.

10. The Respondents' Second 'affirmative defense' is improper for several reasons. Complainant first directs the Board to Section 2-615 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-615, which provides, in pertinent part:

(a) All objections to pleadings shall be raised by motion.

* * *

11. Respondents *did* raise their objections by motion, and were denied. Repeating these objections to the Complaint through pleading the same argument as an 'affirmative defense' is improper. Moreover, no facts are plead-merely legal conclusions which ignore the Board's prior ruling.

12. Also, the Second 'affirmative defense', cannot defend.

If the allegations in the complaint are accepted as true, and by the Board's ruling sufficient to state a cause of action against the Respondents, then the statement that 'the complaint...fails to allege sufficient facts....' cannot defeat liability. It merely attempts to cloud a decided legal issue.

For the reasons stated herein, Respondents' Second Affirmative Defense is legally insufficient, and should be stricken.

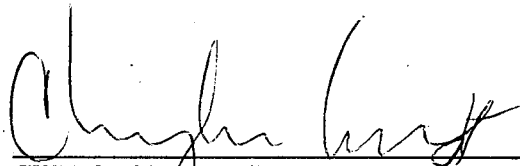
WHEREFORE, Complainant, PEOPLE OF THE STATE OF ILLINOIS, respectfully requests that the Board issue an Order:

1. Striking Respondents', EDWARD PRUIM and ROBERT PRUM'S Second Affirmative Defenses; and
2. Granting such other relief as the Board deems appropriate and just.

RESPECTFULLY SUBMITTED,

LISA MADIGAN, Attorney General of
the State of Illinois

BY:



CHRISTOPHER GRANT
Environmental Bureau
Assistant Attorney General
188 West Randolph Street,
20th Floor
Chicago, IL 60601
(312) 814-5388

RECEIVED
CLERK'S OFFICE

SEP 10 2004

STATE OF ILLINOIS
Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
)
vs.)
)
EDWARD PRUIM, an individual, and)
ROBERT PRUIM, an individual,)
)
Respondents.)

PCB No. 04-207
(Enforcement)

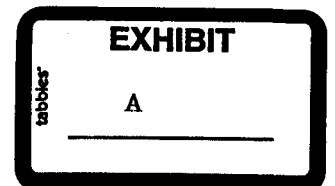
**RESPONDENTS EDWARD PRUIM AND ROBERT PRUIM'S MEMORANDUM OF
LAW IN SUPPORT OF RESPONDENTS' MOTION TO DISMISS COMPLAINT**

Respondents, EDWARD PRUIM and ROBERT PRUIM, (referred to collectively as "Respondents" or "the Pruims", or individually as "Edward Pruim" or "Robert Pruim") by and through their attorneys, LAROSE & BOSCO, LTD., and in opposition to the People of the State of Illinois' ("People" or "Complainant") Complaint, respond as follows:

I. Introduction

The allegations in the present complaint have been the subject of seven (7) years of intense litigation in an almost identical matter before the Illinois Pollution Control Board ("the Board") against Community Landfill Company ("CLC"), captioned PCB 97-193 ("the 1997 case"). The ongoing litigation in the 1997 case has included: a complaint filed in 1997, a First Amended Complaint filed in 1998, a Second Amended Complaint filed in 1999, and substantive rulings on liability both for and against CLC in both 2001 and 2002.

THIS FILING IS SUBMITTED ON RECYCLED PAPER



the 1997 case. The effect of consolidating these two cases would have the same practical effect of amending the complaint. As the Board stated in its March 18, 2004 order, "the new respondents would find a case where (CLC) has already been found in violation on a number of counts. Since the Board has already found violations, this places the new respondents in a difficult position, and the Board finds that they would be prejudiced." (See Exhibit A, page 4). The Board also reasoned that CLC was correct in pointing out that it would be prejudiced "because of the new delay necessary to allow new respondents to fully litigate the alleged violations against them." (See Exhibit A, page 4). Again, nothing has changed in this case since March 18, 2004 and the Board should dismiss the 2004 complaint in its entirety.

The Board has already determined that amending the complaint was untimely, prejudicial to CLC, and improper given that Complainant had numerous opportunities to previously amend the complaint. (See Exhibit A, page 4). The Board should not allow the Complainant to reach the same destination simply by taking another route. The Board should see through this procedural ruse and grant Respondents' Motion to Dismiss and dismiss the 2004 complaint in its entirety.

B. Complainant has Failed to Allege Facts Establishing that the Respondents had Personal Involvement or Active Participation in the Acts Resulting in Liability.

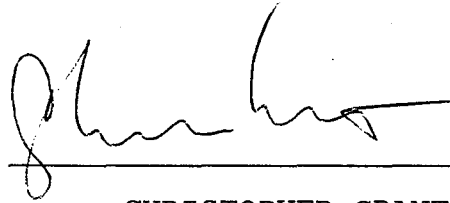
The Complainant has failed to meet its burden under Illinois which requires it to allege facts establishing that the Respondents had personal involvement or active participation in the acts resulting in liability, not just personal involvement or active participation in the management of the corporation. People v. Tang, 346 Ill.App.3d 277, 289, 805 N.E.2d 243, 253-54 (1st Dist. 2004). It is insufficient to merely make allegations that an officer "caused or allowed" certain actions to occur in violation of the Act or that the officers were acting in their corporate capacities. U.S. v.

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)
by LISA MADIGAN, Attorney)
General of the State of Illinois,)
Complainant,)
-vs-) PCB No. 04-207
(Enforcement)
EDWARD PRUIM, an individual, and)
ROBERT PRUIM, an individual,)
Respondents.)

CERTIFICATE OF SERVICE

I, CHRISTOPHER GRANT, an attorney, do certify that I caused to be served this 4th day of February, 2005, Complainant's Reply and Motion to Strike Affirmative Defenses upon the persons listed below by placing same in an envelope bearing sufficient postage with the United States Postal Service located at 100 W. Randolph, Chicago.



CHRISTOPHER GRANT

SERVICE LIST:
Mr. Mark Larose
Ms. Clarissa Grayson
Larose & Bosco, Ltd.
200 N. La Salle Street, #2810
Chicago, IL 60601

Mr. Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
100 W. Randolph
Chicago, Illinois 60601 [via hand delivery]