

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

In the Matter of:)
CASEYVILLE SPORT CHOICE, LLC,)
An Illinois Limited Liability Company,)
Complainant,)
vs.) PCB 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., (formerly)
known as OGDEN FAIRMOUNT, INC.))
A Delaware Corporation.)
Respondent.)

RESPONSE TO FAIRMOUNT PARK, INC.'S MOTION TO DISMISS COUNT II

Comes now the complainant, Caseyville Sport Choice, LLC, by its attorneys, Belsheim & Bruckert, L.L.C., and – for its response to the *Motion to Dismiss Count II Against Fairmount Park, Inc.*, filed by the respondent, Fairmount Park, Inc. – states the following:

1. The respondent Fairmount Park, Inc., asserts (a) that paragraph 7 of Count II of the complaint alleges that its manure and intermixed “municipal trash” was dumped on the Seibers’ parcels of land from approximately 1981 to 1993; (b) that the five-year statute of limitation set forth in §13-205 of the Code of Civil Procedure (735 ILCS 5/13-205) applies to citizens’ clean up cost recovery actions brought before the Board; (c) that the complainant filed its complaint in this case against the respondent more than 14 or 15 years after the last allegedly

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“actionable conduct” by the respondent; (d) that the five-year period of limitation applicable to the complainant’s clean up cost recovery action against the respondent expired before the complainant filed Count II of the complaint against the respondent; and (e) that, in consequence, Count II of the complaint against the respondent should be dismissed. See respondent’s *Motion to Dismiss Count II Against Fairmount Park, Inc.*, paragraphs 1 – 5.

2. The respondent Fairmount Park, Inc., cites the Board’s decision in *Unocal vs. Barge-Way Oil Co., Inc.*, PCB No. 98-169 (IPCB Jan. 7, 1999), as authority for the proposition that the five-year statute of limitation set forth in §13-205 of the Code of Civil Procedure (735 ILCS 5/13-205) applies to citizens’ clean up cost recovery actions brought before the Board.

3. The respondent ignores the fact that the Board, in its decision in *Unocal vs. Barge-Way Oil Co., Inc.*, PCB No. 98-169 (IPCB Jan. 7, 1999), recognized the applicability of the “discovery rule,” in citizens’ clean up cost recovery actions under the Illinois Environmental Protection Act (415 ILCS 5/), to determining when the five-year period set forth in §13-205 of the Code of Civil Procedure (735 ILCS 5/13-205) begins to run.

3. The Board further recognized the applicability of the “discovery rule” – in citizens’ clean up cost recovery actions under the Illinois Environmental Protection Act (415 ILCS 5/), to determining when the five-year period set forth in §13-205 of the Code of Civil Procedure (735 ILCS 5/13-205) commences – in its decision in *Unocal vs. Barge-Way Oil Co., Inc.*, PCB No. 98-169 (IPCB Feb 15, 2001), *3 and footnote 2 at *8.

4. The Board defined the “discovery rule,” in footnote 2 on page 8 of its decision in *Unocal vs. Barge-Way Oil Co., Inc.*, PCB No. 98-169 (IPCB Feb 15, 2001), as follows:

“The ‘discovery rule’ provides that a statute of limitation begins to run not on the date that an injury actually occurred, but on the date that the injured person knew or reasonably should have known of the injury and that the injury was wrongfully caused. See *Hermitage Corp. v. Contractors Adjustment Co.*, 166 Ill. 2d 72, 651 N.E.2d 1132

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(1995).”

See also Johnson vs. Tipton, 103 Ill.App.3d 291, 300, 431 N.E.2d 464, 473, 59 Ill. Dec. 179, 188 (2d Dist. 1982).

5. The complainant, Caseyville Sport Choice, LLC, alleged the following in paragraph 7 of Count II against the respondent Fairmount Park, Inc.:

7. Describe the duration and frequency of the alleged pollution. Be as specific as you reasonably can about when you first noticed the alleged pollution, how frequently it occurs, and whether it is still continuing (include seasons of the year, dates, and times of day if known)

The respondents dumped the horse manure and intermixed “municipal trash” over a period of years (from approximately 1981 to 1993) preceding their conveyance of the parcels of land to the complainant on December 16, 2004. ***The complainant became aware of the huge amount of horse manure, and the presence of “municipal trash” intermixed with the horse manure, in April, 2005, in the course of developing the land for a subdivision.*** Since obtaining title and possession to the parcels of land, the complainant has not allowed the dumping of any more horse manure or intermixed “municipal trash” on the parcels of land.

Emphases, by bolded italics, added.

6. Under the “discovery rule,” the five-year period of limitation – on the complainant, Caseyville Sport Choice, LLC’s citizen’s clean up cost recovery action under the Illinois Environmental Protection Act (415 ILCS 5/) against the respondent Fairmount Park, Inc., thus did not begin to run until April, 2005, when the complainant “became aware of the huge amount of horse manure,” [over 159,000 tons of horse manure (*see* Count II, paragraph 6)] “and the presence of ‘municipal trash’” [over 2,600 tons of ‘municipal trash’ (*see* Count II, paragraph 6)] “intermixed with the horse manure.”

7. The respondents Seiber acted as the agent of the respondent Fairmount Park, Inc., in hauling the manure and intermixed “municipal trash” from the race track to – and in dumping

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those waste materials on – the respondents Seiber's land. *See, e.g.*, copy of a signed contract between the respondent Fairmount Park, Inc., and James Seiber (now deceased), dated February 9, 1990, for the hauling of “manure and other trash generated at Fairmount Park,” attached hereto as *Exhibit A*.

8. Consequently, the knowledge of the respondents Seiber – of the dumping and continued presence of the manure and intermixed “municipal trash” on the land – should not be attributed to or otherwise counted against the complainant, Caseyville Sport Choice, LLC, in determining when (under the “discovery rule”) it knew enough for the five-year period of limitation, applicable to its citizen's clean up cost recovery action under the Illinois Environmental Protection Act (415 ILCS 5/), to begin running.

9. James Seiber, Jr., the son of the deceased James Seiber, has testified in his discovery deposition as follows concerning Fairmount Park, Inc.'s knowledge that the Seibers were dumping the manure and other trash from the race track on the Seibers' land:

“Q. So Fairmount racetrack specifically wanted the manure to be hauled to your land to avoid the higher fees at the landfill?”

A. They would rather have it going there than to a landfill.” *See* discovery deposition of James Seiber, Jr., taken on May 30, 2008, at page 63, lines 5 – 9, attached as *Exhibit B*.

10. If April, 2005, is taken – in accordance with the “discovery rule”– as the time when the five-year statute of limitation began to run, the complainant, Caseyville Sport Choice, LLC, timely filed its initial complaint and Count II of its first amended complaint against the respondent Fairmount Park, Inc.

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WHEREFORE, the complainant, Caseyville Sport Choice, LLC, prays that the Board will deny the *Motion to Dismiss Count II Against Fairmount Park, Inc.*, filed by the respondent, Fairmount Park, Inc.

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

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

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CERTIFICATE OF SERVICE*

I, the undersigned, certify that I have served a copies of the foregoing document by depositing the copies of the document in the United States mail at the post office in O'Fallon, Illinois, on _____, 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 <i>Attorney for Respondents Seiber</i>	Charles E. Hamilton Attorney at Law 87 Oak Hill Drive P.O. Box 24240 Belleville, IL 62223 <i>Attorney for Respondent Fairmount Park, Inc.</i>
--	--

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

**This document is being filed electronically with the Illinois Pollution Control Board after 5:00 p.m. on Tuesday, September 23, 2008, and will be mailed to opposing counsel on Wednesday, September 24, 2008. After that mailing has occurred, the attorney for the complainant will electronically file a Certificate of Service indicating such service.*

Exhibit A

AGREEMENT

AGREEMENT made this 9th day of February 1990, by and between Ogden Fairmount, Inc. ("Ogden") and JAMES SEIBER, d/b/a/ SEIBER HAULING & EXCAVATING ("Seiber").

WITNESSETH:

WHEREAS, Ogden owns and operates Fairmount Park Race Track in Collinsville, Illinois ("Fairmount Park"); and

WHEREAS, Ogden desires to engage Seiber to provide services relating to the storage, collection and removal from Fairmount Park of manure and other trash generated at Fairmount Park, and Seiber desires to be so engaged on the terms and conditions set for herein.

NOW, THEREFORE, the parties hereto hereby agree as follows:

1. During the term of this Agreement, Seiber shall furnish all trucks, containers and personnel necessary for the collection, storage and removal of trash and manure at Fairmount Park that is placed in said containers.

2. The parties acknowledge that Seiber presently has on location at Fairmount Park containers for the collection and storage of trash and manure, the following:

- 65 - 8 yard containers
- 8 - 3 yard containers
- 1 - 4 yard container
- 19 - 1½ yard containers.

Seiber will supply containers in addition to those listed above for an additional charge of \$250 per month per container if requested to do so by Ogden.

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3. One 3 yard container shall be located in the trailer court area of Fairmount Park and shall be emptied by Seiber once a week. One 4 yard container shall be located in the dormitory area of Fairmount Park and shall be emptied by Seiber once a week. Nineteen 1½ yard containers shall be located in the barn area of Fairmount Park as designated by Ogden and shall be emptied by Seiber once a week. All other containers shall be located as directed by Ogden and shall be emptied by Seiber daily (seven days per week).

4. Seiber shall dispose of all trash and manure collected at Fairmount Park in dumping places or landfills in strict compliance with all applicable laws.

5. In the event that any containers are damaged by Ogden's agents or employees, such containers shall be replaced by Seiber at Ogden's expense.

6. All containers and equipment used or required hereunder shall be regularly maintained, cleaned and painted consistent with the dignity of the operations at Fairmount Park and shall, at a minimum, comply with all applicable laws, rules and regulations of any Federal, State or Local government authorities.

7. The following insurance shall be maintained by Seiber in connection with its operations hereunder:

(a) Workmen's Compensation and Employers Liability as respects operations to be performed in the State of Illinois;

(b) Comprehensive General and Automobile Liability in at least the following minimum limits:

Bodily Injury - \$100,000.00 each occurrence -

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\$100,000.00 aggregate.

Property Damage - \$100,000.00 each occurrence -
\$100,000.00 aggregate.

The Comprehensive General-Automobile Liability policy must include Ogden Fairmount, Inc., its parent, subsidiaries and affiliated companies as additional named insureds.

(c) The insurance required hereunder shall be primary and not contributing with any insurance carried by Ogden. Ogden shall be given at least ten days advance written notice of any material change in or cancellation of the above coverages.

(d) On all of the above policies, Seiber shall furnish Ogden within fifteen days prior to commencement of this Agreement, with certificates evidencing such coverage by responsible companies licensed in the State of Illinois.

8. Seiber agrees to indemnify and hold Ogden harmless from and against any and all damages, losses, costs, claims or expenses, including reasonable Attorney's fees, resulting from or arising out of Seiber's services hereunder, including, without limitation, any claims of violations of laws or regulations relating to disposal of trash and manure; in any such action, Seiber shall defend at its own cost, and with Attorneys chosen by Seiber any such claims. Ogden shall take all reasonable action to cooperate with Seiber in the defense of the claim; and if Ogden does not, Seiber shall be released of the obligation to defend, indemnify and hold harmless. If such cooperation by Ogden involves any costs or expenses Seiber shall pay such costs and expenses in advance.

9. In consideration for the services to be rendered by Seiber

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hereunder, Ogden agrees to pay Seiber THIRTEEN THOUSAND FIVE HUNDRED AND 00/100 (\$13,500.00) per month; provided, however, that if during the term of this Agreement it shall become unlawful for Seiber to dispose of the manure from Fairmount Park at Seiber Farm, and as a result, Seiber is required to dispose of manure at a public landfill, the amount to be paid Seiber under this Agreement shall be re-negotiated. If the parties shall fail to reach Agreement with respect thereto, this amount to be paid to Seiber shall be submitted to binding arbitration following the rules of the American Arbitration Association, with three arbitrators to be chosen locally; one by each side and the third by the other two arbitrators. The decision of the arbitrators shall be binding on each party.

10. In the event that horse racing is suspended at Fairmont Park during the term of this Agreement due to labor disputes, acts of God or any other reason whatsoever, the parties' obligations hereunder shall also be suspended for the duration of such suspension, and Ogden shall not be required to make any payments hereunder to Seiber during such period.

11. The term of this Agreement shall commence on the date hereof and shall continue for a period of three years. Further, Ogden grants an option to renew this Agreement with Seiber at the end of the three-year period and Ogden shall not enter into a contract, with anyone else, to do this work, until it is unable to negotiate an Agreement with Seiber.

12. Ogden shall have the right to cancel this Agreement before the expiration of its full term in the event that:

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(a) Seiber fails to perform its obligations hereunder;

or

(b) (1) Seiber violates any valid law, rule or regulations of any Federal, State or Local governmental authority applicable to Seiber's operations hereunder; or

(2) Commits any acts, or omits to perform any act; either of which (b1 or b2) subjects Ogden to any disciplinary procedure or action of any Federal, State or Local governmental authority. Provided that if Seiber fails to perform under the Agreement, he shall be so notified in writing and be allowed thirty days to correct the violation of the Agreement.

13. All manure collected or stored in containers provided by Seiber shall become the exclusive property of Seiber.

IN WITNESS WHEREOF, the undersigned have duly executed this Agreement on the date and year first above written.

OGDEN FAIRMOUNT, INC.

James a Seiber
JAMES SEIBER, d/b/a SEIBER
HAULING AND EXCAVATING

BY: Brian H Zander

Exhibit B

ORIGINAL

Deposition of
James Seiber, Jr.

Caseyville Sport Choice, LLC

-VS-

Erma I. Seiber, et al

PCB 2008-030

May 30, 2008

Reporter: Lynn Bartimus, CSR

Keefe Reporting Company
618-277-0190 or 800-244-0190
Reporter@KeefeReporting.com

STATE OF ILLINOIS
POLLUTION CONTROL BOARD
JAMES R. THOMPSON CENTER
100 W. RANDOLPH STREET, SUITE 11-500
CHICAGO, IL 60601

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OF THE ESTATE OF JAMES A.)
SEIBER, DECEASED, AND ERMA I.)
SEIBER, IN HER INDIVIDUAL)
CAPACITY,)

Respondent.)

Discovery Deposition of
JAMES SEIBER, JR.
Taken on Behalf of the Complainant
May 30th, 2008

Reporter: Lynn E. Bartimus, RPR
IL CSR No. 084-004150, MO C.C.R. No. 960
KEEFE REPORTING COMPANY
reporter@keefereporting.com
618-277-0190 1-800-244-0190
11 North 44th Street, Belleville, Illinois 62226

KEEFE REPORTING COMPANY

1

EXHIBITS

1 Diagram 42
Original exhibit attached to original transcript.

IT IS STIPULATED AND AGREED by and between counsel for Plaintiff and counsel for Defendant that the deposition of JAMES SEIBER, JR., may be taken for discovery purposes, pursuant to and in accordance with the provisions of the Illinois Code of Civil Procedure and Supreme Court Rules pertaining to such depositions, by and on behalf of the Complainant, on May 30th, 2008, at Sprague and Urban, 26 E. Washington Street, Belleville, Illinois, before Lynn E. Bartimus, a Notary Public and Certified Shorthand Reporter, that the issuance of notice is waived, and that this deposition may be taken with the same force and effect as if all statutory requirements had been complied with.

IT IS FURTHER STIPULATED AND AGREED that the signature of the deponent is waived.

JAMES SEIBER, JR., produced, sworn, and

examined on behalf of the Complainant, testified

and deposed as follows:

KEEFE REPORTING COMPANY

3

STATE OF ILLINOIS
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SEIBER, IN HER INDIVIDUAL)
CAPACITY,)

Respondent.)

APPEARANCES

John P. Long, Esq.
Belsheim & Bruckert, LLC
1002 E. Wesley Dr., Ste. 100
O'Fallon, IL 62269
For the Complainant

Donald W. Urban, Esq.
Sprague & Urban
26 East Washington Street
Belleville, IL 62220
For the Respondent

INTERROGATION INDEX
Direct Examination By Mr. Long 4
Cross-Examination By Mr. Urban 54
Redirect Examination By Mr. Long 57
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2

1 MR. LONG: The first thing I need to
2 ask is how to say this gentleman's last name.
3 I've been saying Seiber --
4 THE WITNESS: Seiber.
5 MR. LONG: Seiber, I'm sorry. Okay.
6 MR. URBAN: Well, we have two spellings
7 of Erma, I see, on the pleading. And I believe
8 it's E, isn't it?
9 THE WITNESS: Yes.
10 MR. URBAN: I see some have I-r-m-a.
11 THE WITNESS: I don't know.
12 MR. LONG: We'll change it.
13 DIRECT EXAMINATION
14 BY MR. LONG:
15 Q. Would you state your name, please, sir?
16 A. James Seiber.
17 Q. And you are James Seiber, Jr.?
18 A. I'm James Alvin Seiber, yes.
19 Q. And you are the son of James A. Seiber
20 Sr. and Erma Seiber?
21 A. Yes, sir.
22 Q. Where do you reside now, Mr. Seiber?
23 A. I live at 508 Greenwood in
24 Collinsville.

4

1 we averaged about six loads per day, seven days a
2 week. You know, it's like a train, back and
3 forth. We are everywhere. We were going through
4 there. You know, we just had the one truck.
5 Sometimes, we had two. But it was just the one
6 truck mainly was going. But it was an average of
7 six loads a day, which six loads in a garbage
8 truck is like two tandem truckloads because it
9 compresses it tight and then it fluffs back up
10 when you dump it. I ran the dozer at the farm.
11 Later on, we had another truck driver work, so I
12 would be at the farm --
13 **Q. Let me stop you there. When you said**
14 **you ran the dozer at the farm, was that for the**
15 **purpose of covering up the manure with dirt?**
16 A. You had to knock it down. You had to
17 push it back. We pushed it back. We knocked it
18 down. We bought a 621 scraper. That was when the
19 EPA would come down and make sure we were doing it
20 right. After the first lawsuit, they got -- you
21 know, they wanted this done. Ken told me --
22 **Q. Ken Mensing, you are talking about?**
23 A. Mensing, yes. He told me --
24 **Q. And he is the gentleman from the**

61

1 **Illinois EPA?**
2 A. He is retired now. But he told me that
3 he would rather have it going to our farm than
4 going to a landfill, because it took up valuable
5 space at a landfill, and it wasn't hurting
6 anything at our farm. But, you know, they would
7 come in. They would check on us. They just
8 showed up. And I remember walking around the site
9 with them. And that was on this site, the one
10 listed as number two.
11 **Q. Did you talk to any of top officials at**
12 **Fairmont racetrack?**
13 A. I sat in all the meetings with Brian
14 Zanders, Fred Haida. We had lawyers from New York
15 that -- when we actually -- they couldn't afford
16 to take and haul it to the landfill. It was like
17 \$250 a load at the time. It went from -- in the
18 beginning, it was \$25 a yard, which was \$25 a ton,
19 or a truckload. And then they jumped the price up
20 to \$250 a load, because the --
21 **Q. You are talking about at a landfill?**
22 A. The landfills. The landfills. So we
23 called there to keep the expenses down. And then
24 Fairmont, they told us, if we had to go to a

62

1 landfill, they couldn't afford to pay it. So we
2 hauled to there. And everybody was all right with
3 it. Caseyville was all right with it. The EPA
4 was all right with it.
5 **Q. So Fairmont racetrack specifically**
6 **wanted the manure to be hauled to your land to**
7 **avoid the higher fees at the landfill?**
8 A. They would rather have it going there
9 than to a landfill.
10 **Q. All right. You said you sat in a**
11 **meeting with lawyers from New York?**
12 A. That was at the end, when they finally
13 put the injunction on us. They never could take
14 and -- they never really did anything. They put a
15 cease stop on it. One day, they went to court,
16 and it was over. Because they would go back and
17 forth to court for years. The county would bump
18 heads. We want you to do this. We want you to do
19 this. But they never ever stopped us. Well,
20 then, they come in there, and they said, "That's
21 it." They told us that we couldn't dump anywhere
22 unless it was a landfill. Then we never ever
23 hauled anything there after that.
24 They took and come -- then the lawyers

63

1 from New York was like, "We have got to do
2 something. We are going to have to go in there."
3 Well, that's when we started doing composting at
4 Fairmont Park. Never at the farm.
5 **Q. What were the lawyers from New York**
6 **doing? Why were they there?**
7 A. Contract negotiations for our contract.
8 **Q. With you and your father or with your**
9 **father, actually?**
10 A. Yes. Actually with my father. I just
11 sat in on the stuff. My dad always wanted me to
12 know about everything.
13 **Q. How many times did you sit through a**
14 **contract negotiation like that?**
15 A. Oh, I probably went through -- our
16 contracts were good for like three or four years.
17 I probably went through like six of them. I think
18 we had the contract for like 16 years. But we
19 didn't haul -- we didn't haul all that here the
20 whole time. But we had the contract for 16 years.
21 **Q. Did the officials at Fairmont racetrack**
22 **ever say, on any other occasion other than the one**
23 **meeting you talked about, that they understood**
24 **that your father was hauling the manure to his**

64

1 land there in Caseyville?
2 A. Well, I don't know. I really
3 couldn't -- I couldn't put words in other people's
4 mouth. I know we had the foreman at the track,
5 Frank Killian. He used to come out. He would
6 walk the whole farm looking for mushrooms. He was
7 always there. They would come in and out. They
8 would show up at the farm.

9 Q. Who else -- what other officials from
10 Fairmont racetrack showed up?

11 A. Well, Frank is the only one I know that
12 actually came to the farm. I know Jim DeValle
13 knew we were talking and doing it. Fred Haida, he
14 would be in there. He was actually head of
15 security. His son was one of the prosecutors that
16 was prosecuting us over a lot of stuff.

17 Q. Bob Haida is Fred Haida's son?

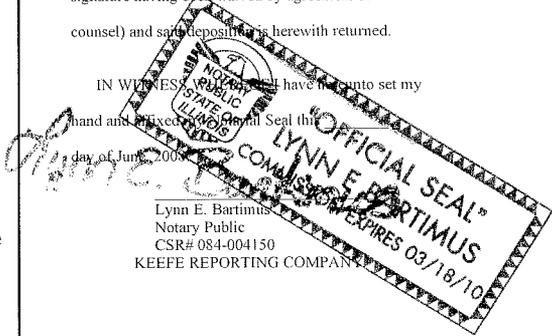
18 A. Yes. So people say they don't know
19 about it, but it was just common knowledge.

20 Q. All right. Just -- I can only think of
21 one other question. I've said this before, but I
22 really am down to the last question now. That day
23 when you took -- when you rode around with Mike
24 Eagan and this gentleman named Dick, did the

STATE OF ILLINOIS)
) SS
COUNTY OF ST. CLAIR)

I, Lynn E. Bartimus, a Notary Public in and
for the County of St. Clair, State of Illinois, DO
HEREBY CERTIFY that pursuant to agreement between
counsel there appeared before me on May 30th,
2008, at Sprague and Urban, 26 E. Washington
Street, Belleville, Illinois, JAMES SEIBER, JR.,
who was first duly sworn by me to testify the
whole truth of his knowledge touching upon the
matter in controversy aforesaid so far as he
should be examined, and his examination was taken
by me in shorthand and afterwards transcribed upon
the computer (but not signed by the deponent, his
signature having been waived by agreement of
counsel) and said deposition is herewith returned.

IN WITNESS WHEREOF, I have hereunto set my
hand and affixed the Notary Seal this
14 day of June, 2008.



Lynn E. Bartimus
Notary Public
CSR# 084-004150
KEEFE REPORTING COMPANY

1 manure still smell at all? Could you tell the
2 manure was there just from smelling it?

3 A. Not unless you went way down there and
4 started kicking it around, no.

5 Q. So it had been in place long enough
6 that you couldn't notice an odor from it?

7 A. No. We hadn't hauled anything for
8 three years. I pointed it out, but there was no
9 smell.

10 MR. LONG: Now I think I am finished.
11 You have said before you waive.

12 MR. URBAN: We will waive signature.
13 SIGNATURE WAIVED

14
15 (The reporter marked Exhibit Number 1
16 for identification.)
17
18
19
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22
23
24