

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.)	

NOTICE OF FILING

To:

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

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

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

PLEASE TAKE NOTICE THAT I have on January 31, 2011 electronically filed with the Office of the Clerk of the Pollution Control Board E.R. 1, LLC, AS ASSIGNEE OF COMPLAINANT CASEYVILLE SPORT CHOICE, LLC, MOTION FOR LEAVE TO FILE *INSTANTER* and E.R. 1, LLC, AS ASSIGNEE OF COMPLAINANT CASEYVILLE SPORT CHOICE, LLC, RESPONSE TO RESPONDENTS ERMA I. SEIBER, ADMINISTRATRIX OF THE ESTATE OF JAMES A. SEIBER AND IN HER INDIVIDUAL CAPACITY AND FAIRMOUNT PARK, INC.'S MOTIONS TO DISMISS CAUSE AS FRIVOLOUS FOR LACK OF BOARD AUTHORITY TO GRANT RELIEF OF REIMBURSEMENT OF CLEAN UP COSTS AS REQUESTED BY COMPLAINANT, a copy of which is hereby served upon you.

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FAIRMOUNT PARK, INC., a Delaware)	
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Respondents.)	

E.R. 1, LLC, AS ASSIGNEE OF COMPLAINANT CASEYVILLE SPORT CHOICE, LLC, MOTION FOR LEAVE TO FILE INSTANTER

E.R. 1, LLC, ("E.R. 1") as assignee of Complainant Caseyville Sport Choice, LLC ("CSC"), by and through its undersigned counsel, hereby moves for leave to file *instanter* a Response to Respondents Erma I. Seiber, Administratrix of the Estate of James A. Seiber and in Her Individual Capacity ("Seiber") and Fairmount Park, Inc.'s ("Fairmount") (Fairmount and Seiber are collectively referred to herein as "Respondents") Motions to Dismiss Cause as Frivolous for Lack of Board Authority to Grant Relief of Reimbursement of Clean Up Costs as Requested By Complainant, and states as follows:

1. CSC filed its complaint against Respondents in 2008.
2. Respondents filed motions to dismiss CSC's complaint two years later in 2010.

On information and belief, Respondents delayed filing their motions to dismiss well beyond the thirty days allowed for the filing of such motions under 35 Ill. Admin. Code § 101.506, based on

the Respondents' belief that certain statute of limitations might run for claims that CSC might have against Respondents under Illinois law

3. In January 2011, CSC offered to assign its claims against Respondents to E.R. 1.

4. Without waiving its rights to seek further relief against CSC for outstanding amounts owed and other claims, E.R. 1 accepted assignment of CSC's claims against Respondents on January 31, 2011.

5. E.R. 1 respectfully requests leave to file the attached Response *instanter*.

WHEREFORE, E.R. 1, LLC, As Assignee of Complainant Caseyville Sport Choice, LLC, respectfully requests leave to file *instanter* the Response to Respondents Motions to Dismiss Cause as Frivolous for Lack of Board Authority to Grant Relief of Reimbursement of Clean Up Costs as Requested By Complainant, and grant any other and further relief as the IPCB deems just and proper.

Dated: January 31, 2011

Respectfully submitted,

By: 

Daniel Nester (ARDC No. 6208872)

Steven J. Poplawski (ARDC No. 6193897)

Pamela Howlett, Esq. (ARDC No. 6281863)

Christopher Blaesing, Esq.

(ARDC No. 6298240)

Bryan Cave LLP

211 North Broadway, Suite 3600

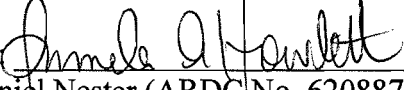
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*Attorneys for E.R. 1, LLC, As Assignee of
Caseyville Sport Choice, LLC*

Respectfully submitted.

By: 

Daniel Nester (ARDC No. 6208872)

Steven J. Poplawski (ARDC No. 6193897)

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

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)	
Respondents.)	

E.R. 1, LLC, AS ASSIGNEE OF COMPLAINANT CASEYVILLE SPORT CHOICE, LLC, RESPONSE TO RESPONDENTS ERMA I. SEIBER, ADMINISTRATRIX OF THE ESTATE OF JAMES A. SEIBER AND IN HER INDIVIDUAL CAPACITY AND FAIRMOUNT PARK, INC.'S MOTIONS TO DISMISS CAUSE AS FRIVOLOUS FOR LACK OF BOARD AUTHORITY TO GRANT RELIEF OF REIMBURSEMENT OF CLEAN UP COSTS AS REQUESTED BY COMPLAINANT

E.R. 1, LLC ("E.R. 1") as Assignee of Complainant Caseyville Sport Choice, LLC ("CSC"), by and through its undersigned counsel, in support of its Response to Respondents Erma I. Seiber, Administratrix of the Estate of James A. Seiber and in Her Individual Capacity ("Seiber") and Fairmount Park, Inc.'s ("Fairmount") (Fairmount and Seiber are collectively referred to herein as "Respondents") Motions to Dismiss Cause as Frivolous for Lack of Board Authority to Grant Relief of Reimbursement of Clean Up Costs as Requested By Complainant, pursuant to 35 Ill. Admin. Code § 101.500(d), states as follows:

I. INTRODUCTION

This action arises out of CSC's effort to obtain reimbursement for costs it incurred in remediating more than 160,000 tons of Fairmount's racetrack waste (consisting of horse manure and other solid waste) disposed of on Seiber's property prior to CSC's purchase of the property from Seiber in 2004. CSC did not learn of the extent of the improper disposal of Fairmount's waste until after CSC had purchased the property when CSC attempted to develop the property for residential use. Once CSC made the initial discovery that a significant amount of waste was disposed on the property, its subsequent due diligence revealed that Fairmount had contracted with Mr. Seiber to have him remove and dispose of Fairmount's waste from at least 1981 until 1993, and that, for this twelve-year period, Seiber disposed of Fairmount's waste almost exclusively on the property that is now owned by CSC. Upon CSC's discovery of the full nature and extent of the waste on its property, CSC cleaned up Fairmount's waste, under Illinois Environmental Protection Agency supervision, at a cost to CSC in excess of \$4.5 million. E.R. 1, LLC as assignee of CSC's claims, now seeks reimbursement from Respondents under the Illinois Environmental Protection Act (the "Act") for the costs CSC incurred as a result of the actions of Respondents.

CSC filed its First Amended Formal Complaint against Respondents in 2008, to which Seiber and Fairmount filed motions to dismiss in November and July 2010, respectively.^{1/} The Respondents' Motions are both based solely on the contention that the Act does not provide the relief CSC seeks. As the argument herein demonstrates, Respondents contention is wrong and CSC respectfully submits that the Respondents' Motions should be denied.

^{1/} Note, while Respondents' Motions should be denied on the merits, Respondents' Motions are also procedurally defective under the procedural rules of the Illinois Pollution Control Board, which require that all motions to dismiss must be filed within 30 days after service of the challenged document. *See* 35 Ill. Admin. Code § 101.506.

II. ARGUMENT

Respondents assert that the Illinois Pollution Control Board (“IPCB”) cannot grant CSC’s request for reimbursement by Respondents under the Act for costs CSC incurred in cleaning up Fairmount’s waste that was improperly disposed of on what is now CSC’s property. In their respective motions to dismiss, the Respondents argue that the Act does not authorize a private party to obtain reimbursement of cleanup costs for removal and disposal of solid waste. See Seiber’s Motion to Dismiss at Para. 3; Fairmount’s Motion to Dismiss at Para. 2. In short, Respondents are incorrect, as the IPCB has explicitly held that it may award reimbursement for cleanup costs to a private party for violations of the Act by parties such as Respondents.

As recently as March 2010, the IPCB has found that the Board can award a petitioner, like CSC, reimbursement of response costs under Section 33(a) of the Act, which section authorizes the IPCB to issue and enter a final order “it deems appropriate under the circumstances.” See 415 ILCS 5/33(a); Elmhurst Memorial Healthcare v. Chevron U.S.A. Inc., PCB 09-066, slip op. at 23 (Mar. 18, 2010). Notably, in Elmhurst, the respondent Chevron, unlike the Respondents in this matter, recognized the Board’s authority to grant clean-up cost recovery, but requested that the Board reconsider its position. Elmhurst at p. 23. Less than a year ago, the Board refused Chevron’s invitation to reconsider its position and reaffirmed the right of petitioner’s, like CSC, to seek reimbursement for clean-up costs resulting from the violation of parties such as CSC. This 2010 opinion is only a recent example of the line of cases wherein the IPCB has consistently held that it may order a respondent to reimburse a private party for clean-up costs incurred as a result of respondent’s violation of the Act. See, e.g., Grand Pier Center LLC v. River East LLC, PCB 05-157, slip. op. at 5 (May 19, 2005); Chrysler Realty

Corp. v. Thomas Industries, Inc., PCB 01-25, slip op. at 7 (Dec. 7, 2000); Lake County Forest Preserve v. Ostro, PCB 92-80 (Mar. 31, 1994).^{2/}


Therefore, IPCB may award CSC reimbursement from Respondents for clean-up costs in the event that it finds that Respondents, either individually or collectively, violated the Act.

III. CONCLUSION

Respondents have misstated the law in their motions to dismiss. IPCB precedent has clearly and unequivocally held that the IPCB can award clean-up costs to private parties for violations of the Act by respondents. Therefore, E.R. 1, as assignee of Complainant Caseyville Sport Choice, LLC respectfully requests that the IPCB deny Respondents motions to dismiss, and grant any other and further relief as the IPCB deems proper.

Dated: January 31, 2011

Respectfully submitted,

By: 

Daniel Nester (ARDC No. 6208872)

Steven J. Poplawski (ARDC No. 6193897)

Pamela Howlett, Esq. (ARDC No. 6281863)

Christopher Blaesing, Esq.

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

^{2/} Further, Illinois Supreme Court precedent supports the IPCB's interpretation of the scope of the Board's authority under Section 33 of the Act. See People v. Fiorini, 143 Ill.2d 318, 350 (1991) (Court declined "to hold here that an award of cleanup costs would not be an available remedy for a violation of the Act under appropriate facts," and that the issue should be left to the trial's court discretion).

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ERMA I. SEIBER, in Her Individual)	
Capacity, and)	
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CERTIFICATE OF SERVICE

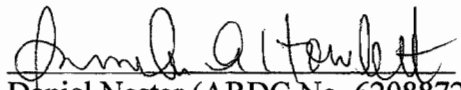
I, the undersigned, on January 31, 2011, caused the foregoing E.R. 1, LLC, AS ASSIGNEE OF COMPLAINANT CASEYVILLE SPORT CHOICE, LLC, MOTION FOR LEAVE TO FILE *INSTANTER* and ER1, AS ASSIGNEE OF COMPLAINANT CASEYVILLE SPORT CHOICE, LLC, RESPONSE TO RESPONDENTS ERMA I. SEIBER, ADMINISTRATRIX OF THE ESTATE OF JAMES A. SEIBER AND IN HER INDIVIDUAL CAPACITY AND FAIRMOUNT PARK, INC.'S MOTIONS TO DISMISS CAUSE AS FRIVOLOUS FOR LACK OF BOARD AUTHORITY TO GRANT RELIEF OF REIMBURSEMENT OF CLEAN UP COSTS AS REQUESTED BY COMPLAINANT and NOTICE OF FILING to be electronically filed with the Office of the Clerk, and caused a true and correct copy of said documents to be served upon:

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

Donald W. Urban
Sprague and Urban
26 E. Washington Street
Belleville, Illinois 62220
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Penni S. Livingston
Attorney at Law
5701 Perrin Road
Fairview Heights, Illinois 62208
Attorney for Fairmount Park, Inc.

By placing same in U.S. Mail at St. Louis, Missouri.



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Caseyville Sport Choice, LLC*



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January 31, 2011

VIA ELECTRONIC FILING

Illinois Pollution Control Board
Clerk's Office
James R. Thompson Center, Suite 11-500
100 West Randolph Street
Chicago, Illinois 60601
<http://www.ipcb.state.il.us>

Re: Caseyville Sport Choice, LLC v. Erma I. Seiber, Administratrix of the Estate of James A. Seiber, Deceased and In Her Individual Capacity and Fairmount Park, Inc. (PCB 2008-030)

This law firm represents E.R. 1, LLC, as assignee of Caseyville Sport Choice, LLC in the above described case. Please find enclosed the following pleadings:

- E.R. 1, LLC, As Assignee of Complainant Caseyville Sport Choice, LLC, Motion for Leave to File *Instantly*; and
- E.R. 1, LLC, As Assignee of Complainant Caseyville Sport Choice, LLC, Response to Respondents Erma I. Seiber, Administratrix of the Estate of James A. Seiber and in Her Individual Capacity and Fairmount Park, Inc.'s Motions to Dismiss Cause as Frivolous for Lack of Board Authority to Grant Relief of Reimbursement of Clean Up Costs as Requested by Complainant.

A Notice of Filing and Certificate of Service are enclosed as well.

Sincerely,

A handwritten signature in cursive script, appearing to read "Pamela A. Howlett".
Pamela A. Howlett

PAH

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