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JUN 07 2011

STATE OF ILLINOIS
Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

SCOTT MAYER,)
Complainant,)
vs.)
) PCB 2011-022
LINCOLN PRAIRIE WATER COMPANY,)
KORTE & LUITJOHAN CONTRACTORS, INC.,)
and MILANO & GRUNLOH ENGINEERS, LLC,)
Respondents.)

ORIGINAL

ANSWER AND AFFIRMATIVE DEFENSES

NOW COMES the Respondent, Milano & Grunloh Engineers, LLC, by their attorneys, LIVINGSTON, BARGER, BRANDT & SCHROEDER, and for their Answer and Affirmative Defenses to the Complainant's Complaint, states as follows:

**COUNT I
(LINCOLN PRAIRIE WATER COMPANY)**

1. Count I of the Complainant's Complaint is not directed to this Respondent, and therefore, this Respondent makes no answer thereto. Insofar as the allegations contained in Count I of the Complainant's Complaint may be deemed to be directed to this Respondent, this Respondent denies the same and demands strict proof thereof.

WHEREFORE, the Complainant, Scott Mayer, is not entitled to a judgment against this Respondent, Milano & Grunloh Engineers, LLC, in an amount of Six Hundred Forty-Seven Thousand Dollars (\$647,000.00), or for any other amount whatsoever.

**COUNT II
(Korte & Luitjohan Contractors, Inc.)**

1. Count II of the Complainant's Complaint is not directed to this Respondent, and therefore, this Respondent makes no answer thereto. Insofar

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as the allegations contained in Count II of the Complainant's Complaint may be deemed to be directed to this Respondent, this Respondent denies the same and demands strict proof thereof.

WHEREFORE, the Complainant, Scott Mayer, is not entitled to a judgment against this Respondent, Milano & Grunloh Engineers, LLC, in an amount of Six Hundred Forty-Seven Thousand Dollars (\$647,000.00), or for any other amount whatsoever.

COUNT III
(Milano & Grunloh Engineers, LLC)

1. Respondent admits the existence of the statute identified in Paragraph 1 of Count III of the Complainant's Complaint but denies its applicability to this Respondent.

2. Respondent states that the allegations contained in Paragraph 2 of Count III of the Complainant's Complaint are correct.

3. Respondent states that the allegations contained in Paragraph 3 of Count III of the Complainant's Complaint are correct.

4. Respondent states that the allegations contained in Paragraph 4 of Count III of the Complainant's Complaint are correct.

5. Respondent denies the allegations contained in Paragraph 5 of Count III of the Complainant's Complaint as improper conclusions of law to be determined during the pendency of this suit.

6. Respondent denies the allegations contained in Paragraph 6 of Count III of the Complainant's Complaint, and each and every one of them.

7. Respondent denies the allegations contained in Paragraph 7 of Count III of the Complainant's Complaint, and each and every one of them.

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8. Respondent states that the allegations contained in Paragraph 8 of Count III of the Complainant's Complaint are correct.

9. Respondent states that the allegations contained in Paragraph 9 of Count III of the Complainant's Complaint are correct.

10. Respondent denies the allegations contained in Paragraph 10 of Count III of the Complainant's Complaint, and each and every one of them.

11. Respondent denies the allegations contained in Paragraph 11 of Count III of the Complainant's Complaint, and each and every one of them.

12. Respondent denies the allegations contained in Paragraph 12 of Count III of the Complainant's Complaint, and each and every one of them.

13. Respondent denies the allegations contained in Paragraph 13 of Count III of the Complainant's Complaint, and each and every one of them.

14. Respondent denies the allegations contained in Paragraph 14 of Count III of the Complainant's Complaint, and each and every one of them.

15. Respondent states that it has insufficient knowledge upon which to base a reasonable belief as to the truth of the allegations contained in Paragraph 15 of Count III of the Complainant's Complaint, and therefore, denies the same and demands strict proof thereof.

16. Respondent states that it does not have sufficient personal knowledge upon which to base a reasonable belief as to the truth of the allegations contained in Paragraph 16 of Count III of the Complainant's Complaint, and therefore, denies the same and demands strict proof thereof.

17. Respondent states that it does not have sufficient personal knowledge upon which to base a reasonable belief as to the truth of the

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allegations contained in Paragraph 17 of Count III of the Complainant's Complaint, and therefore, denies the same and demands strict proof thereof

18. Respondent denies the allegations contained in Paragraph 18 of Count III of the Complainant's Complaint as improper conclusions of law to be determined during the pendency of this suit.

19. Respondent states that it does not have sufficient personal knowledge upon which to base a reasonable belief as to the truth of the allegations contained in Paragraph 19 of Count III of the Complainant's Complaint, and therefore, denies the same and demands strict proof thereof.

20. Respondent states that it does not have sufficient personal knowledge upon which to base a reasonable belief as to the truth of the allegations contained in Paragraph 20 of Count III of the Complainant's Complaint, and therefore, denies the same and demands strict proof thereof.

21. Respondent denies the allegations contained in Paragraph 21 of Count III of the Complainant's Complaint, as being improper conclusions of law and fact to be determined during the pendency of this suit.

22. Respondent states that it does not have sufficient personal knowledge upon which to base a reasonable belief as to the truth of the allegations contained in Paragraph 22 of Count III of the Complainant's Complaint, and therefore, denies the same and demands strict proof thereof.

23. Respondent states that it does not have sufficient personal knowledge upon which to base a reasonable belief as to the truth of the allegations contained in Paragraph 23 of Count III of the Complainant's Complaint, and therefore, denies the same and demands strict proof thereof.

24. Respondent admits the existence of the statute identified in Paragraph 24 of Count III of the Complainant's Complaint, but denies the applicability of said statute to this Respondent.

25. Respondent admits the existence of the statute identified in Paragraph 25 of Count III of the Complainant's Complaint, but denies the applicability of said statute to this Respondent.

26. Respondent states that the allegations contained in Paragraph 26 of Count III of the Complainant's Complaint are correct.

27. Respondent denies the allegations contained in Paragraph 27 of Count III of the Complainant's Complaint as being improper conclusions of law to be determined during the pendency of this suit.

28. Respondent denies the allegations contained in Paragraph 28 of Count III of the Complainant's Complaint, and each and every one of them.

29. The Court has previously stricken the Complainant's request for attorneys fees and therefore, no answer is required to Paragraph 29 of Count III of the Complainant's Complaint.

WHEREFORE, the Complainant, Scott Mayer, is not entitled to a judgment against this Respondent, Milano & Grunloh Engineers, LLC, in an amount of Six Hundred Forty-Seven Thousand Dollars (\$647,000.00), or for any other amount whatsoever.

AFFIRMATIVE DEFENSES

Now comes the Respondent, Milano & Grunloh Engineers, LLC, by its attorneys, LIVINGSTON, BARGER, BRANDT & SCHROEDER, and for its Affirmative Defenses in the above-captioned matter, states as follows:

FIRST AFFIRMATIVE DEFENSE – EXCESS DAMAGES

For its First Affirmative Defense, Respondent, Milano & Grunloh Engineers, LLC, states as follows:

1. That the Complainant's claim is for property damage to commercial farmland.
2. That the Complainant claims damages in excess of Six Hundred Thousand Dollars (\$600,000.00).
3. That the property in question amounts to less than five acres of farmland.
4. That the property is used for a business purpose.
5. That Illinois law does not permit recovery of an amount in excess of the value of the property in cases of property damage.
6. That the Complainant has admitted in this case that the fair market value of his property is Five Thousand Five Hundred dollars (\$5,500.00) per acre.
7. That, therefore, the Complainant cannot recover more than Five Thousand Five Hundred Dollars (\$5,500.00) per acre for property damage in any event.

WHEREFORE, the Respondent, Milano & Grunloh Engineers, LLC, respectfully prays that the Pollution Control Board enter an Order limiting any judgment which might be entered in favor of the Complainant to an amount not to exceed the fair market value of the property which is the subject matter of this litigation.

SECOND AFFIRMATIVE DEFENSE – FAILURE TO MITIGATE

For its Second Affirmative Defense, the Respondent, Milano & Grunloh Engineers, LLC, states as follows:

1. That the Complainant is capable of, and able to grow, corn and/or beans on the farmland which is the subject matter of this litigation; that the only alleged limitation on the property claimed by the Complainant is the inability to grow hay or alfalfa on said property.

2. That in order to mitigate his damages, therefore, it is incumbent upon the Complainant to grow corn or beans on the property in question.

3. That the Complainant has failed to do this and has allowed the ground to lay fallow and has not used it for any purpose.

4. That the failure and refusal of the Complainant to use the property which is the subject matter of this litigation in a commercially reasonable manner, namely to grow corn or beans, amounts to a failure to mitigate his damages as required by law.

WHEREFORE, the Respondent, Milano & Grunloh Engineers, LLC, respectfully prays that in the event that judgment should be entered in favor of the Complainant, the judgment should be limited to the amount by which the Complainant's profits for growing alfalfa exceed the profits which would be realized had the Complainant mitigated his damages by growing corn and/or beans.

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THIRD AFFIRMATIVE DEFENSE – ASSUMPTION OF RISK

For its Third Affirmative Defense, the Respondent, Milano & Grunloh Engineers, LLC, states as follows:

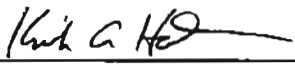
1. That the alleged damage to this property occurred in the year 2005.
2. That at the time of the alleged damage to the property the Complainant was aware of the alleged presence of small quantities of copper wire in the property in question.
3. That at the time of the alleged damage, the Complainant was growing corn on the property in question.
4. That three years thereafter, the Complainant changed the crop on the field in question to grow hay.
5. That Illinois law does not permit recovery in an amount in excess of the value of the property in cases of property damage.
6. That if the Complainant had not changed his crop, there would have been no adverse consequences to the Complainant by the presence of the telephone wire as alleged in his Complaint on the land in question.
7. That the Complainant farms 600 acres of land.
8. That half of the Complainant's land is farmed in corn and beans, and the other half is farmed in hay.
9. That the Complainant has property where he can grow as much hay as he now grows without any adverse effects on him.
10. That, in fact, the Complainant could have continued to grow hay elsewhere as he had done in the past and had he chosen to do so.

11. That when the Complainant, in the face of knowledge of the presence of telephone wire in the ground, acknowledged that it would be a problem in the event that hay was harvested on this property, the Complainant deliberately chose to farm this ground in hay. Complainant has assumed the risk of any economic losses which he may have suffered as a consequence.

WHEREFORE, the Respondent, Milano & Grunloh Engineers, LLC, respectfully pray that judgment be entered in its favor and against the Complainant, and that the Respondent recover its costs of suit.

Milano & Grunloh Engineers, LLC,
Respondent

By: LIVINGSTON, BARGER, BRANDT
& SCHROEDER

By: 
Kirk A. Holman

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CERTIFICATE OF SERVICE

The undersigned certifies that on June 2, 2011, I served the foregoing instrument upon the parties in this cause by depositing copies in the U.S. Mail in Bloomington, Illinois, with postage prepaid, in envelopes addressed to the following attorney of record:

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921 Broadway Avenue
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Mattoon, IL 61938-0746

Keith Fruehling
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Urbana, Illinois 61803-0129

Jerome E. McDonald, Esq.
Campbell, Black Carnine, Hedin, Ballard & McDonald, P.C.
108 South 9th Street
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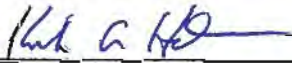
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June 2, 2011

Illinois Pollution Control Board
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Herbert M. Livingston (1898 - 1987)
Ralph E. Schroeder (1927 - 1991)
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Pollution Control Board

Re: Scott Mayer v. Lincoln Prairie Water Company,
et al. - Illinois Pollution Control Board #2011-022

Dear Sir/Madam:

Enclosed for filing in the above matter on behalf of the Respondent, Milano & Grunloh Engineers, LLC, please find the original and nine copies of Milano & Grunloh Engineers, LLC's Answer and Affirmative Defenses.

We are enclosing one extra copy of the document that we ask that you file-stamp and return to our office in the enclosed, self-addressed and stamped envelope. Thank you for your cooperation in this matter.

Very truly yours,



Kirk A. Holman

KAH:mat

Encl.

cc: James Roytek, Esq.
Jerome E. McDonald, Esq.
Keith Fruehling