

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Complainant,)
)
 v.)
)
 PROFESSIONAL SWINE MANAGEMENT,)
 LLC, an Illinois limited liability corporation,)
 HILLTOP VIEW, LLC, an Illinois limited)
 liability corporation, WILDCAT FARMS, LLC,)
 an Illinois limited liability corporation,)
 HIGH-POWER PORK, LLC, an Illinois limited)
 liability corporation, EAGLE POINT FARMS,)
 LLC, an Illinois limited liability corporation,)
 LONE HOLLOW, LLC, an Illinois limited liability)
 corporation, TIMBERLINE, LLC, an Illinois)
 limited liability corporation, PRAIRIE STATE)
 GILTS, LTD, an Illinois corporation, LITTLE)
 TIMBER, LLC, an Illinois limited liability)
 corporation,)
 Respondents.)

PCB NO. 10-84
(Enforcement)

NOTICE OF ELECTRONIC FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on August 2, 2013, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois, a MOTION TO STRIKE RESPONDENT PROFESSIONAL SWINE MANAGEMENT'S AFFIRMATIVE DEFENSE TO COUNTS III, IV, V, VI, VII AND VIII, a copy of which is attached hereto and herewith served upon you.

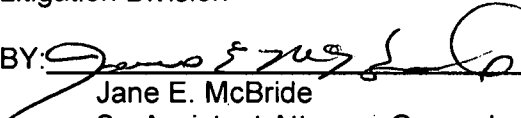
Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN,
Attorney General of the
State of Illinois

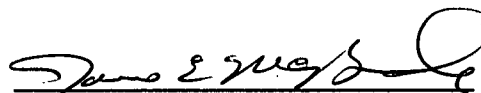
MATTHEW J. DUNN, Chief
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BY: 
Jane E. McBride
Sr. Assistant Attorney General
Environmental Bureau

CERTIFICATE OF SERVICE

I hereby certify that I did on August 2, 2013, cause to be served by First Class Mail, with postage thereon fully prepaid, by depositing in a United States Post Office Box in Springfield, Illinois, a true and correct copy of the following instruments entitled MOTION TO STRIKE RESPONDENT PROFESSIONAL SWINE MANAGEMENT'S AFFIRMATIVE DEFENSE TO COUNTS III, IV, V, VI, VII AND VIII upon the persons listed on the Service List.



JANE McBRIDE
Sr. Assistant Attorney General

This filing is submitted on recycled paper.

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)
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 Complainant,)
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 v.)
)
 PROFESSIONAL SWINE)
 MANAGEMENT, LLC, an Illinois)
 limited liability corporation, and)
 HILLTOP VIEW, LLC, an Illinois)
 limited liability corporation, WILDCAT)
 FARMS, LLC, an Illinois limited)
 liability corporation, HIGH-POWER)
 PORK, LLC, an Illinois limited liability)
 corporation, EAGLE POINT FARMS, LLC, an)
 Illinois limited liability corporation,)
 LONE HOLLOW, LLC, an Illinois limited)
 liability corporation, TIMBERLINE, LLC,)
 an Illinois limited liability corporation,)
 PRAIRIE STATE GILTS, LTD, an Illinois)
 corporation, LITTLE TIMBER, LLC, an)
 Illinois limited liability corporation)
)
 Respondents.)

PCB NO. 10-84
(Enforcement)

**MOTION TO STRIKE RESPONDENT PROFESSIONAL SWINE MANAGEMENT'S
AFFIRMATIVE DEFENSE TO COUNTS III, IV, V, VI, VII AND VIII**

NOW COMES, Complainant, PEOPLE OF THE STATE OF ILLINOIS, ex rel Lisa Madigan, Attorney General of the State of Illinois, and moves to strike Respondent Professional Swine Management's Affirmative Defense to Counts III, IV V, VI, VII and VII on the following grounds:

Standard

1. The Board's procedural rules provide that "any facts constituting an affirmative defense must be plainly set forth before hearing in the answer or in a supplemental answer,

unless the affirmative defense could not have been known before hearing” 35 Ill. Adm. Code 103.204(d).

2. The standard for affirmative defenses that has been established by the Board was set forth as follows in the matter of *People v. Heritage Coal Company, LLC (f/k/a Peabody Coal Company)*, PCB 99-134, slip op at 4 (June 5, 2003):

In a valid affirmative defense, the respondent alleges “new facts or arguments that, if true, will defeat . . . the government’s claim even if all allegations in the complain are true.” *People v. Community Landfill Co.*, PCB 97-193, slip op at 3 (Aug 6, 1998). The Board has also defined an affirmative defense as a “response to a plaintiff’s claim which attacks the plaintiff’s legal right to being an action, as opposed to attacking the truth of claim.” *Farmer’s State Bank v. Phillips Petroleum Co.*, PCB 97-100 slip op at 2 n. 1 (January 23, 1997) (quoting Black’s Law Dictionary). Furthermore, if the pleading does not admit the opposing party’s claim, but instead attacks the sufficiency of that claim, it is not an affirmative defense. *Warner Agency v. Doyle*, 121 Ill. App. 3d 219, 221, 459 N.E. 2d 663, 635 (4th Dist. 1984).

3. The Code of Civil Procedure provides the following guidance regarding pleading affirmative defenses. Section 2-613 (d), 735 ILCS 5/2-613(d), provides in part:

The facts constituting any affirmative defense . . . and any defense which by other affirmative matter seeks to avoid the legal effect of or defeat the cause of action set forth in the complaint, . . . in whole or in part, and any ground or defense, whether affirmative or not, which, if not expressly stated in the pleading, should be likely to take the opposite party by surprise, must be plainly set forth in the answer or reply. 735 ILCS 5/2-613(d) (2008).

The purpose of the above-quoted language is to specify the disputed legal issues before trial.

Handelman v. London Time, Ltd., 124 Ill. Ap. 3d 318, 320, 464 N.E.2d 710, 712 (1st Dist. 1984).

The parties are to be informed of the legal theories which will be presented by their respective opponents. *Id.* This is a prime function of pleading. *Id.*

4. Further guidance is available in Section 2-612 of the Code of Civil Procedure, 735

ILCS 5/2-612, which provides:

Insufficient pleadings. (a) If any pleading is insufficient in substance or form the court may order a fuller or more particular statement. If the pleadings do not sufficiently define the issues the court may order other pleadings prepared.

(b) No pleading is bad in substance which contains such information as reasonably informs the opposite party of the nature of the claim or defense which he or she is called upon to meet.

(c) All defects in pleadings, either in form or substance, not objected to in the trial court are waived.

5. A valid affirmative defense gives color to the opposing party's claim but then asserts new matter which defeats an apparent right. *Condon v. American Telephone and Telegram Co.*, 210 Ill. App. 3d 701, 709, 569 N.E.2d 518, 523 (2d Dist. 1991), citing *The Worner Agency Inc. v. Doyle*, 121 Ill. App. 3d 219, 222, 459 N.E.2d 633 (4th Dist 1984).

6. "To set forth a good and sufficient claim or defense, a pleading must allege ultimate facts sufficient to satisfy each element of the cause of action or affirmative defense pled. . . . In determining the sufficiency of any claim or defense, the court will disregard any conclusions of fact or law that are not supported by allegations of specific fact." *Richco Plastic Co. v. IMS Co.*, 288 Ill. App.3d 782, 784-85, 681 N.E.2d 56, 58 (1st Dist. 1997),

7. A motion to strike an affirmative defense admits well-pleaded facts constituting the defense, and attacks only the legal sufficiency of the facts. "Where the well-pleaded facts of an affirmative defense raise the possibility that the party asserting them will prevail, the defense should not be stricken." *International Insurance Co. v. Sargent and Lundy*, 242 Ill. App. 3d 614, 630-31, 609 N.E.2d 842, 853-54 (1st Dist. 1993), citing *Raprager v. Allstate Insurance Co.*, 183 Ill. App. 3d 847, 854, 539 N.E. 2d 787, 791 (2nd Dist. 1989).

8. Affirmative defenses that are totally conclusory in nature and devoid of any

specific facts supporting the conclusion are inappropriate and should be stricken. See *International Ins. Co.*, 242 Ill. App. 3d at 635.

Asserted Affirmative Defense

9. Respondent Professional Swine Management asserts the same affirmative defense for each count III through VIII. It reads as follows

As Complainant did not follow the procedures set forth in 415 ILCS 5/31 prior to filing this enforcement action Count III (IV, V, VI, VII and VIII) must be dismissed with prejudice.

Argument

10. Counts III through VIII are brought solely on the Attorney General's own motion. Based on the applicable case law, Respondent Professional Swine Management's affirmative defense is not affirmative matter that avoids the legal effect of or defeats the cause of action pled in Counts III through VIII.

11. The Illinois Pollution Control Board has extensively addressed the requirements of Section 31 of the Act, 415 ILCS 5/31. In considering the legislative history of the 1996 amendments to Section 31 the Board has repeatedly found that they were not intended to bar the Attorney General from prosecuting an environmental violation. See *People v. Chiquita Processed Foods, LLC*, PCB 02-56 (November 21, 2002), *People v. Eagle-Picher-Boge*, PCB 99-152 (July 22, 1999); *People v. Geon*, PCB 97-62 (October 2, 1997); and *People v. Heuermann*, PCB 97-92 (September 18, 1997).

12. Rather, the written notice required by Section 31(a)(1) is a precondition to the Illinois EPA's referral of the alleged violations to the Attorney General. *People v. Chemetco*, PCB 96-76 (July 8, 1998). The legislative history of Section 31 indicates that the legislature did


not intend to prevent the Attorney General from bringing enforcement actions that are not based on an agency referral. *Id.* Respondent Professional Management, in its affirmative defense, has not alleged that the counts are based on a referral to the Attorney General from the Illinois EPA, and, in fact, they are not.

WHEREFORE, on the foregoing grounds and for the foregoing reasons, Complainant respectfully requests that the Board strike the affirmative defense asserted by Professional Swine Management for counts III through VIII.

Respectfully submitted,
PEOPLE OF THE STATE OF ILLINOIS,
ex rel. LISA MADIGAN, Attorney General
of the State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement Division

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