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OCT 18 2004

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

STATE OF ILLINOIS
Pollution Control Board

PEOPLE OF THE STATE OF ILLINOIS)	
)	
Complainant,)	PCB No. 00-104
)	(Enforcement)
v.)	
)	
THE HIGHLANDS, L.L.C., et al.,)	
)	
Respondents.)	

NOTICE OF FILING

To:	Bradley Halloran	Jane E. McBride
	Hearing Officer	Assistant Attorney General
	Illinois Pollution Control Board	Environmental Law Bureau
	James R. Thompson Center, Suite 11-500	Office of the Illinois Attorney General
	100 West Randolph	500 South Second Street
	Chicago, Illinois 60601	Springfield, Illinois 62706

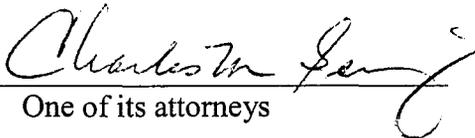
Jeffrey W. Tock
Harrington, Tock & Royse
Huntington Towers, Suite 601
201 West Springfield Avenue
P.O. Box 1550
Champaign, Illinois 61824-1550

PLEASE TAKE NOTICE that on October 18, 2004, we filed with the Illinois Pollution Control Board the attached Respondent Murphy Farms, Inc.'s Motion To Dismiss Second Amended Complaint, Respondent Murphy Farms, Inc.'s Memorandum of Law in Support of its Motion to Dismiss Second Amended Complaint, and Affidavit of Douglas C. Lenhart, copies of which are hereby served upon you.

Respectfully submitted,

MURPHY FARMS, INC.

Dated: October 18, 2004

By: 
One of its attorneys

Charles M. Gering
McDermott, Will & Emery
227 West Monroe Street
Chicago, Illinois 60606
(312) 372-2000

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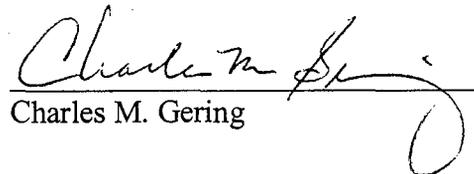
CERTIFICATE OF SERVICE

I, the undersigned attorney, certify that on October 18, 2004, I served the attached Respondent Murphy Farms, Inc.'s Motion To Dismiss Second Amended Complaint, Respondent Murphy Farms, Inc.'s Memorandum of Law in Support of its Motion to Dismiss Second Amended Complaint, and Affidavit of Douglas C. Lenhart, by U.S. Mail with proper postage prepaid upon:

Bradley Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 West Randolph
Chicago, Illinois 60601

Jane E. McBride
Assistant Attorney General
Environmental Law Bureau
Office of the Illinois Attorney General
500 South Second Street
Springfield, Illinois 062706

Jeffrey W. Tock
Harrington, Tock & Royse
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Charles M. Gering

CHI99 4369423-1.047331.0013

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STATE OF ILLINOIS
Pollution Control Board

PEOPLE OF THE STATE OF ILLINOIS,

Complainant,

v.

THE HIGHLANDS, LLC, an Illinois limited liability corporation, and MURPHY FARMS, INC., (a division of MURPHY-BROWN, LLC, a Delaware limited liability corporation, and SMITHFIELD FOODS, INC., a Virginia corporation),

Respondents.

No. PCB No. 00-104
(Enforcement)

**RESPONDENT MURPHY FARMS, INC.'S MOTION
TO DISMISS SECOND AMENDED COMPLAINT**

Respondent Murphy Farms, Inc. ("Murphy") hereby moves the Board to dismiss Counts I and II of Complainant's Second Amended Complaint (the "Complaint"), to the extent that those counts relate to Murphy, pursuant to 35 Ill. Adm. Code Section 100.500(a) and 735 ILCS 2/619(a)(9). In support of its motion, Murphy states as follows:

1. The Complaint alleges that Respondents Highlands, LLC ("Highlands") and Murphy caused air pollution and water pollution in violation of state law.
2. Count I of the Complaint alleges that Highlands and Murphy caused air pollution by "causing or allowing strong, persistent and offensive hog odors to emanate from the facility that unreasonably interfere with the use and enjoyment of the neighbors' property," and by "failing to practice adequate odor control methods and technology." Complaint, Count I, paras. 85-86. Count I further alleges that these actions violated Section 9(a) of the Illinois Environmental Protection Act (the "Act") and 35 Ill. Adm. Code Section 501.402(c)(3).
3. Count II alleges that Highlands and Murphy caused water pollution in violation of state law on or about June 18, 2002 when Highlands' land application of hog waste resulted in

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surface runoff that entered an unnamed tributary of French Creek in the vicinity of Highlands' farm. Complaint, Count II, paras. 28-32. Count II further alleges that this land application violated Sections 12(a), (d), and (f) of the Act, and 35 Ill. Adm. Code Sections 302.203, 302.212(a) and (b), 501.405(a), and 580.105.

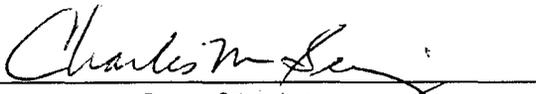
4. The claims against Murphy are fatally flawed and should be dismissed pursuant to 35 Ill. Adm. Code Section 101.500(a) and 735 ILCS 5/2-619(a)(9) because (1) Murphy did not own the farm from which the alleged contamination emanated, (2) Murphy had no ability to control the operations at that farm, and (3) Murphy did not exercise sufficient control over the operation of the farm to cause or allow pollution at the site.

5. Murphy has filed contemporaneously herewith its Memorandum of Law in Support of its Motion to Dismiss Second Amended Complaint and the accompanying Affidavit of Douglas C. Lenhart.

WHEREFORE, for the foregoing reasons and for the reasons set forth in its supporting memorandum, Respondent Murphy Farms, Inc. respectfully requests that the Board enter an order dismissing with prejudice Counts I and II of the Second Amended Complaint to the extent that those counts relate to Murphy.

Dated: October 18, 2004

MURPHY FARMS, INC.

By: 
One of Its Attorneys

Charles M. Gering
McDermott Will & Emery LLP
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Chicago, Illinois 60606-5096
312.372.2000
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CHI99 4375342-1.047331.0013

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Respondents.

No. PCB No. 00-104
(Enforcement)

STATE OF ILLINOIS
Pollution Control Board

**RESPONDENT MURPHY FARMS, INC.'S
MEMORANDUM OF LAW IN SUPPORT OF ITS
MOTION TO DISMISS SECOND AMENDED COMPLAINT**

I. INTRODUCTION

In their Second Amended Complaint (the "Complaint"), the People of the State of Illinois (the "State") allege that Respondent Murphy Farms, Inc. ("Murphy") caused air and water pollution in violation of regulations adopted by the Illinois Pollution Control Board. The State's claims against Murphy are fatally flawed and should be dismissed with prejudice pursuant to 35 Ill. Adm. Code Section 101.500(a) and 735 ILCS 5/2-619(a)(9) because (1) Murphy did not own the farm from which the alleged contamination emanated, (2) Murphy had no ability to control the operations at that farm, and (3) Murphy did not exercise sufficient control over the operation of the farm to cause or allow pollution at the site.

II. BACKGROUND

In 1996, Murphy and Highlands entered into an agreement under which Highlands agreed to raise pigs at its farm near Williamsfield, in rural Knox County, and Murphy agreed to pay Highlands a specified amount for each pig raised at Highlands' farm. Affidavit of Doug Lenhart,

Exhibit 1 hereto, para. 4. Murphy owned the pigs, but had no ownership interest in Highlands' farm. *Id.*, para. 5. The farm was operated entirely by Highlands, which determined where the farm would be sited, owned and maintained the land, buildings, and other structures on the farm, employed workers to run the farm, and had unfettered control of the operation of the farm. *Id.*, paras. 5-7. Highlands further agreed to dispose of all animal waste according to federal, state and county regulations. *Id.*, para. 8.

Highlands raised pigs for Murphy pursuant to their agreement from December 1997 until December 2002, when the parties decided to terminate their relationship. *Id.*, para. 3. Highlands continues to raise pigs on its farm, although Murphy has had no involvement with the farm since December 2002. *Id.*

During the period of their relationship, Murphy supplied feed, medication, and veterinary services for the pigs that Highlands raised on its farm. *Id.*, para. 5. However, no Murphy personnel were employed at Highlands' farm. *Id.*, para. 6. Highlands employed management personnel and workers to operate the farm, and Highlands' management determined how the farm would be operated. *Id.*, paras. 6-7.

Based on its experience at other farms, Murphy made recommendations concerning husbandry and developmental issues with regard to animal care, but Highlands determined whether it would follow Murphy's recommendations. *Id.*, para. 7. Indeed, Highlands sometimes deviated from Murphy's recommendations. *Id.* Highlands controlled all aspects of the operation of its farm, and Murphy had no ability to cause Highlands to make, or to refrain from making, any particular decision with respect to any issue concerning Highlands' farm. *Id.* Similarly, to the extent that Highlands' waste management program involved land application of waste,

Highlands controlled the land application process, and Murphy was not involved in any way with land application of waste material from Highlands' farm. *Id.*, para. 8.

Counts I and II of the Complaint are directed to Highlands and Murphy. Count III is directed only to Highlands.

Count I alleges that Highlands and Murphy caused air pollution in violation of state law by "causing or allowing strong, persistent and offensive hog odors to emanate from the facility that unreasonably interfere with the use and enjoyment of the neighbors' property" (Complaint, Count I, para. 85), and by "failing to practice adequate odor control methods and technology" (Complaint, Count I, para. 86). Count I alleges that these actions violated Section 9(a) of the Illinois Environmental Protection Act (the "Act") and 35 Ill. Adm. Code Section 501.402(c)(3).

Count II alleges that Highlands and Murphy caused water pollution in violation of state law on or about June 18, 2002 when Highlands' land application of hog waste resulted in surface runoff that entered an unnamed tributary of French Creek in the vicinity of Highlands' farm. Complaint, Count II, paras. 28-32. The State alleges that this land application violated Sections 12(a), (d), and (f) of the Act, and 35 Ill. Adm. Code Sections 302.203, 302.212(a) and (b), 501.405(a), and 580.105.

III. ARGUMENT

The Complaint makes only a few vague and conclusory allegations concerning conduct on Murphy's part which allegedly supports the State's claims against Murphy. The Complaint provides no specific bases for those allegations; instead, it simply sets forth conclusions concerning Murphy's alleged conduct, and purports to rely on those conclusions in support of the claims against Murphy in Counts I and II. When the details of Murphy's interaction with Highlands and its farm are examined, it is clear that Counts I and II are insupportable as they

relate to Murphy, and that they should be dismissed with prejudice pursuant to 35 Ill. Adm. Code Section 101.500(a) and Section 2-619(a)(9) of the Code of Civil Procedure.

A. Legal Standard for Dismissal

Section 101.500(a) of Title 35 of the Illinois Administrative Code states that “[t]he Board may entertain any motion the parties wish to file that is permissible under the Act or other applicable law, these rules, or the Illinois Code of Civil Procedure.” 35 Ill. Adm. Code 101.500(a). Section 2-619(a)(9) of the Code of Civil Procedure provides that a court may dismiss a claim against one or more defendants when that claim is barred by affirmative matter avoiding the legal effect of or defeating the claim. The purpose of a Section 2-619 motion is to provide a means to dispose of issues of law or easily proved issues of fact prior to trial. *Krilich v. Am. Nat’l Bank & Trust Co.*, 334 Ill. App. 3d 563, 570, 778 N.E.2d 1153, 1160 (2nd Dist. 2002) (citation omitted). “[A] section 2-619 motion is properly allowed . . . when it raises affirmative matter which negates the plaintiff’s cause of action completely or when it refutes crucial conclusions of law or conclusions of material fact that are unsupported by allegations of specific facts.” *American Healthcare Providers, Inc. v. Cook County*, 265 Ill. App. 3d 919, 922, 638 N.E.2d 772, 775 (1st Dist. 1994).

In evaluating a motion to dismiss pursuant to Section 2-619, the court may consider pleadings as well as affirmative matter not contained in the pleadings, including affidavits. *Zedella v. Gibson*, 165 Ill. 2d 181, 185, 650 N.E.2d 1000, 1002 (1995). “If facts set forth in an affidavit supporting a motion to dismiss are not contradicted by a counteraffidavit, they will be taken as true notwithstanding contrary unsupported allegations in the complaint.” *Krilich*, 334 Ill. App. 3d at 572, 778 N.E.2d at 1162 (citation omitted).

B. Count I Must be Dismissed Because Murphy Neither Owned Nor Controlled Operations at Highlands' Farm, and Could Not Have Caused Air Pollution

Count I alleges that Highlands and Murphy violated Section 9(a) of the Act and 35 Ill. Adm. Code Section 501.402(c)(3). Section 9(a) of the Act states that “[n]o person shall cause or threaten or allow the discharge or emission of any contaminant into the environment . . . so as to cause or tend to cause air pollution” 415 ILCS 5/9(a). The State alleges that Murphy violated this section by “causing or allowing strong, persistent and offensive hog odors to emanate from the facility that unreasonably interfere with the use and enjoyment of the neighbors’ property.” Complaint, Count I, para. 85. Section 501.402(c)(3) states that “[a]dequate odor control methods and technology shall be practiced by operators of new and existing livestock management facilities and livestock waste handling facilities so as not to cause air pollution.” 35 Ill. Adm. Code 501.402(c)(3). The State alleges that Murphy violated this section “[b]y failing to practice adequate odor control methods and technology . . . thereby causing air pollution.” Complaint, Count I, para. 86.

To state a claim under each of these sections, the State must allege specific conduct by Murphy which supports the alleged violations. When the vague and conclusory assertions in the Complaint concerning Murphy’s alleged conduct are examined in light of the facts set forth in the Affidavit of Doug Lenhart filed contemporaneously with Murphy’s motion to dismiss, it is clear that the State’s Complaint falls far short of this requirement, and that Count I must be dismissed. Indeed, virtually the only accurate allegation in the Complaint concerning Murphy’s conduct is that it owned the pigs raised at Highlands’ farm; this is not enough to support the State’s claims against Murphy in Count I.

To prevail on a claim under Section 9(a) of the Act, Illinois law requires that the State demonstrate that an alleged polluter either had the capability of controlling the pollution or “was at least in control of the premises on which the pollution occurred.” *Phillips Petroleum Company v. Pollution Control Board*, 72 Ill. App. 3d 217, 220-21, 390 N.E.2d 620, 623 (2nd Dist. 1979). In *Phillips*, the Illinois Appellate Court reversed a Board decision and dismissed a claim under Section 9(a) of the Act. That case involved a railroad tank car that was punctured as the result of a derailment; the punctured tank car released anhydrous ammonia into the air causing property damage and physical injuries to individuals exposed to the gas. The tank car and the anhydrous ammonia contained in the car were owned by Phillips Petroleum Company (“Phillips”), but the tank car was part of a train operated by another entity. The court held that despite Phillips’ ownership of the tank car and its dangerous contents, Phillips was not liable for the air pollution that occurred when the train derailed because the operator of the railroad was in control of the car until the derailment. *Id.*

Similar principles apply in the context of nuisance claims, which are analogous to the State’s claim against Murphy under Section 9(a) of the Act in that nuisance claims also require a showing of “substantial invasion of another’s interest in the use and enjoyment of his or her land.” *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 204, 680 N.E.2d 265, 277 (1997). As with claims under Section 9(a) of the Act, a nuisance claim is predicated on conduct and control. The defendant’s wrongful conduct is an essential element: “the standard for determining if particular *conduct* constitutes a nuisance is the *conduct’s* effect on a reasonable person.” *Id.* (citation omitted; emphasis added). “[W]here it is not shown that a person created or continued a nuisance or that he owned, maintained, or controlled the premises on which it exists, such person

has no responsibility therefor.” *Brunsfeld v. Mineola Hotel and Restaurant, Inc.*, 119 Ill. App. 3d 337, 345, 456 N.E.2d 361, 367 (1st Dist. 1983) (citations omitted).

It is well-settled that the mere introduction of livestock into an area—even large numbers of animals—without more, does not establish the requisite conduct to support a nuisance claim. Instead, the plaintiff must establish that the operation or maintenance of the facility at which the animals are located is deficient, and that the defendant’s deficient operation or maintenance of the facility resulted in the creation of the nuisance. The court in *Village of Goodfield v. Jamison*, 188 Ill. App. 3d 851, 544 N.E.2d 1229 (4th Dist. 1989), analyzed precisely that issue. In that case, the court held that a hog transfer station, which is an intermediate facility to which farmers bring their hogs for later transport to market by the transfer station operator, did not necessarily constitute a nuisance. The court affirmed the denial of the plaintiff’s request for injunctive relief, reasoning that the issue of whether nuisance conditions existed on the premises depended on how the waste was handled and on other operational factors. *See id.*, 188 Ill. App. 3d at 860-61, 544 N.E.2d at 1234-35. The court held that the mere presence of hundreds and hundreds of hogs per day was insufficient to support the plaintiff’s nuisance claim. *See id.*

The uncontroverted facts concerning Murphy’s involvement with Highlands’ farm clearly establish that the State’s claims against Murphy in Count I of the Complaint are insupportable. Although Murphy owned the pigs that Highlands raised, Murphy had no ownership interest in Highlands’ farm. Affidavit of Doug Lenhart, Exhibit 1 hereto, para. 5. Highlands operated the farm with its own management personnel and employees. *Id.*, para. 6. Murphy had no ability to control any aspect of the operation of the farm, and did not control the farm’s operation in any way. *Id.*, para. 7. Highlands determined where the farm would be sited, and owned and

maintained the land, buildings, and waste treatment system. *Id.*, paras. 5, 7. Highlands selected the waste treatment systems that were used at its farm. *Id.*, para. 9.

In light of these facts, Murphy's conduct, which must be the focus of the Board's analysis of the sufficiency of the State's Complaint, clearly does not support the claim against Murphy set forth in Count I of the Complaint. Murphy did not own, had no ability to control, and did not control the operation of Highlands' farm. Thus, Murphy could not have caused air pollution in violation of Section 9(a) of the Act. Similarly, Murphy could not be liable for any failure to practice adequate odor control methods and technology under 35 Ill. Adm. Code Section 501.402(c)(3).

For these reasons, Count I of the Complaint is insupportable, and must be dismissed with prejudice.

C. Count II Should be Dismissed Because Murphy Did Not Participate in Land Application of Livestock Waste

Count II of the Complaint alleges that Highlands and Murphy caused water pollution when surface runoff from land application of waste from Highlands' farm entered an unnamed tributary of French Creek in the vicinity of Highlands' farm. The Complaint erroneously alleges that "Highlands *and* Murphy were land applying waste from the facility via a traveling gun irrigation unit on June 18, 2002." Complaint, Count II, para. 22 (emphasis added). This erroneous assertion is the basis of five alleged violations of state environmental laws. In truth, Murphy never played any role in connection with land application of waste from Highlands' farm; Highlands was in complete control of that process. Consequently, Count II should be dismissed.

To establish a water pollution violation, the State must show that the alleged violator was capable of exercising control over the source of the pollution at issue. *See Perkinson v. Pollution Control Board*, 187 Ill. App. 3d 689, 694-95, 543 N.E.2d 901, 904 (3rd Dist. 1989) (noting that a person would not be responsible for pollution where the person “lacked the capability to control the source, as in *Phillips Petroleum . . .*”). “The analysis applied by courts in Illinois for determining whether an alleged polluter has violated the Act is whether the alleged polluter exercised sufficient control over the source of the pollution.” *People v. A.J. Davinroy Contractors*, 249 Ill. App. 3d 788, 793, 618 N.E.2d 1282, 1286 (5th Dist. 1993) (citation omitted).

Count II of the State’s Complaint does not meet these requirements. Murphy had no ownership interest in Highlands’ farm, and did not participate in any way in the operation of the farm. Exhibit 1, paras. 5-7. Murphy did not control the handling of waste material generated at Highlands’ farm. *Id.*, para. 8. At no time, including but not limited to the alleged incident on June 18, 2002 which forms the basis of Count II of the Complaint, did Murphy engage in or participate in any way in the land application of such waste material. *Id.*, para. 8.

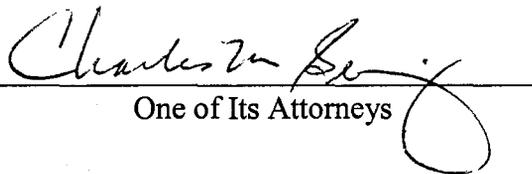
Because Murphy was neither the owner nor the operator of Highlands’ farm, and because it had no role in the land application of waste material that is the subject of Count II, Murphy had no responsibility to report the alleged release pursuant to 35 Ill. Adm. Code Section 508.105(a). Similarly, Murphy’s complete lack of control over the source of the alleged pollution fatally undermines the State’s allegations that Murphy violated Sections 12(a), (d), and (f) of the Act. Thus, the claims set forth in Count II are insupportable and must be dismissed with prejudice.

IV. CONCLUSION

The vague and conclusory allegations of the State's Complaint are insufficient to support its claims against Murphy in Counts I and II. When those claims are examined in light of the facts set forth in the Affidavit of Douglas C. Lenhart, it is clear that those claims cannot stand. For these reasons, Murphy respectfully requests that the Board dismiss Counts I and II with prejudice to the extent that those counts relate to Murphy.

Dated: October 18, 2004

MURPHY FARMS, INC.

By: 
One of Its Attorneys

Charles M. Gering
McDermott Will & Emery LLP
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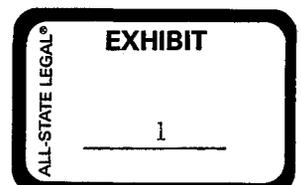
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AFFIDAVIT OF DOUGLAS C. LENHART

Douglas C. Lenhart, under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, states as follows:

1. I have firsthand knowledge of the matters stated herein, and could and would testify competently thereto if called as a witness.
2. I am currently a Territory Manager for Murphy-Brown, LLC. I have held that position since 2000.
3. During the period from 1996 through 2000, I was employed as Illinois Operations Manager for Murphy Farms, Inc. ("Murphy"). As Illinois Operations Manager for Murphy through 2000, and continuing thereafter in my capacity as Territory Manager for Murphy-Brown, LLC, I was the liaison between Murphy and certain farmers in Illinois who raised pigs owned by Murphy. These farmers included Doug and Jim Baird, who were the principals of Highlands, L.L.C. ("Highlands"), a company that operates a farm located near Williamsfield in rural Knox County, Illinois. Highlands raised pigs owned by Murphy from December 1997 through

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December 2002. By mutual agreement, Murphy and Highlands terminated their relationship in December 2002, and all pigs owned by Murphy were removed from Highlands' farm at that time.

4. Under the agreement between Murphy and Highlands into which the parties entered in 1996, Highlands agreed to raise pigs owned by Murphy at Highlands' farm, and Murphy agreed to pay Highlands a specified amount for each pig that Highlands raised at Highlands' farm pursuant to that agreement.

5. Highlands and/or its principals owned Highlands' farm, including the land, buildings, structures, fixtures, and equipment. Murphy owned the pigs that Highlands raised on its farm pursuant to its agreement with Murphy, and Murphy supplied feed, medication, and veterinary services for those pigs. However, Murphy had no ownership interest in Highlands' farm at any time, nor in any buildings, structures, fixtures, or equipment located on Highlands' farm.

6. Highlands operated its farm with its own management personnel and employees. No Murphy Farms personnel were employed at Highlands' farm at any time.

7. Highlands' farm, including its waste treatment system, was operated entirely by Highlands and its employees. Highlands' management personnel determined where the farm would be sited and how it would be operated. Murphy made recommendations concerning husbandry and developmental issues with respect to animal care, but Highlands determined whether it would follow those recommendations. Highlands sometimes deviated from Murphy's recommendations, and Murphy had no ability to cause Highlands to comply with its recommendations. Highlands controlled all aspects of the operation of its farm, and Murphy had

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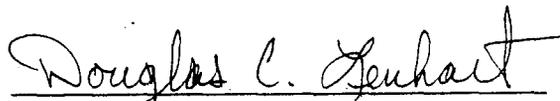
no ability to cause Highlands to make, or to refrain from making, any particular decision with respect to any issue concerning Highlands' farm.

8. Under its agreement with Murphy, Highlands agreed to dispose of all animal waste according to federal, state and county requirements. Murphy had no ability to control, and did not control, the handling of waste material generated at Highlands' farm. To the extent that its waste management program involved land application of waste, Highlands completely controlled the land application process. Murphy was not involved in any way with land application of waste material from Highlands' farm, including but not limited to those activities on June 18, 2002, which form the basis of Count II of the Complaint in this matter.

9. Highlands used two waste treatment systems at its farm during the period of time when it was raising pigs for Murphy, a Bion Technologies, Inc. system and a BioSun system. Highlands selected these waste treatment systems for use at its farm. Murphy did not have the ability to, and did not, cause Highlands to use any particular waste treatment system or technology.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

Dated: October 14, 2004


Douglas C. Lenhart

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4. Under the agreement between Murphy and Highlands into which the parties entered in 1996, Highlands agreed to raise pigs owned by Murphy at Highlands' farm, and Murphy agreed to pay Highlands a specified amount for each pig that Highlands raised at Highlands' farm pursuant to that agreement.

5. Highlands and/or its principals owned Highlands' farm, including the land, buildings, structures, fixtures, and equipment. Murphy owned the pigs that Highlands raised on its farm pursuant to its agreement with Murphy, and Murphy supplied feed, medication, and veterinary services for those pigs. However, Murphy had no ownership interest in Highlands' farm at any time, nor in any buildings, structures, fixtures, or equipment located on Highlands' farm.

6. Highlands operated its farm with its own management personnel and employees. No Murphy Farms personnel were employed at Highlands' farm at any time.

7. Highlands' farm, including its waste treatment system, was operated entirely by Highlands and its employees. Highlands' management personnel determined where the farm would be sited and how it would be operated. Murphy made recommendations concerning husbandry and developmental issues with respect to animal care, but Highlands determined whether it would follow those recommendations. Highlands sometimes deviated from Murphy's recommendations, and Murphy had no ability to cause Highlands to comply with its recommendations. Highlands controlled all aspects of the operation of its farm, and Murphy had

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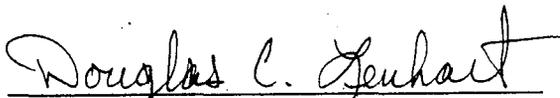
no ability to cause Highlands to make, or to refrain from making, any particular decision with respect to any issue concerning Highlands' farm.

8. Under its agreement with Murphy, Highlands agreed to dispose of all animal waste according to federal, state and county requirements. Murphy had no ability to control, and did not control, the handling of waste material generated at Highlands' farm. To the extent that its waste management program involved land application of waste, Highlands completely controlled the land application process. Murphy was not involved in any way with land application of waste material from Highlands' farm, including but not limited to those activities on June 18, 2002, which form the basis of Count II of the Complaint in this matter.

9. Highlands used two waste treatment systems at its farm during the period of time when it was raising pigs for Murphy, a Bion Technologies, Inc. system and a BioSun system. Highlands selected these waste treatment systems for use at its farm. Murphy did not have the ability to, and did not, cause Highlands to use any particular waste treatment system or technology.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

Dated: October 14, 2004


Douglas C. Lenhart

(THIS FILING IS MADE ON RECYCLED PAPER)