BEFORE THE 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
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
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PLEASE TAKE NOTICE that on December 22, 2004, we filed with the Illinois Pollution Control Board the attached Respondent Murphy Farms, Inc.'s Reply In Support of its Motion To Dismiss Second Amended Complaint, copies of which are hereby served upon you.

Respectfully submitted,

MURPHY FARMS, INC.

Dated: December 22, 2004

By: _____
One of its attorneys

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(THIS FILING IS MADE ON RECYCLED PAPER)

CERTIFICATE OF SERVICE

I, the undersigned attorney, certify that on December 22, 2004, I served the foregoing Notice of Filing and attached Respondent Murphy Farms, Inc.'s Reply In Support of its Motion To Dismiss Second Amended Complaint, by U.S. Mail with proper postage prepaid upon:

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BEFORE THE 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 REPLY IN SUPPORT OF ITS MOTION TO DISMISS SECOND AMENDED COMPLAINT

In its response to Murphy's motion to dismiss, the State has not contradicted any of the facts set forth in the Affidavit of Douglas C. Lenhart (the "Lenhart Affidavit") filed in support of Murphy's motion. Instead, the State has argued that Murphy's contract with Highlands provided a *theoretical* basis for Murphy to control the management of Highlands' farm, and that inquiries made by Mr. Lenhart relating to siting issues (some of which did not relate to Highlands' farm) suggest that Murphy may have been involved in siting the farm. These conclusory assertions, based entirely on speculation and unsupported by any specific allegations of conduct on Murphy's part which caused or allowed pollution at Highlands' farm, are comparable to those in the complaint and provide no basis for the Board to deny Murphy's motion to dismiss.

It is undisputed that Murphy had no ownership interest in Highlands' farm. Undisputed facts set forth in the Lenhart Affidavit demonstrate that Murphy had no ability to control Highlands' operation of the farm, and that Murphy did not exercise sufficient control over the operation of the farm to cause or allow pollution at the site. Moreover, even if the State's conclusory assertions in its response brief concerning Murphy's ability to control operation of

the farm were true, the State has not identified any conduct on Murphy's part which constituted actual control of the operation of Highlands' farm, and, more importantly, the State has offered no basis for the Board to conclude that any such conduct caused or allowed the alleged pollution at Highlands' farm.

There is no evidence, or even an allegation, that Murphy controlled whatever actions of Highlands caused the pollution at the site which was alleged in Count I of the complaint. Similarly, Murphy had no role in the land application of waste which is the basis of Count II, and cannot be held liable for any violations allegedly resulting from that activity. Thus, Murphy's motion to dismiss should be granted.

In evaluating Murphy's motion to dismiss, the Board is to focus on whether the allegations in the complaint regarding Murphy's conduct support the State's claims that Murphy caused or allowed pollution at Highlands' farm. Conclusions of material fact, in the absence of supporting allegations of specific facts, are not enough to avoid dismissal. One of the purposes of a motion to dismiss pursuant to Section 2-619 of the Code of Civil Procedure is to dispose of easily proved issues of fact before trial. *Krilich v. Am. Nat'l Bank & Trust Co.*, 334 Ill. App. 3d 563, 570, 778 N.E.2d 1153, 1160 (2nd Dist. 2002). When a Section 2-619 motion raises affirmative matter which negates the plaintiff's cause of action completely or when it refutes crucial conclusions of material fact that are unsupported by allegations of specific facts, the motion should be granted. *American Healthcare Providers, Inc. v. Cook County*, 265 Ill. App. 3d 919, 922, 638 N.E.2d 772, 775 (1st Dist. 1994). Facts set forth in an affidavit supporting a motion to dismiss which are not contradicted by a counter-affidavit are to be taken as true despite contrary unsupported allegations in the complaint. *Krilich*, 334 Ill. App. 3d at 572, 778 N.E.2d at 1162.

I. THE STATE'S ARGUMENTS CONCERNING MURPHY'S ALLEGED CONTROL OF HIGHLANDS' OPERATIONS ARE BASED ENTIRELY ON SPECULATION

The State does not dispute that Murphy had no ownership interest in Highlands' farm. With respect to Murphy's conduct relating to the alleged pollution at Highlands' farm, the State repeatedly points out that Murphy owned the hogs that Highlands raised at its farm, and that Murphy provided feed, medication, and other supplies used in raising those hogs. The State has not identified a single act on Murphy's part which allegedly led to the pollution at issue other than Murphy's ownership of hogs and its provision of supplies used in raising those hogs. These acts are insufficient to establish the claims asserted in the State's complaint.

The State has not offered any evidence, or even an allegation, that Murphy took any actions that caused the alleged pollution at Highlands' farm. Moreover, there is no evidence that Murphy actually controlled the allegedly wrongful acts of Highlands which caused the pollution. Murphy's unexercised but alleged theoretical right to control Highlands' operations is insufficient, as a matter of law, to establish Murphy's liability for the alleged pollution.

To establish Murphy's liability, the State must identify the specific conduct that caused the alleged pollution, and prove that Murphy actually, rather than theoretically, controlled those acts. *See Phillips Petroleum Co. v. Pollution Control Bd.*, 72 Ill. App. 3d 217, 220-21, 390 N.E.2d 620, 623 (2nd Dist. 1979). The State has not done so. The State's arguments are based on conclusory assertions for which the State offers no factual basis, and the State has not provided any evidence establishing that Murphy controlled the acts that resulted in the alleged pollution.

The State discusses numerous theories regarding ways in which Murphy *could have* exercised control over Highland's operations, but provides no specific allegations countering the

Lenhart Affidavit with respect to anything that Murphy actually did. For example, the State argues that the provisions of Murphy's contract with Highlands reserved unto Murphy the right to provide management procedures and required Highlands to take measures that Murphy deemed necessary to provide for the herd. Even assuming that Murphy provided management procedures and that Highlands was required to take measures that Murphy deemed necessary to provide for the herd (which the complaint does not specifically allege and which the State has not established through counter-affidavit), the State has neither identified any such management procedures or measures, nor explained how any such management procedures or measures caused or allowed pollution at Highlands' facility.

The State also discusses Murphy's provision of training to Highlands' employees, and suggests that this training indicates that Murphy controlled the operation of Highlands' facility. However, the State has not established, or even alleged, that Highlands' operation of its farm was consistent with any training that may have been provided by Murphy. Indeed, the training referenced in the State's brief was "farrowing training" according to the memorandum from Douglas Lenhart which was attached to the affidavit of Jane E. McBride; farrowing training relates to the birth of young pigs, not to any issue concerning waste treatment or waste management. More importantly, the State does not identify any element of such training which caused or allowed pollution at Highlands' facility.

Similarly, the State's discussion of Murphy's agreements with Highlands concerning the financial management of Highlands' farm offers no basis for the Board to conclude that Murphy controlled the operation of the farm. The addendum referenced at page 5 of the State's response brief expressly indicates that it relates to adjustments to the contract between Murphy and Highlands. It is certainly not unusual for one making payments pursuant to a contract to require

information concerning how the money is being spent. More importantly, however, the State has not identified any way in which the financial issues discussed in its brief relate to Highlands' operations that allegedly caused pollution at the site, and the State included no allegations concerning those issues in its complaint.

The State discusses Mr. Lenhart's communications with regulators concerning siting issues, but most of those communications related to a proposed facility other than Highlands' farm. Specifically, the State indicates at page 6 of its brief that most of Mr. Lenhart's siting inquiries concerned a facility proposed for Peoria County, not the Highlands facility which is located in Knox County. Even if Mr. Lenhart contacted regulators with respect to the Highlands facility, however, such inquiries do not establish that Murphy exercised, or had the ability to exercise, control over Highlands' siting decisions. Murphy certainly had an interest in ensuring that Highlands' siting decisions were consistent with Illinois law; thus, there was good reason for Mr. Lenhart's inquiries concerning siting issues. However, the State's unsupported conclusion that Mr. Lenhart's inquiries indicate that Murphy controlled, or had the ability to control, the siting of Highlands' farm (which the complaint does not allege) is entirely speculative and does not provide the basis for the Board to deny Murphy's motion.

Finally, the State discusses Murphy's alleged role in the selection of the waste treatment technology originally in place at Highlands' farm, and unspecified modifications of the waste treatment system. The State argues that there was a relationship between Murphy and Bion, the company that provided the waste treatment technology initially used at Highlands' farm, and that the State believes that Murphy "had a significant role" in the installation and use of Highlands' waste treatment system. State's Brief, p. 10. Based on this unsupported assertion concerning Murphy's role in the installation and use of Highlands' waste treatment system, the State argues

that Murphy "participated in the control of how its waste was to be handled at The Highlands facility." *Id.* Although it offers no evidence in support of this argument and identifies no particular aspect of waste handling at Highlands' farm which Murphy supposedly controlled, the State goes on to argue that Murphy was involved in land application of waste because "[l]and application is a part and parcel of the waste handling system utilized at The Highlands." *Id.*, pp. 10-11. The State provides no factual support for any of these conclusions. The State does not even argue, much less provide facts that establish, that Murphy controlled, or had the ability to control, Highlands' selection of waste treatment technology or its modification of the waste treatment system.

The State's arguments concerning what Murphy theoretically could have done pursuant to its agreement with Highlands constitute nothing more than speculation, and do not establish that Murphy actually controlled the acts that resulted in the alleged pollution. This is particularly clear in connection with the State's argument at pages 7-8 of its brief concerning Murphy's supposed ability to control ventilation in Highlands' barns. The State first asserts that because Murphy had the right under its agreement with Highlands to provide management procedures for the care of its breeding herd, Murphy "had sole control of the management of all procedures for the care and productivity of the hogs . . . ." State's Brief, p. 7. This is an enormous leap of logic for which the State offers absolutely no support. Based on this insupportable premise, the State goes on to argue without any evidentiary support that "it is obvious that Respondent Murphy ultimately had the final say as to the rate of ventilation in the facility . . . ." State's Brief, pp. 7-8. Not only is this not obvious, as the State argues, it is also squarely inconsistent with the Lenhart Affidavit.

The State has not identified any basis, and none exists, to support its argument that Murphy controlled the ventilation of Highlands' barns at any time, or, indeed, that Murphy controlled any other aspect of Highlands' operation. Nevertheless, the State's unsupported argument concerning ventilation is the only argument included in the State's brief with respect to any specific alleged conduct on Murphy's part. Like its other arguments concerning what Murphy *might have done*, the State's argument is based entirely on speculation. All of the State's speculative arguments should be rejected.

II. THE STATE HAS NOT CONTRADICTED THE FACTS SET FORTH IN THE LENHART AFFIDAVIT BY COUNTER-AFFIDAVIT OR OTHERWISE

Murphy filed the Lenhart Affidavit in support of its motion to dismiss, and the State has not contradicted the facts set forth in that affidavit by counter-affidavit or by any other means. The Lenhart Affidavit established that Highlands' farm was operated entirely by Highlands, and that Highlands (1) determined where the farm would be sited, (2) owned and maintained the land, buildings, and other structures on the farm, (3) employed the workers who ran the farm, and (4) had unfettered control of the operation of the farm. Lenhart Affidavit, paras. 5-7. In addition, the Lenhart Affidavit stated that no Murphy employees worked at Highlands' farm, and that Highlands employed management personnel and workers to operate its farm. *Id.*, paras. 6-7. The Lenhart Affidavit further set forth that Murphy made recommendations concerning husbandry and developmental issues relating to animal care, but that Highlands determined whether it would follow those recommendations and, indeed, sometimes deviated from Murphy's recommendations. *Id.*, para. 7. The Lenhart Affidavit stated that Highlands controlled all aspects of the operation of its farm. *Id.* Finally, the Lenhart Affidavit establishes that Highlands selected the waste treatment systems used at the farm and controlled the land

application process, and that Murphy was not involved in any way with land application of waste material from Highlands' farm. *Id.*, paras. 7-9.

The State has not contradicted any of these facts by counter-affidavit or otherwise, and the facts set forth in the Lenhart Affidavit therefore must be taken as true for purposes of the Board's consideration of Murphy's motion to dismiss. *See Krilich*, 334 Ill. App. 3d at 572, 778 N.E.2d at 1162. The unsupported conclusory allegations in the complaint and the speculative arguments in the State's brief concerning what Murphy might have done, or what it could have done, do not contradict the facts in the Lenhart Affidavit, and provide no basis for the Board to reject Murphy's motion to dismiss. *Id.*

The affidavits filed with the State's brief do not contain facts that contradict those in the Lenhart Affidavit. The affidavit of Jane E. McBride provides only the foundation for certain documents. The affidavit of Bruce Yurdin (the "Yurdin Affidavit") includes information concerning communications between Douglas Lenhart and Mr. Yurdin relating to waste treatment issues, but does not assert, much less prove, that Murphy selected, or had the ability to select, the waste treatment technology used at the farm. The affidavit of Eric O. Ackerman (the "Ackerman Affidavit") includes certain facts concerning inquiries made by Douglas Lenhart with respect to siting requirements. As discussed above, however, most of the inquiries did not relate to Highlands' farm. To the extent that Mr. Lenhart made inquiries relating to Highlands' farm, there was good reason for Mr. Lenhart's inquiries: Murphy had an interest in ensuring that Highlands sited its farm, where Murphy's pigs would be raised, consistent with the requirements of Illinois law. The fact that Mr. Lenhart made those inquiries does not indicate that Murphy controlled, or had the ability to control, siting of Highlands' farm.

The remainder of the Yurdin Affidavit and the Ackerman Affidavit consist of unsupported conclusions purportedly based on information and belief and, in the case of the Yurdin Affidavit, a hearsay description of a telephone conversation which allegedly took place between Mr. Lenhart and a colleague of Mr. Yurdin. Supreme Court Rule 191, which sets forth requirements for affidavits filed in support of Rule 2-619 motions, states that such affidavits:

> shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; . . . [and] shall not consist of conclusions but of facts admissible in evidence . . . .

Courts applying the requirements of Rule 191 to affidavits filed in support of Rule 2-619 motions have held that conclusions set forth in such affidavits should be ignored. *See Robidoux v. Oliphant*, 201 Ill. 2d 324, 335 (2002) ("Supreme Court Rule 191 is specific in mandating that affidavits cannot consist of conclusions but must set forth facts admitted in evidence."); *Fabiano v. City of Palos Hills*, 336 Ill. App. 3d 635, 650 (1st Dist. 2002) (holding that Rule 191(a) should be construed according to the plain and ordinary meaning of its language such that "a court must disregard conclusions in affidavits . . . ."). Moreover, affidavits based on information and belief cannot contradict facts set forth in affidavits based on personal knowledge. *Allied American Ins. Co. v. Mickiewicz*, 124 Ill. App. 3d 705, 708-709 (1st Dist. 1984) (finding that counter-affidavits consisting of allegations based on information and belief are insufficient to rebut an affidavit consisting of positive averments of fact based upon an affiant's personal knowledge). Thus, the portions of the Yurdin Affidavit and the Ackerman Affidavit consisting of conclusions, and the portions based on information and belief, cannot contradict the facts set forth in the Lenhart Affidavit, and should be ignored.

The State raises the issue of discovery several times in its brief (*see, e.g.*, State's Brief, p. 10), and states that the affidavits presented with its brief establish that without discovery, the

merits of Murphy's Rule 2-619 motion cannot properly be assessed (State's Brief, p. 24). The State, however, misses the point of the Rule 2-619 motion, which was intended as a means of resolving easily proved issues of fact before trial. *See Krilich v. Am. Nat'l Bank & Trust Co.*, 334 Ill. App. 3d 563, 570, 778 N.E.2d 1153, 1160 (2nd Dist. 2002). Where, as here, the party opposing the motion does not file counter-affidavits that contradict the facts set forth in an affidavit supporting the movant's motion, those facts are taken as true. *Id.*, 334 Ill. App. 3d at 572, 778 N.E.2d at 1162.[1]

Because the State has not contradicted the facts set forth in the Lenhart Affidavit, the Board must take those facts as true for purposes of evaluating Murphy's motion to dismiss. Based on those uncontroverted facts, the State's claims against Murphy should be dismissed.

III. The State's Authorities Are Inapposite

To support its claim under Section 9(a) of the Illinois Environmental Protection Act (the "Act"), Illinois law clearly requires that the State demonstrate that Murphy actually controlled the acts that caused the pollution or "was at least in control of the premises on which the pollution occurred." *Phillips Petroleum Co. v. Pollution Control Board*, 72 Ill. App. 3d 217, 220-21, 390 N.E.2d 620, 623 (2nd Dist. 1979). None of the authorities relied on by the State support its assertion that Murphy's theoretical right to control care of the hogs at Highlands' farm is sufficient to hold Murphy liable for alleged pollution caused by Highlands.

The State argues that the court's reasoning in *People v. McFalls*, 313 Ill. App. 3d 223, 728 N.E.2d 1152 (3rd Dist. 2000), supports its claims against Murphy in Count I of its

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[1] To the extent that the State believed that facts contradicting those in the Lenhart Affidavit were unavailable to the State because the facts were known only to individuals whose affidavits the State could not procure because of hostility or otherwise, Supreme Court Rule 191(b) provides a detailed mechanism for requesting an opportunity to engage in discovery with respect to the crucial facts. The State did not follow that procedure.

complaint. That case, however, provides no support for the State's claims. In *McFalls*, the court addressed claims not under Section 9(a) of the Act, but under the open dumping prohibitions set forth in Section 21 of the Act. The defendant in that case had dumped various waste materials on certain real property, then argued that it could not be liable under Section 21 of the Act because it did not own or control the real estate where it had dumped those wastes. The court found that it was reasonable for those who dumped the wastes to be held liable for the cost of restoring the property they had damaged through their disposal practices. *Id.*, 313 Ill. App. 3d at 228, 728 N.E.2d at 1156.

In *McFalls*, the defendant's dumping of waste material on the property at issue constituted "open dumping" under Section 21, and resulted in pollution on the property. In contrast, the State has not identified a single act on Murphy's part which resulted in pollution at Highlands' farm in violation of Section 9(a) of the Act. Murphy's ownership of the hogs raised at Highlands' farm is not sufficient to support the State's claims against Murphy in Count I of the complaint.

The State also presents a lengthy quote from *Perkinson v. Pollution Control Board*, 187 Ill. App. 3d 689, 543 N.E.2d 901 (3rd Dist. 1989), although it presents no argument concerning the court's analysis in that case. *Perkinson* involved a situation in which it was undisputed that the defendant was in control of lagoons and land from which pollution discharges occurred. Given that the defendant clearly had control of the land and the structures from which the pollution occurred, that case has no application here, given that the State has presented no facts establishing that Murphy controlled the operations at Highlands' farm. Similarly, the State's discussion of *Sierra Club, Inc. v. Tyson Foods, Inc.*, 299 F. Supp. 2d 693 (W. Dist. Ky. 2003) provides no support for the State's claims given that (1) the *Tyson* case involved alleged

CERCLA and EPCRA violations, not violations of the Act, and (2) the State conceded that Tyson's arrangement with its growers is not identical to the arrangement that existed between Murphy and Highlands (State's Brief, p. 16).

The State's criticism of Murphy's reliance on nuisance principles is entirely misplaced. As the State observed in its brief, the standard applicable to air pollution claims under Section 9(a) of the Act is whether there has been "unreasonable interference with the enjoyment of life or property." State's Brief, p. 18. The standard applied in common law nuisance cases is virtually identical to this standard. *See, e.g., Kolstad v. Rankin*, 179 Ill. App. 3d 1022, 1032, 534 N.E.2d 1373, 1380 (4th Dist. 1989) ("Any unreasonable, unwarranted, or unlawful use of one's property such that another's use and enjoyment of his property is invaded by a material annoyance, inconvenience, discomfort, or hurt is a nuisance." [citation omitted]). It is true that the Board is not authorized to proceed against common law nuisance claims, but given that the standard applicable to such cases is virtually identical to the standard that applies with respect to claims under Section 9(a), Murphy's assertion that similar principles apply to the resolution of such claims is accurate.

After asserting that nuisance principles do not apply to this matter, the State nevertheless discusses at length *Nickels v. Burnett*, 343 Ill. App. 3d 654, 798 N.E.2d 817 (2nd Dist. 2003). In the *Nickels* case, the trial court granted a preliminary injunction to prevent a prospective nuisance. In that case, however, the plaintiffs had presented extensive evidence showing a substantial likelihood of potential harm to their health and property values. *Id.*, 343 Ill. App. 3d at 656, 798 N.E.2d at 820. For unexplained reasons, the defendants chose not to controvert the plaintiffs' evidence. *Id.*, 343 Ill. App. 3d at 663, 798 N.E.2d at 826. The court reviewed the trial court's grant of the requested preliminary injunction pursuant to an abuse of discretion standard

and, given that the only evidence in the record was that offered by the plaintiffs, the court found that the trial court had not abused its discretion in issuing the preliminary injunction.

The State argues that the *Nickels* case establishes that "plaintiffs in this state have presented sufficient showings of potential harm and substantial certainty that the harms would occur should a large number of hogs be established in a given location, to uphold the grant of injunctive relief prohibiting construction and operation of facilities housing large numbers of hogs." State's Brief, p. 23. This is a significant overstatement of the holding in the *Nickels* case, in which the court merely found that the trial court had not abused its discretion in issuing a preliminary injunction where the only evidence before the court was that submitted by the plaintiffs. The *Nickels* case does not support the State's argument, which suggests that under no circumstances may a large number of hogs be located at a farm in Illinois. This position squarely conflicts with the court's holding in *Village of Goodfield v. Jamison*, 188 Ill. App. 3d 851, 544 N.E.2d 1229 (4th Dist. 1989) (which is unaffected by the court's decision in *Nickels*), as well as with the comprehensive regulatory scheme for facilities housing large numbers of animals set forth in the Livestock Management Facilities Act, 510 ILCS 77, which contemplates facilities precisely like Highlands' farm.

The uncontroverted facts concerning Murphy's activities relating to Highlands' farm clearly demonstrate that there is no basis for the State's claims against Murphy in Count I of the complaint. The State's speculation concerning what Murphy might have done provides no legal basis for those claims. Consequently, those claims should be dismissed with prejudice.

IV. Count II Must Be Dismissed Because Murphy Was Not Involved With Land Application of Waste Material

The only allegation in the complaint concerning Murphy's conduct with respect to the violations alleged in Count II of the complaint is that Highlands and Murphy applied waste

material from Highlands' farm on land in the vicinity of the farm. That simply is not true, as the uncontroverted Lenhart Affidavit makes clear. The fact of the matter is that Murphy had no role whatsoever in the land application of waste at Highlands' farm at any time.

Count II is based on allegations concerning land application of waste material on June 18, 2002, which resulted in runoff that killed fish in a nearby creek. The State has offered no evidence that Murphy exercised any control over the land application of that waste. Consequently, the State has not established a legal basis for its claims against Murphy in Count II of its complaint, and those claims should be dismissed with prejudice.

CONCLUSION

The speculative arguments the State has raised in response to Murphy's motion to dismiss do not cure the fatal flaws present in the State's complaint. The State has offered no evidence that any act on Murphy's part caused the alleged pollution on which the complaint is founded.

Based on the uncontroverted facts established through the Lenhart Affidavit, the State's claims against Murphy in Counts I and II of the complaint 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: December 22, 2004

MURPHY FARMS, INC.

By: _____
One of Its Attorneys

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