

BEFORE THE ILLINOIS
POLLUTION CONTROL BOARD

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STATE OF ILLINOIS
Pollution Control Board

GRAND PIER CENTER LLC)
AMERICAN INTERNATIONAL)
SPECIALTY LINES INSURANCE CO.)
as subrogee of GRAND PIER CENTER LLC)
Complainants) PCB 05-157
v.) (Citizens Enforcement – Land)
RIVER EAST LLC)
CHICAGO DOCK AND CANAL TRUST)
CHICAGO DOCK AND CANAL COMPANY)
KERR-McGEE CHEMICAL LLC)
Respondents)

**ANSWER TO COUNTER-COMPLAINT, AFFIRMATIVE DEFENSES
AND COUNTERCLAIM**

Plaintiffs Grand Pier Center LLC and American International Specialty Lines Insurance Co. as subrogee of Grand Pier Center LLC (“Grand Pier” and “AISLIC” individually, “Counter-Complaint Respondents” collectively) provide the following answer, affirmative defenses, and counterclaim to Kerr-McGee Chemical LLC’s counter-complaint.

1. To the extent that the Board has jurisdiction over the Complaint, the Board has jurisdiction over this Counter-Complaint pursuant to 35 IAC 103.200 and Sections 5(d), 31(d) and 33(a) of the Act.

Answer: Denied

2. In 1997, Grand Pier acquired property in Chicago, Cook County, Illinois bounded by North Columbus Drive, East Grand Avenue, North St. Clair Street and East Illinois Street, which property, at time of acquisition by Grand Pier, was paved and in use as a parking lot. This site is generally denoted by the address 200 East Illinois Street.

Answer: Admitted, with the clarification that the property is also known as “the RV3 Site.”

3. Before acquiring this property, Grand Pier retained one or more environmental consultants to conduct environmental reviews that included the 200 East Illinois Street site.

Answer: Denied.

4. This environmental review process indicated that a site immediately to the east of 200 East Illinois Street and on the other side of North Columbus Drive at 316 East Illinois was undergoing cleanup pursuant to a 1996 unilateral administrative order (UAO) issued by the U.S. Environmental Protection Agency, pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601 *et. seq.*, to address contamination by thorium resulting from the historical operations of the Lindsay Light Co. in this area of Chicago.

Answer: Denied.

5. In April 1999, Grand Pier's environmental consultant offered to conduct a file review to investigate the nature of the environmental concern for an additional cost. Neither Grand Pier nor any consultant to Grand Pier conducted a file search at the EPA to learn the particulars of the then-ongoing cleanup activities.

Answer: Counter – Complaint Respondents are without knowledge or information sufficient to form a belief as to the truth of this allegation, and therefore deny same.

6. Grand Pier knew or should have known that, until construction of North Columbus Drive in the mid-1980s, the properties at 316 East Illinois Street and 200 East Illinois Street were contiguous. Moreover, a file search at the EPA of the then-ongoing cleanup would have revealed that characterization of the contamination pertaining to the 316 East Illinois Street site indicated that pockets of thorium residues extended beyond the Western property boundary beneath sidewalks and North Columbus Drive.

Answer: Counter – Complaint Respondents are without knowledge or information sufficient to form a belief as to the truth of this allegation, and therefore deny same.

7. Although Grand Pier and/or its consultants and contractors, conducted subsurface borings at the 200 East Illinois Street site, none was addressed to the possibility of thorium residues despite the fact that Grand Pier knew or should have known of the presence of thorium residues and/or the possibility of the presence of thorium residues.

Answer: Denied.

8. Ray M. Chin, the principal behind Grand Pier and a trained engineer, previously worked for Commonwealth Edison and was involved with one or more nuclear power generating stations, where he obtained familiarity with radionuclides and the potential human health risks associated with them. Ray M. Chin knew or should have known of the presence of thorium residues at the 200 East Illinois Street site.

Answer: Admitted that Mr. Chin is a structural engineer who last worked for Commonwealth Edison in 1978. The remaining allegations are denied.

9. At the time Grand Pier acquired the property at 200 East Illinois Street site, it knew or should have known of the presence of thorium residues at the site.

Answer: Denied.

10. The pavement covering the 200 East Illinois Street site acted as a shield to prevent human exposure to the "gamma radiation" associated with thorium residues. In a September 1999 Enforcement Confidential Addendum regarding paved areas adjacent to the Lindsay Light II Site, EPA determined that the radioactive material in the soils was not water soluble and thus did not present a water contamination risk and that the shielding effects of the asphalt, concrete, and overburden prevent the release of the radiation to humans or the environment. EPA also determined in the September 1999 Enforcement Confidential Addendum that the radioactive materials would be released to the environment if the shielding materials were disturbed or if a person tunneled into the radioactive materials. The September 1999 Enforcement Confidential Addendum pertains to the Action Memorandum accompanying an Administrative Order on Consent regarding the Lindsay Light II Site.

Answer: Counter – Complaint Respondents are without knowledge or information sufficient to form a belief as to the truth of this allegation, and therefore deny same.

11. In January 2000, Grand Pier began to remove the pavement on the surface of the 200 East Illinois Street site, to excavate the site, and to dispose of that material at the Beverly Gravel Site, a quarry in Elgin, Illinois. Grand Pier undertook these actions to prepare for construction of a commercial building despite the fact that Grand Pier knew or should have known that its actions would cause a risk to human health and the environment from exposure to gamma radiation.

Answer: Denied.

12. Only by Grand Pier's removal of the pavement and excavation of the site for construction of a commercial development, was the public and the environment exposed to the risks of thorium. Grand Pier undertook the removal of the pavement and excavation of the site for its own economic benefit. Kerr-McGee did not stand to benefit economically from Grand Pier's commercial development activities.

Answer: Denied.

13. In February 2000, EPA directed cessation of these excavation activities pending a survey to determine whether the excavation would expose thorium residues. After a survey by EPA personnel indicated the presence of thorium residues, EPA amended a 1996 unilateral administrative order with respect to the 316 East Illinois Street site to direct thorium removal activities at the 200 East Illinois Street site by Grand Pier. EPA also directed the removal of the thorium residues that Grand Pier had disposed of at the Beverly Gravel Site.

Answer: Denied.

14. In March 2000, Kerr-McGee and Grand Pier reached an agreement by which both parties reserved all rights to seek future reimbursement, but, to enable prompt conduct of removal activities directed by EPA, Kerr-McGee undertook to arrange transportation and disposal of thorium residues to be excavated by Grand Pier's contractor at the 200 East Illinois Street site.

Answer: Admitted.

15. As a result of Grand Pier's actions, Kerr-McGee has incurred approximately \$3.6 million of costs.

Answer: Denied.

16. Pursuant to a consent decree under § 107 of CERCLA, 96 U.S.C. § 9607, entered in the United States District Court for the Northern District of Illinois in June 2004, Kerr-McGee has reimbursed EPA approximately \$130,000 for its costs of oversight and response with respect to the 200 East Illinois Street site.

Answer: Counter – Complaint Respondents are without knowledge or information sufficient to form a belief as to the truth of this allegation, and therefore deny same.

17. Grand Pier has not paid any share of these EPA costs or reimbursed Kerr-McGee for any of the costs incurred by Kerr-McGee.

Answer: Admitted, and further stating that EPA never requested Counter – Complaint Respondents to pay the costs EPA sought from Kerr-McGee, and that Counter – Complaint Respondents are under no obligation to “reimburse” Kerr-McGee for costs Kerr-McGee incurred in the transportation and disposal of hazardous waste Kerr-McGee generated.

COUNTER-COMPLAINT COUNT I: 415 ILCS 5/21(e)

18. Kerr-McGee repeats and realleges the allegations of paragraphs of 1-17 of its Counter-Complaint as if fully set forth herein.

Answer: Counter-Complaint Respondents repeat and reallege their answers to the allegations of paragraphs 1-17 of Kerr-McGee's Counter-Complaint.

19. The Act provides that no person shall dispose, treat, store or abandon any waste, or transport any waste into this State for disposal, treatment, storage or abandonment, except at a site or facility which meets the requirements of the Act and of regulations and standards thereunder. 415 ILCS 5/21(e).

Answer: Counter – Complaint Respondents admit that this allegation is a reasonably accurate restatement of 415 ILCS 5/21(e).

20. Grand Pier's removal of asphalt, concrete, and overburden at the 200 East Illinois Street site, the excavation of the site, and the subsequent disposal of the material were acts of "disposal," as that term is defined in 415 ILCS 5/3.185, other than at a site or facility which meets the requirements of the Act and of regulations standards thereunder.

Answer: Denied.

AFFIRMATIVE DEFENSES

For their affirmative defenses, Grand Pier Center LLC and American International Specialty Lines Insurance Co. as subrogee of Grand Pier Center LLC, incorporate by reference and adopt herein the specific factual averments contained in their Complaint in support of each of their affirmative defenses, and aver the following:

1. Kerr-McGee fails to allege any claim or cause of action against American International Specialty Lines Insurance Co. because even taking Kerr-McGee's allegations as true, AISLIC had no involvement with any "act of disposal," and Kerr-McGee has no direct action right or claim against AISLIC.

2. Kerr-McGee's claims are barred because Kerr-McGee has acted as a volunteer, and Kerr-McGee has no right of action over against the Counter – Complaint Respondents arising from actions Kerr-McGee has undertaken and performed voluntarily.

3. Kerr-McGee assumed the risk, and is estopped from asserting its claim against the Counter – Complaint Respondents, in that Kerr-McGee acquiesced in and ratified the alleged conduct of Grand Pier which underlie Kerr-McGee’s claim against Counter – Complaint Respondents.

4. Kerr-McGee’s claim has been waived as a result of Kerr-McGee’s own actions and omissions.

5. Kerr-McGee’s claim is barred by the doctrine of unclean hands.

6. Kerr-McGee’s alleged injuries and damages were caused by its own negligence.

7. The alleged acts or omissions of Grand Pier are not the proximate cause of any alleged environmental contamination and resultant damages complained of by Kerr-McGee.

8. Any injuries, damages or conditions complained of by Kerr-McGee were caused by the acts or omissions of third parties not under the control of Grand Pier.

9. Kerr-McGee has failed to mitigate its purported damages.

10. Grand Pier Center LLC was an innocent purchaser of the RV3 Site and did not possess any knowledge that the Site was contaminated by radioactive thorium. Grand Pier Center had completed its due diligence investigation of the environmental condition of the Site by relying upon an environmental consultant ATC Group Services, Inc., doing business as ATC Associates, Inc. (ATC). ATC performed a Phase I and Phase II Subsurface Investigation prior to Grand Pier Center’s purchase of the Site. The Phase II Subsurface Investigation Report did not reveal the presence of radioactive thorium.

Grand Pier Center relied upon the Phase II Subsurface Investigation Report when it purchased the RV3 Site.

11. Denying they are liable for any of Kerr-McGee's claim, but in the event that Grand Pier Center LLC and American International Specialty Lines Insurance Co. as subrogee of Grand Pier Center LLC are found liable, Kerr-McGee's recovery, if any, must be limited to that portion of damages attributable to the conduct of Grand Pier, and which exceeds those portions of damages attributable to all other persons, including Kerr-McGee. Grand Pier Center LLC and American International Specialty Lines Insurance Co. as subrogee of Grand Pier Center LLC adopt the averments contained in its Complaint paragraphs 8, 12-14, 27, 30, and 32-34, in support of this affirmative defense.

COUNTERCLAIM TO COUNTER-COMPLAINT

In accord with the Board's Procedural Rules, 35 Ill. Adm. Code 103, and Illinois Code of Civil Procedure, 735 ILCS 5/2-613(d), Grand Pier Center LLC and American International Specialty Lines Insurance Co. as subrogee of Grand Pier Center LLC ("Grand Pier" and "AISLIC" individually), assert this Counterclaim to Kerr-McGee's Counter-Complaint, and aver as follows:

1. Grand Pier and AISLIC have filed a Complaint in this action, the allegations of which are incorporated in this Counterclaim as though fully set forth herein.

2. Grand Pier and AISLIC further allege that prior to Grand Pier's purchase of the RV3 Site, ATC Group Services, Inc., doing business as ATC Associates, Inc. (ATC), was contracted for the performance of a Phase I and a Phase II Subsurface Investigation.

3. The Phase II Subsurface Investigation Report represented that on September 15, 1997, ATC had performed an investigation at the RV3 Site, in order to evaluate subsurface conditions for potential soil and groundwater impacts from previous uses at the Site. ATC also represented that it had placed a borehole near the eastern edge of the RV3 Site in order to evaluate RV3 Site conditions in proximity to the adjacent Lindsay Light II Site, which ATC knew or should have known was contaminated with thorium.

4. Defendant ATC in its Phase II Subsurface Investigation Report represented that it had investigated the RV3 Site subsurface for environmental impacts proximate to the Lindsay Light II Site. ATC represented that its investigation did not show adverse impact or contamination of the subsurface soils at the RV3 Site.

5. Subsequent to ATC's investigation and Phase II Subsurface Investigation Report concerning the RV3 Site, Grand Pier acted in reliance upon ATC's representation and purchased the RV3 Site.

6. Grand Pier was an innocent purchaser of the RV3 Site, which Grand Pier later discovered on February 29, 2000, was contaminated with radioactive thorium.

7. At time of the events giving rise to this dispute, and at all relevant times hereto, there was in existence in the State of Illinois an act entitled "Act in Relation to Contribution Among Tort Feasors," 740 ILCS100/5.

8. Kerr-McGee's alleged injuries or damages suffered in connection with its Counter-Complaint were caused in whole or in substantial part by the negligent acts and/or omissions of Kerr-McGee.

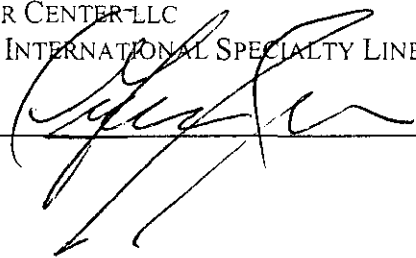
9. If Grand Pier or AISLIC are found liable to Kerr-McGee in any amount whatsoever, which liability Grand Pier and AISLIC has denied and continues to deny herein, then Grand Pier and AISLIC will be entitled to contribution from Kerr-McGee in an amount commensurate with its proportion of liability.

WHEREFORE, Counter-Complaint Respondents deny that Kerr-McGee is entitled to judgment for its response costs at the RV3 Site or monies paid to the United States related to any removal action at the RV3 Site; thus, Counter-Complaint Respondents pray that this Board enter judgment in their favor and against Kerr-McGee on its Counter-Complaint. Complainants/Counter-Complaint Respondents Grand Pier Center LLC and American International Specialty Lines Insurance Co. as subrogee of Grand Pier Center LLC, respectfully request that in the event that Kerr-McGee, receives a judgment in any amount whatsoever, that this honorable Court enter an order granting Grand Pier Center LLC and American International Specialty Lines Insurance Co. as subrogee of Grand Pier Center LLC, contribution as against Kerr-McGee, in amount commensurate with its proportion of liability as determined by the trier of fact and for any and all other relief as this court deems just and appropriate.

Respectfully submitted this 12th day of August 2005.

GRAND PIER CENTER-LLC
AMERICAN INTERNATIONAL SPECIALTY LINES INSURANCE CO.

By: _____



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Daniel C. Murray
Garrett L. Boehm, Jr.
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CERTIFICATE OF SERVICE

I, the undersigned, on oath, state that I have served on the date of July 5, 2005, the attached Plaintiff's Answer to Kerr-McGee's Counter Complaint, by U.S. mail, upon the following persons:

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Chicago Dock and Canal Trust**

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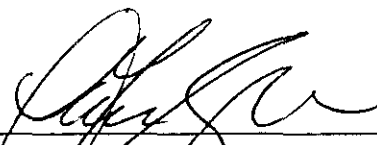
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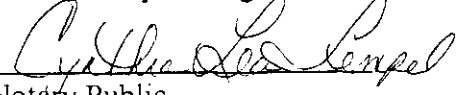
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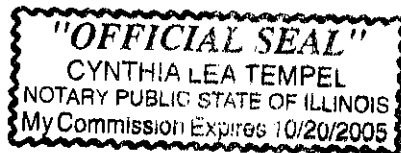


Garrett L. Boehm, Jr.
JOHNSON & BELL, LTD.

Subscribed to and sworn before me
This 12th day of August, 2005.



Notary Public



My commission expires: 10/20/2005