BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois,	)	
Complainant,	)	
vs.	)	PCB No. 04-207 (Enforcement)
COMMUNITY LANDFILL COMPANY, INC., an Illinois corporation,	)	
Respondent.	)	

NOTICE OF FILING

TO: Ms. Dorothy Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph Street, 11-500
Chicago, IL 60601

Mr. Christopher Grant
Assistant Attorney General
Environmental Bureau
188 W. Randolph, 20th Floor
Chicago, IL 60601

Mr. Bradley Halloran
Hearing Officer
Illinois Pollution Control Board
100 W. Randolph Street, Suite 11-500
Chicago, IL 60601

PLEASE TAKE NOTICE that on September 10, 2004, we filed with the Clerk of the Illinois Pollution Control Board an original and nine copies of **RESPONDENTS EDWARD PRUIM AND ROBERT PRUIM'S MOTION TO DISMISS COMPLAINT and RESPONDENTS EDWARD PRUIM AND ROBERT PRUIM'S MEMORANDUM OF LAW IN SUPPORT OF RESPONDENTS' MOTION TO DISMISS COMPLAINT,** copies of which are attached and herewith served upon you.

Clarissa C. Grayson
Attorney for Respondent

Mark A. LaRose
Clarissa C. Grayson
Attorney No. 37346
LaRose & Bosco, Ltd.
200 North LaSalle Street, Suite 2810
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CERTIFICATE OF SERVICE

The undersigned, an attorney, on oath states that she caused to be served a copy of the foregoing **RESPONDENTS EDWARD PRUIM AND ROBERT PRUIM'S MOTION TO DISMISS COMPLAINT and RESPONDENTS EDWARD PRUIM AND ROBERT PRIUIM'S MEMORANDUM OF LAW IN SUPPORT OF RESPONDENTS MOTION TO DISMISS COMPLAINT** to the following parties of record, by placing same in the U.S. Mail, postage prepaid this 10TH day of September, 2004:

Mr. Christopher Grant
Environmental Bureau
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188 West Randolph Street, 20th Floor
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Complainant,	)	
v.	)	PCB No. 04-207 (Enforcement)
EDWARD PRUIM, an individual, and ROBERT PRUIM, an individual,	)	
Respondents.	)	

RESPONDENTS' MOTION TO DISMISS COMPLAINT

Respondents, EDWARD PRUIM and ROBERT PRUIM, by and through their attorneys LaRose & Bosco, Ltd., hereby present Respondents' Motion to Dismiss Complaint and in support thereof, state as follows:

1. On May 21, 2004, Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois filed a complaint in the above captioned matter ("the 2004 case").

2. On July 15, 2004, Respondents were granted until September 10, 2004, to answer the complaint or to otherwise plead.

3. Complainant already attempted, and failed in its attempt, to add these respondents to an almost identical matter before the Illinois Pollution Control Board ("the Board"), captioned PCB 97-193 ("the 1997 case"). On March 18, 2004, the Board unanimously denied Complainant's

Motion for Leave to File Third Amended Complaint in the 1997 case where Complainant sought leave to name these respondents individually. The Board held that the motion was untimely, prejudicial and that the complainant had numerous opportunities to name the respondents before, but had failed to do so.

4. The Board should adopt its own reasoning articulated in the 1997 case and dismiss the complaint in the 2004 case, by holding that:

a. to allow the complaint in the 2004 case to stand would be prejudicial to Respondents and to Community Landfill Company, respondent in the 1997 case;

b. the complaint is untimely;

c. the Complainant had numerous opportunities to file a complaint against these individuals previously but failed to do so; and

d. there is no practical difference in the result if the 2004 case is consolidated with the 1997 case because all of the previously litigated counts will have to be re-litigated.

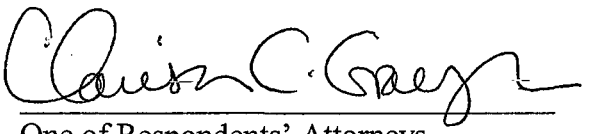
5. The Board should dismiss the complaint in the 2004 case and hold that Complainant failed to meet its burden under Illinois law which requires it to allege that Respondents had personal involvement or active participation in the acts resulting in liability, not just personal involvement or active participation in the management of the corporation.

6. Alternatively, at a minimum, Count XI should be dismissed based on the doctrine of *res judicata* since a final judgment was rendered by a court of competent jurisdiction on the merits which is conclusive as to the rights of the parties and their privies and constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action.

7. A Memorandum of Law in Support of Respondents' Motion to Dismiss Complaint is herewith filed.

WHEREFORE, based on the foregoing, and as further enunciated in Respondents' Memorandum of Law in Support of Respondents' Motion to Dismiss Complaint, Respondents respectfully request that the Board grant their Motion to Dismiss Complaint, and dismiss the complaint in the 2004 case with prejudice.

Respectfully Submitted,



One of Respondents' Attorneys

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	)	(Enforcement)
EDWARD PRUIM, an individual, and ROBERT PRUIM, an individual,	)	
	)	
Respondents.	)	

RESPONDENTS EDWARD PRUIM AND ROBERT PRUIM'S MEMORANDUM OF LAW IN SUPPORT OF RESPONDENTS' MOTION TO DISMISS COMPLAINT

Respondents, EDWARD PRUIM and ROBERT PRUIM, (referred to collectively as "Respondents" or "the Pruims", or individually as "Edward Pruim" or "Robert Pruim") by and through their attorneys, LAROSE & BOSCO, LTD., and in opposition to the People of the State of Illinois' ("People" or "Complainant") Complaint, respond as follows:

I. Introduction

The allegations in the present complaint have been the subject of seven (7) years of intense litigation in an almost identical matter before the Illinois Pollution Control Board ("the Board") against Community Landfill Company ("CLC"), captioned PCB 97-193 ("the 1997 case"). The ongoing litigation in the 1997 case has included: a complaint filed in 1997, a First Amended Complaint filed in 1998, a Second Amended Complaint filed in 1999, and substantive rulings on liability both for and against CLC in both 2001 and 2002.

The People failed in its recent attempt to file a Third Amended Complaint in the 1997 case wherein it sought leave to add Edward Pruim and Robert Pruim individually as additional defendants. The People's Motion for Leave to File a Third Amended Complaint was unanimously denied by the Board on March 18, 2004 on the grounds that to grant this leave would be prejudicial, untimely and that the complainant previously had the opportunity to amend the complaint. (See Order of the Board dated March 18, 2004, attached as Exhibit A).

Complainant only now, in 2004, has filed a "new" complaint ("Complaint" or "2004 Complaint") naming Edward Pruim and Robert Pruim, individually, as respondents. (See 2004 complaint attached as Exhibit B). It is important to note that the allegations contained in the People's complaint against Edward Pruim and Robert Pruim individually are nearly identical to those contained in its failed, proposed Third Amended Complaint. Complainant's sole allegations in the 2004 complaint against Edward and Robert Pruim are based on documents that the Illinois Environmental Protection Agency ("Agency") has had in its possession since 1993, 1995 and 1996, long before the original complaint was even filed in the 1997 case against CLC.

The Board should dismiss the 2004 complaint in its entirety for the following reasons:

(A) The Board should apply its own reasoning in denying Complainant's Motion for Leave to File a Third Amended Complaint in the 1997 case and dismiss the 2004 complaint because the 2004 complaint is untimely, prejudicial and the Complainant had numerous previous opportunities to file the 2004 complaint (See Order of March 18, 2004 attached as Exhibit A);

(B) The Complainant has failed to meet its burden under Illinois law to allege facts establishing that the Respondents had personal involvement or active participation in the acts resulting in liability, not just personal involvement or active participation

in the management of the corporation;

(C) If Complainant is allowed to file this "new" complaint against Edward Pruim and Robert Pruim, the effect will be the same as if it had been allowed to file a Third Amended Complaint.

(D) Alternatively, at a minimum, Count XI should be dismissed based on the doctrine of *res judicata* since the identical count (Count XII in the 1997 case) was dismissed against CLC in the Board's Order of July 26, 2001. (See Order attached as Exhibit C);

II. Procedural History

On May 1, 1997, Complainant filed its first complaint in this matter. The 1997 Complaint named CLC as the sole respondent and contained six (6) counts alleging violations relating to managing refuse and litter, leachate flow, landscape waste, financial assurance, failure to file a significant modification permit, and water pollution. Complainant then filed a First Amended Complaint on April 3, 1998; again CLC was the only respondent. The First Amended Complaint included four (4) additional Counts alleging violations relating to overheight of the landfill.

On November 24, 1999, over the Respondent's strenuous objections, Complainant filed a Second Amended Complaint, again only naming CLC as respondent. (See Second Amended Complaint attached as Exhibit D). The Second Amended Complaint included twelve (12) additional Counts, for a total of twenty-two counts, alleging violations relating to asbestos, used tires, the gas collection facility, leachate disposal, final cover, financial assurance, and failure to provide revised cost estimates.

The 1997 case has been the subject of the exchange of hundreds of documents comprising thousands of pages, numerous depositions, and cross-motions for summary judgment by the parties.

On April 5, 2001, the Board ruled against CLC on Counts V and XII of the Second Amended Complaint. CLC filed a motion for reconsideration on May 15, 2001. On July 26, 2001, the Board reversed its decision on Count XII by finding in favor of CLC on liability and dismissing that count. The Board affirmed its ruling against CLC on Count V and ordered a hearing on penalty.

On October 2, 2002, the Board issued an extensive order regarding the parties' cross-motions for summary judgment. The Board found in favor of CLC on Counts XI, XVIII, and XXII of the Second Amended Complaint and dismissed those counts against CLC. The Board denied the Complainant's motion for Summary Judgment on Counts I, II, VI, XV, XVII, XIX (in part) and XX of the Second Amended Complaint, and ordered a hearing on liability on those Counts. Finally, the Board found in favor of Complainant on Counts III, IV, V, VII, VIII, IX, X, XIII, XIV, XVI, XIX (in part) and XXI and ordered a hearing on penalty on those counts. For the Board's convenience, a chart summarizing the current status of the Counts in the 1997 case with a cross-reference to the 2004 complaint is attached as Exhibit E.

On December 5, 2003, Complainant filed a motion before the Board wherein it requested leave to file its Third Amended Complaint naming Edward Pruim and Robert Pruim, the principals of CLC, as additional defendants. That motion was unanimously denied by the Board on March 18, 2004. (See Exhibit A).

There are scant differences between Second Amended Complaint in the 1997 case and the 2004 complaint that is the subject of the present Motion to Dismiss. Complainant has simply taken the Second Amended Complaint and inserted general allegations against the Respondents that they "caused or allowed" certain acts to occur in violation of the Environmental Protection Act ("the Act"). The allegations contained in the 1997 and 2004 complaints will be compared in Section III (B)(1) below.

III. Argument

A. The Board should apply its own reasoning and dismiss the present complaint against Edward Pruim and Robert Pruim on the grounds that it is untimely, prejudicial and the Complainant had numerous previous opportunities to file a complaint against these respondents but failed to do so.

The Board should apply the reasoning it utilized in denying Complainant's Motion for Leave to file a Third Amended Complaint in the 1997 case naming Edward Pruim and Robert Pruim as respondents because the 2004 complaint is untimely, prejudicial and the Complainant had numerous previous opportunities to file the 2004 complaint but failed to do so. If the Board allows the 2004 complaint to stand, the ultimate effect will be the same as if it had granted the People's Motion for Leave to File a Third Amended Complaint because both sets of respondents, CLC (the 1997 case) and Edward Pruim and Robert Pruim (the 2004 case) will have to litigate all counts. The Board has already held that the Third Amended Complaint would prejudice the other parties, was not timely, and that the Complainant had previous opportunities to the amend the complaint. (See Exhibit A, page 4). The Board should now apply the same reasoning to the 2004 complaint and dismiss it in its entirety.

1. The Present Complaint is Untimely

The 2004 complaint was filed on May 21, 2004, more than 7 years after the complaint in the 1997 case was filed on May 1, 1997. Two additional amended pleadings in the 1997 case were filed in 1998 and 1999. The parties' cross-motions for summary judgment on seventeen (17) counts were ruled on by the Board on October 4, 4002, nearly two years ago, and on two (2) counts on April 5, 2001, nearly 3 1/2 years ago. Almost one (1) year has passed since discovery closed in the 1997 case on November 25, 2003. Every allegation against the Respondents in the 2004 case was known to the Complainant at the time the 1997 was filed. The Board held that the Third Amended Complaint

was untimely, stating in its Order that "these new respondents have been the owners of CLC since the inception of the case" and "the respondents have been owners or officers of CLC since the case was filed". (See Exhibit A, page 4). Nothing has changed and the Board should again hold that the 2004 complaint is untimely.

2. Complainant has had Numerous Previous Opportunities to File a Complaint Against the Respondents

The 2004 complaint contains numerous general allegations against the Respondents, the sufficiency of which will be fully addressed in Section III B, below. Aside from those general allegations, only Count VII (Depositing Waste in Unpermitted Portion of Landfill) and Count IV (Failure to Provide and Maintain Adequate Financial Assurance Pursuant to the April 20, 1993 Permit) of the 2004 complaint contain any specific allegations against either Respondent. These allegations are identical in content to those rejected by the Board in its denying Complainant's Motion for Leave to File a Third Amended Complaint where the Board held that "complainant has had not only the opportunity, but has been allowed to exercise that opportunity by the Board on two prior occasions." (See Exhibit A, page 4).

In regard to Count VII, Paragraph 20 in Complainant's 2004 complaint alleges:

"On or about January 17, 1995, the Respondents submitted a Solid Waste Capacity Certification to Illinois EPA, signed by Respondent Edward Pruim, reporting that there was no remaining capacity in Parcel B as of January 1, 1995.

(2004 Complaint, Exhibit B, Count VII, ¶ 20).

Paragraph 22 in Count VII of the present complaint alleges:

"On or about January 15, 1996, the Respondents submitted a Solid Waste Capacity Certification to Illinois EPA, signed by Respondent Robert Pruim, reporting that the Respondents had received over 540, 000 cubic yards for deposit in Parcel B between January 1, 1995 and December 31, 1995."

(2004 Complaint, Exhibit B, Count VII, ¶ 22).

The documents referred to in Count VII of the 2004 complaint have been in the Agency's possession since January, 1995 and January, 1996 respectively. They were available to Complainant fully twenty-eight (28) and sixteen (16) months respectively before even the 1997 complaint was filed. By the time Complainant filed its Second Amended Complaint on November 24, 1999, the records had been in the Agency's possession for nearly five (5) and four (4) years respectively.

Similarly, in regard to Count IV, Paragraph 22 in the 2004 complaint alleges:

"Respondents Edward Pruim and Robert Pruim failed to arrange financing and increase the total amount of CLC's financial assurance to $1,342,500.00 within 90 days after the Agency approved its cost estimate on April 20, 1993."

(2004 Complaint, Exhibit B, Count IV, ¶ 22).

It almost goes without saying that obviously, any alleged failure by the respondents to increase the amount of financial assurance within 90 days after April 20, 1993, would have been known to the Complainant in approximately July, 1993, **more than eleven (11) years ago.** In fact, it would have been known to the Complainant for nearly four (4) years before it filed the 1997 complaint in May, 1997 and which it has amended twice.

Complainant failed in its attempt to have the respondents added individually to the 1997 complaint and therefore, has resorted to seeking relief against the respondents separately. The Board should not allow it to succeed and should follow its own reasoning as set forth in its Order of March 18, 2004 wherein it denied Complainant's Motion for Leave to File a Third Amended Complaint, finding that Complainant had had the opportunity to file a complaint against Edward Pruim and Robert Pruim but failed to do so. The Board should now reach the same conclusion that it did only six (6) months ago.

3. Allowing the 2004 Complaint to Proceed will Result in Prejudice to the Respondents and CLC

The documents cited by Complainant in support of the allegations in Count IV and Count VII have been in the Complainant's own files at the time that all pleadings in the 1997 case were filed. The alleged facts behind the allegations concerning Edward and Robert Pruim were known to the Complainant for between eight (8) and eleven (11) years.

On October 2, 2002, the Board made substantial rulings both for and against CLC as sole respondent on the parties' cross-motions for summary judgment based on the Second Amended Complaint. These substantive rulings include: rulings on Counts XI, XVIII, and XXII in favor of CLC thereby dismissing those counts; rulings on Counts I, II, VI, XV, XVII, XIX (in part) and XX in favor of CLC, finding that genuine issues of material fact precluded summary judgment and ordering a hearing on liability; and rulings in favor of Complainant on Counts III, IV, VII, VIII, IX, X, XIII, XVI, XIX (in part) and XXI, and ordering a hearing on penalty. In addition, on July 26, 2001, following CLC's Motion for Reconsideration, the Board ultimately ruled in favor of CLC on Count XII of the Second Amended Complaint, thereby dismissing that count, and in favor of Complainant on Count V of the 1997 complaint and ordering a hearing on that count. (See July 26, 2001 order, Exhibit C). In summary, at this point, the Board has ordered a hearing on liability for seven (7) counts, and a hearing on penalty for twelve counts, all against CLC alone.

If the 2004 complaint is allowed to proceed against the respondents, all of these counts that have already been the subject of more than seven (7) years of intense litigation, including rulings on summary judgment in favor of the Complainant, would have to be re-litigated by the parties. In fact, a likely outcome would be that Complainant would move to have the 2004 case consolidated with

the1997 case. The effect of consolidating these two cases would have the same practical effect of amending the complaint. As the Board stated in its March 18, 2004 order order, "the new respondents would find a case where (CLC) has already been found in violation on a number of counts. Since the Board has already found violations, this places the new respondents in a difficult position, and the Board finds that they would be prejudiced." (See Exhibit A, page 4). The Board also reasoned that CLC was correct in pointing out that it would be prejudiced "because of the new delay necessary to allow new respondents to fully litigate the alleged violations against them." (See Exhibit A, page 4). Again, nothing has changed in this case since March 18, 2004 and the Board should dismiss the 2004 complaint in its entirety.

The Board has already determined that amending the complaint was untimely, prejudicial to CLC, and improper given that Complainant had numerous opportunities to previously amend the complaint. (See Exhibit A, page 4). The Board should not allow the Complainant to reach the same destination simply by taking another route. The Board should see through this procedural ruse and grant Respondents' Motion to Dismiss and dismiss the 2004 complaint in its entirety.

B. Complainant has Failed to Allege Facts Establishing that the Respondents had Personal Involvement or Active Participation in the Acts Resulting in Liability.

The Complainant has failed to meet its burden under Illinois which requires it to allege facts establishing that the Respondents had personal involvement or active participation in the acts resulting in liability, not just personal involvement or active participation in the management of the corporation. People v. Tang, 346 Ill.App.3d 277, 289, 805 N.E.2d 243, 253-54 (1st Dist. 2004). It is insufficient to merely make allegations that an officer "caused or allowed" certain actions to occur in violation of the Act or that the officers were acting in their corporate capacities. U.S. v.

Bestfoods, 524 U.S. 62, 72 (1998); People v. Tang, 346 Ill.App.3d 277, 289, 805 N.E.2d 243, 253-54 (1st Dist. 2004).

1. Complainant's Allegations that Respondents "Caused or Allowed" Acts are Insufficient

In order for liability to attach personally to corporate officers under Illinois law, the Complainant must allege facts establishing that the Respondents had personal involvement or active participation in the acts resulting in liability, not just personal involvement in the management of the corporation. People v. Tang, 346 Ill.App.3d 277, 289, 805 N.E.2d 243, 253-54 (1st Dist. 2004). It is insufficient to merely allege that respondents "caused or allowed" certain actions to occur in violation of the Act. Id.

A review of the facts alleged against respondents in **Count I alone** of the 2004 complaint reveal a slew of just such general allegations:

a. Respondents managed, operated and co-owned CLC

b. Edward Pruim and Robert Pruim:

* were responsible for and signed and submitted all permit applications and reports to the IEPA related to the landfill
* jointly directed and managed CLC's landfill operations
* caused and allowed the deposit of waste in the landfill
* negotiated and arranged for surety bonds and letters of credit relating to the landfill
* were responsible for ensuring CLC's compliance with pertinent environmental laws and regulations

c. Respondents failed to remove or cause employees to remove refuse in perimeter ditches and the retention pond and allowed refuse to remain in perimeter ditches

d. Respondents allowed leachate seeps to erode areas of the landfill and expose previously covered refuse

e. Respondents allowed litter and refuse to remain exposed.

And this is only Count I. (See 2004 Complaint, Exhibit B, Count I).

Additional examples of allegations that Respondents "caused or allowed" certain acts are presented throughout the 2004 complaint by Complainant. The wording may vary slightly from Count to Count, substituting in "failed to cause" or "failed to take sufficient action" but the effect is the same: Complainant merely alleges that Respondents "caused or allowed" certain acts, as follows:

f. Respondents failed to take sufficient action or direct their employees to take sufficient action to prevent leachate seeps from exiting the landfill (Count II);

g. Respondents caused and allowed the landfilling of landscape waste at the site (Count III);

h. Respondents failed to arrange financing and increase total amount of financial assurance to $1,342,500.00 between July 13, 1996 and June 20, 1996 (Count IV);

i. Respondents failed to cause CLC to file required sign mod for Parcel B by June 15, 1993 (Count V);

j. Respondents failed to take sufficient action, or direct their employees to take sufficient action, to prevent leachate from flowing off-site to the Illinois River (Count VI);

k. Respondents caused and allowed the deposit of refuse in unpermitted portions of Parcel B (Count VII);

l. Respondents have caused and allowed the deposition of waste in unpermitted portions of Parcel B (Count VIII);

m. Respondents caused or allowed the consolidation of refuse at the site above the permitted elevation of 580 feet above mean sea level (Count IX);

n. Respondents failed to obtain a supplemental permit for CLC (Count X);

o. Respondents failed to cause CLC to submit their application for a sign mod by June 15, 1993 (Count XI);

p. Respondents were allowing the mixing of waste tires with municipal waste and placement of the mixed waste in the active are of Parcel A (Count XII);

q. Respondents, by their acts and omissions, caused and allowed violations (regarding blowing litter) (Count XIII);

r. Respondents allowed commencement of the operation of gas facility without having first provided the information to the IEPA (Count XIV);

s. Respondents failed to take any action, or authorize and direct their employees to take any action, to prevent erosion, ponding, and cracking and failed to provide proper vegetative cover (Count XV);

t. Respondents caused and allowed leachate to be pumped from the landfill into new cells (Count XVI)

u. Respondents caused or allowed violations regarding not increasing financial assurance (Count XVII);

v. Respondents caused or allowed placement of leachate in areas that had not been certified or approved by the IEPA (Count XVIII); and, finally,

w. Respondents failed to cause CLC to provide a revised cost estimate by 12/26/94 (Count XIX).

(See 2004 Complaint, Exhibit B).

It is insufficient to merely allege that respondents "caused or allowed" certain actions to occur in violation of the Act. People v. Tang, 346 Ill.App. 3d 277, 289, 805 N.E.2d 243, 253-54 (1st Dist. 2004). As evidenced by the allegations outlined above, Complainant clearly has failed to allege facts establishing the respondents' active participation or personal involvement in the acts resulting in liability. The 2004 complaint should be dismissed in its entirety.

2. None of the Allegations in the 2004 Complaint Rise to the Level where Liability Should Attach.

Illinois courts have made it abundantly clear that in order for liability to attach to a corporate officer individually, as opposed to the corporation itself, the corporate officers must have active participation in the acts resulting in liability. People v. Tang, 346 Ill.App. 3d 277, 289, 805 N.E.2d 243, 253-54 (1st Dist. 2004). The complainant must allege more than that the corporate officer held a management position, had general corporate authority, or served in a supervisory capacity in order to establish individual liability under the Act. In addition, the United States Supreme Court has held that activities that involve the facility such as monitoring performance, supervising finance and capital budget decisions, and articulating general policies and procedures should not give rise to direct liability. U.S. v. Bestfoods, 524 U.S. 62, 72 (1998). These are just the types of activities performed on behalf of the corporation that the Complainant sets forth in Count I: signing and submitting permit applications; jointly directing the landfill operations; and arranging for surety bonds. These are the kinds of activities that do not give rise to individual liability.

In cases where liability did attached, it was found that the officer personally ran operations at the site, spent a great deal of time at the site, directly supervised the employees, and personally applied fertilizer and pesticides to farm fields by operating a floater. People v. Agpro, 345 Ill.App.3d 1011, 1028-1029, 803 N.E.2d 1007, 1019 (2nd Dist. 2004). In applying Illinois law, the Seventh Circuit found that the allegations in the complaint stated a claim for violations of CERCLA where it was alleged that the officer had knowingly exercised direct control over the substances at issue; actually accepted loads of material that included the substances at issue; and directed and controlled the employees who caused the contamination. Arst v. Pipefitters, 25 F.3d 417, 421 (7th Cir. 1994).

Similarly, an officer was found liable where it was held that he had supervised the day to day operations of the landfill by negotiating waste-dumping contracts with the owners of the waste, directing where the wastes were to be dumped, and designing or directing measures for preventing toxic substances in the wastes from leaching into the ground. (BFI v. Ter Maat, 195 F.3d 953, 958 (7th Cir. 1999).

Nowhere in the 2004 complaint does Complainant allege that Robert Pruim and/or Edward Pruim manage the day to day operations of CLC, beyond vague and general allegations of "managed, operated and co-owned CLC" (Exhibit B, Count I, ¶4) and "jointly directed and managed CLC's landfill operations" (Exhibit B, Count I, ¶8). Complainant does make these allegations because it cannot. In fact, sworn testimony indicates the exact opposite: Respondents' complete lack of involvement with the landfill on a day to day basis beyond their purely corporate functions. (See Deposition testimony of Robert Pruim, attached as Exhibit F, pp 12-13). Robert Pruim testified that his and Edward Pruim's responsibilities were "typical corporate functions" such as securing customers, paying bills and collections. (Exhibit F, pp. 12-13). The previously cited deposition of Robert Pruim was taken in the 1997 case on October 29, 2003. Edward Pruim was not deposed by Complainant in the 1997 case.

The allegations in the 2004 complaint are insufficient to proceed against Respondents individually. The Complainant has failed to allege active participation or personal involvement in the acts resulting in liability and have additionally failed to allege that respondents were involved in the day to operations of the landfill. Instead, it is clear that their involvement is limited to acts taken in their corporate capacities.

C. Count XI Should be Dismissed Based on the Doctrine of *Res Judicata*

Alternatively, at a minimum, Count XI should be dismissed based on the doctrine of *res judicata* since the identical count (Count XII in the 1997 case) was dismissed against CLC in the Board's Order of July 26, 2001 (See attached as Exhibit B). The doctrine of *res judicata* provides that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action. Nowak v. St. Rita High School, 197 Ill.2d 381, 389, 757 N.E.2d 471, 477 (2001).

For the doctrine of *res judicata* to apply, the following three requirements must be satisfied: (1) a court of competent jurisdiction rendered a final judgment on the merits; (2) there is an identity of cause of action; and (3) there is an identity of parties or their privies. Nowak v. St. Rita High School, 197 Ill.2d 381, 390, 757 N.E.2d 471, 477 (2001). All three requirements have been met in this case.

1. Rendering of a Final Judgment on the Merits by a Court of Competent Jurisdiction

For the doctrine of *res judicata* to apply, the first requirement is that a court of competent jurisdiction rendered a final judgment on the merits. Nowak v. St. Rital High School, 197 Ill.2d 381, 390, 757 N.E.2d 471, 477 (2001). This requirement is met because the Illinois Pollution Control Board is a court of competent jurisdiction that rendered a final judgment on the merits, having ruled in favor of CLC on July 26, 2001. (See Exhibit B).

2. Identity of Cause of Action

For the doctrine of *res judicata* to apply, the second requirement is that there is an identity of causes of action between the earlier and subsequent causes of action. Nowak v. St. Rital High

School, 197 Ill.2d 381, 390, 757 N.E.2d 471, 477 (2001). This requirement is met because the allegations contained in Count XII of the 1997 Complaint are substantively the same as the allegations contained in Count XI of the 2004 Complaint. (See 1997 Complaint attached as Exhibit D; and 2004 Complaint attached as Exhibit B).

3. Identity of Parties or their Privies

For the doctrine of *res judicata* to apply, the third requirement is that there is an identity of the parties or their privies between the earlier and subsequent litigation. . Nowak v. St. Rital High School, 197 Ill.2d 381, 390, 757 N.E.2d 471, 477 (2001). In Grisanzio v. Bilka, the court held that the identity of parties criterion was satisfied where the defendants in the subsequent litigation were the sole shareholders of the corporate defendant in the prior litigation. 158 Ill.App.3d 821, 827, 511 N.E.2d 762, 766 (2nd Dist. 1987). This is exactly the same scenario as in the 1997 case against CLC and the 2004 case against the respondents.

Respondents have satisfied all three elements. Count XI in the 2004 complaint was already ruled on by the Board in 1997 case in CLC's favor and based on the principles of *res judicata*, Count XI should be dismissed against the respondents in the 2004 case..

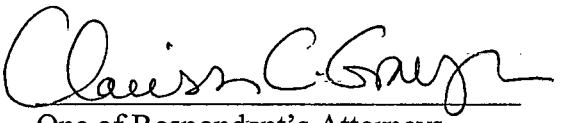
IV. Conclusion

Notwithstanding its own suggestion to the Complainant that "...nothing in this order prevents the complainant from filing a separate enforcement action against the new respondents named in the third amended complaint", the Board should follow its own reasoning as articulated in its Order of March 18, 2004, denying complainants motion for leave to file a Third Amended Complaint, and prevent the 2004 complaint from going forward. It should find that to allow it's filing is untimely, prejudicial and that Complainant had numerous opportunities to do so before but chose not to.

Further, the Board should find that Complainant's allegations are insufficient in that it fails to allege active participation or direct involvement in the act that resulted in liability nor does it allege any involvement in the day to day operations of the landfill beyond that of its corporate functions.

WHEREFORE, Respondents Edward Pruim and Robert Pruim respectfully request that the Board grant its Motion to Dismiss with prejudice.

Respectfully Submitted,



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