IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, CHANCERY DIVISION

PRESTIGE FEED PRODUCTS, LLC, an Illinois limited liability company, Plaintiff/Counter-Defendant, v. VILLAGE OF MOUNT PROSPECT, an Illinois municipal corporation, et. al., Defendants/Counter-Plaintiffs.	Case No. 2023 CH 05147 Judge Clare J. Quish Cal. 14 Courtroom 2301

PRESTIGE'S COMBINED § 2-619.1 MOTION FOR JUDGMENT ON THE PLEADINGS AND FOR PARTIAL SUMMARY JUDGMENT ON THE VILLAGE'S THIRD AMENDED COUNTERCLAIM

Prestige Feed Products, LLC ("Prestige"), by its attorneys, Robbins DiMonte, Ltd., moves this Court, pursuant to Section 5/2 615(e) of the Illinois Code of Civil Procedure, to enter a judgment on the pleadings in its favor and against the Village of Mount Prospect ("Village"), or in the alternative, to enter a partial summary judgment pursuant to 735 ILCS 5/2-1005, and in support thereof, states as follows:

INTRODUCTION

Prestige is entitled to a judgment on the pleadings pursuant to §2-615(e) because the Counterclaim does not sufficiently allege that Prestige is violating applicable law. Prestige is also entitled to a judgment on the pleadings pursuant to §2-615(e) because the sole relief that the Village seeks in its Counterclaim amounts to a permanent injunction against Prestige but the Village seeks to alter (not maintain) the status quo, and because the Village fails to sufficiently allege that it has suffered irreparable injury, it has no adequate remedies at law, and it will succeed on the merits. Moreover, Prestige is entitled to partial summary judgment in its favor pursuant to 735 ILCS 5/2-1005 because the Counterclaim raises no genuine issue of material fact that Prestige is emitting odors above legal threshold levels.

STATEMENT OF FACTS [1]

1. On July 19, 2024, the Village filed its Third Amended Counterclaim ("Counterclaim"). The Counterclaim has three counts. Count I alleges "Violation of Village Code § 14.604"; Count II alleges "Violation of Village Code Section 14.2101(G)(6)"; and Count III alleges "Common Law Public Nuisance." The Village prays for substantially the same relief in each of the three counts as follows: "*A. Enjoin [Prestige] from operating (if not completely, during normal business hours) unless and until it can (i) come into a conforming Light Manufacturing Use (Count I); [and] (ii) operate the Facility so as not to cause a source of discomfort to neighboring uses [and] so as not to cause a nuisance to neighboring uses (Count II); [and] (iii) so as not to cause a nuisance (Count III); [and] B. Any additional damage or remedy that is appropriate*. (C*ounts I-III*)."

2. In the Counterclaim, the Village presents no objectively measurable or scientific data that establish that Prestige's releases odorous matter above the odor threshold level found in the Village Code and Illinois law, or that Prestige's business is a nuisance as defined by law.

3. On September 4, 2024, Prestige filed Prestige's Verified Answer to the Counterclaim; the Affidavit of Joseph C. Pesoli dated September 4, 2024; the Affidavit of Ryan Hartley dated September 4, 2024; and the Affidavit of Riccardo A. DiMonte dated September 4, 2024, which are all incorporated and restated in full herein.

4. Prestige operates a light manufacturing facility in the Village at 431 Lakeview Court, Suite A ("Facility"), where it manufactures and sells soy and cheese-based feed products. See Pesoli Affidavit ¶¶ 2. Complaint, ¶ 1.

[1] The Statement of Facts is 9 pages long and the Argument is 10 pages long.

5. The Facility is part of a multitenant building in an industrial park. The Facility has an area of nearly 32,603 sq.ft., makes up 40.05% of the building, and is situated in its northernmost portion. The properties to the North, East, South, and West of the Facility are also zoned I-1. The Facility's neighbors immediately to the South are in the I-1 district and are not in a residential zoning classifications. See Pesoli Affidavit ¶¶ 2-3.

6. Prestige rents the Facility space. Its current lease agreement runs through January 31, 2029. Prestige pays combined base rent, common area maintenance, and real estate taxes of over $300,000 per year. Id., ¶¶ 4, 5, and 59.

7. The Village Zoning Code in Section 14.2101 states:

> "14.2101: Purpose: The I-1 limited industrial district is intended to provide an area suitable for industrial, manufacturing, warehousing and research facilities that do not create appreciable nuisance or hazards, or an area for such uses that require a pleasant, hazard and nuisance free environment." (Ord. 4590, 9-21-1993). Complaint ¶ 12.

8. During 2018 and 2019, the Village approved Prestige's use as light manufacturing at the Facility. The Village also approved all building and construction permits and all inspections and licenses to renovate and operate the Facility. The final Village inspections took place on February 6 and 7, 2019. The Village granted Prestige an occupancy permit on February 7, 2019, and Prestige began operations onsite March 19, 2019. Pesoli Affidavit ¶¶ 6 – 16; Complaint ¶ 14.

9. After March of 2019, several neighbors surrounding the Facility complained to the Village about odors emanating from the Facility. Since May 2019, the Village has claimed that the Village has received complaints from its residents about a "strong burning smell" coming from Prestige's Facility. The Village has also alleged that Prestige's use at the Facility violated various Village Ordinances and constitutes a nuisance. Pesoli Affidavit ¶¶ 17 – 18; Complaint ¶ 15.

10. The Village Code of Ordinances, Section 11.3401: Nuisances, states:

> "**Section 11.3401: Nuisances**: No business, occupation or activity, licensed under this code or not, shall be conducted or operated so as to constitute a nuisance or so as to amount to a nuisance in fact." (1981 Code; amd. Ord. 3617, 3-4-1986). Complaint ¶ 22.

11. Section 14.2104: Bulk Regulations provides as follows:

> **Section 14.2104: Bulk Regulations**
> ...
> G. Performance Standards: No use established in an I-1 limited industrial district shall be operated so as to exceed the performance standards listed below. Any use already established shall be permitted to be altered, enlarged, expanded or modified provided that all performance standards of the district are met.
> ...
> 6. Odorous Matter Limitations: The release of odorous matter from any industrial district across residence or business district boundary lines shall be so controlled that, at ground level or at habitable elevations, the concentration <u>shall not exceed the odor threshold level</u>. Further, the release of odorous matter across lot lines shall not become a nuisance or source of discomfort to neighboring uses. (Ord. 4590, 9-21-1993; amd. Ord. 5173, 3-6-2001; Ord. 5751, 8-4-2009)" [<u>Emphasis added</u>]. Complaint ¶ 23.

12. The Village Code defers to Illinois law with respect to the odor threshold level applicable to Section 14.2104: Bulk Regulations. The odor threshold level is listed in the Illinois Joint Committee on Administrative Rules, Administrative Code, Title 35: Environmental Protection, Subtitle B: Air Pollution, Chapter I: Pollution Control Board, Subchapter L: Air Quality Standards and Episodes, Part 245 Odors, Section 245.121 Objectionable Odor Nuisance Determination ("<u>35 IAC 245.121</u>"), which in pertinent part states,

> "**Section 245.121 Objectionable Odor Nuisance Determination**
> An objectionable odor nuisance exists:
>
> a) On or adjacent to residential, recreational, institutional, retail sales, hotel or educational premises when odor is detectable in the ambient air after it is diluted with <u>eight</u> volumes of odor-free air as measured by the Scentometer;
>
> b) On or adjacent to industrial premises when odor is detectable in the ambient air after it is diluted with <u>twenty-four</u> volumes of odor-free air as measured by the Scentometer; […]" [<u>Emphasis added</u>]. Complaint ¶¶ 24 – 25.

13. To address the complaints and the Village's concerns, Prestige shut down between June and October of 2019 and informed the Village that it would purchase and install a Byers Scientific Vapor System to reduce or eliminate released odors. The Village reviewed and approved the construction permit for the Byers odor remediation system which was installed in September 2019 and further calibrated through October 2019. Prestige resumed operations in October 2019. Pesoli Affidavit ¶¶ 17 – 18; Complaint 26.

14. Between November of 2019 and April of 2020, the Village shared with Prestige additional complaints from neighbors, some of which were made on days when Prestige was not even operating its equipment at the Facility. Prestige further improved the existing odor mitigation system by installing additional vaporization nozzles to disperse more vapor to the airstream. Id., ¶ 18.

15. On April 22, 2020, Prestige advised the Village that, in good faith, it would further improve the odor mitigation system by reconstructing the duct work from the exterior cyclones to be all closed duct work and have their air dispersed into a carbon filtration system on the roof of the Facility. The Village approved this plan, and Prestige completed the re-construction of the odor control system in July 2020. Id., ¶ 19.

16. On October 1, 2020, representatives of Prestige and of the Village met at the Facility during operation and agreed that Prestige could resume general operations with no restrictions due to lack of released odors. Prestige operated during regular hours from October 1, 2020, to February 28, 2021. Id., ¶ 21.

17. On March 1, 2021, the Village sent Prestige a Notice of Imminent Legal Action alleging that Prestige's operations constituted a nuisance. To address these concerns, Prestige engaged Mostardi Platt, an expert engineering and environmental compliance firm, to perform an

onsite and offsite odor investigation. Additionally, Prestige agreed to run its Facility for limited late night and early morning hours between 8:00 pm and 5:00 am. The parties also executed a Tolling Agreement dated March 30, 2021. Id., ¶¶ 22 – 23.

18. To objectively measure the odors emanating from Prestige's Facility, on April 1, 2021, Mostardi Platt collected Olfactometer readings at 8 locations and conducted an ambient odor survey using a Scentometer at 21 locations, 15 of them offsite and 6 onsite. On June 2, 2021, Mostardi Platt issued its Odor Investigation report which was immediately shared with the VOMP. A copy of this report without the appendices is attached hereto and identified as **Exhibit E** of the Complaint. Pesoli Affidavit ¶¶ 23 – 25; Complaint ¶ 29; Hartley Affidavit ¶¶ 35 – 37.

19. The Olfactometer results of all four Tedlar Bag samples collected at the boundaries at the neighboring real properties adjacent to the Facility had detection readings of 3 or less. The Scentometer results on all 21 tested locations had detection readings of less than 2. Therefore, as of April 2021, no objectively measured odor nuisance from the Facility existed on the properties surrounding the Facility. Additionally, Mostardi Platt determined that the normal operation of the Facility does not have a significant impact on the use and enjoyment of neighboring properties and therefore, the Village's claims of a legal odor nuisance were without merit. Pesoli Affidavit ¶¶ 26 – 27; Hartley Affidavit ¶ 38.

20. Based on this report, the Village allowed Prestige to continue operating during nighttime hours between June 2021 and October 2022. Pesoli Affidavit ¶ 28; Complaint ¶ 32.

21. During Spring 2022, Prestige implemented additional significant upgrades to its odor control system. First, Prestige upgraded the carbon filters with the Anue-Geo filter unit. Prestige also built a new custom aluminum filter cage to fit the newer and thicker filters, and to provide additional support against the elements. Secondly, Prestige upgraded the vapor deodorizer

solution with one specifically engineered for solid waste odor applications with stronger and more potent mix of essential oils. To handle this new vapor, Prestige sent back its Vapor-Phase Odor Control Machine to Byers Scientific to replace all PVC piping with stainless steel piping to prevent degradation from the stronger vapor. Mostardi Platt also collected new odor data on June 10, 2022. Pesoli *Affidavit* ¶¶ 30 – 31; Complaint ¶ 33.

22. During September and October of 2022, the Village reported receiving additional complaints about odors emanating from the Facility, some of which were received on days when Prestige was not operating. In response, Mostardi and Platt issued an updated report on October 31, 2022, based on the data collected on June 10, 2022. Pesoli Affidavit ¶¶ 32 – 33. Complaint ¶¶ 34 – 35. A copy of the October 31, 2022, report without the appendices is attached hereto and identified as **Exhibit F** to Prestige's Complaint. Prestige immediately shared this report with the Village. Complaint ¶ 35.

23. The results of the October 31, 2022, Report also showed that the Scentometer readings were zero (0 at 7 of the 8 tested fence line locations and less than 2 at the 8th location); and that Prestige's operation at the Facility does not reach or surpass the nuisance threshold Scentometer readings under applicable law. The report also concludes that (i) no objectionable odor nuisance from the Facility exists on the neighboring properties, that (ii) the normal operation of the Facility does not constitute a nuisance, and that (iii) Prestige's use does not impact the use and enjoyment of the neighboring properties. Pesoli Affidavit ¶ 34; Complaint ¶ 35 – 36.

24. Prestige and the Village amended and renewed the Tolling Agreement several times to continue through April 2023. Pesoli Affidavit ¶ 29; Complaint On April 10, 2023, notwithstanding objective test results from June 2, 2021, and October 31, 2022, the Village notified Prestige that it intended to terminate the Tolling Agreement as of June 9, 2023. Pesoli Affidavit ¶

35; Complaint ¶ 37. The Termination of the Tolling Agreement results in the Village's ability to revoke Prestige's occupancy permit and business license at the Facility. Pesoli Affidavit ¶ 35; Complaint ¶ 37.

25. On May 25, 2023, Prestige filed a Verified Complaint for Injunction, for Declaratory Judgment, and for Damages ("Complaint"), seeking to stop the Village from revoking Prestige's occupancy permit and business license at the Facility. Prestige also demanded a Jury Trial on the law count. Prestige's Complaint remains pending and undetermined before the Court.

26. In its Complaint and during numerous court appearances and discussions with the Village Prestige pledged to install at the Facility a Tri-Stack Strobic Air Fan to further reduce or completely eliminate the emissions from its operations. See Pesoli Affidavit ¶ 37; Complaint ¶ 41. In September 2023, Prestige also retained V3 Companies, Ltd. ("V3"), to prepare several expert and scientific reports, and to objectively measure the existence and strength of odors which the neighbors and the Village have complained about; and to determine whether Prestige's business operation is a nuisance. Pesoli Affidavit ¶ 48.

27. On December 9, 2023, Prestige invested $171,889 to install a Tri-Stack Strobic Air Fan to further reduce or completely eliminate the emissions at the site. Id. ¶39. Since December 9, 2023, when Prestige installed the Strobic fan, odor surrounding the facility is either non-detectable, or, in one location, detectable but well below the legal standard. Id., ¶ 42.

28. Following the installation of the Strobic Air Fan at the Facility, V3 and its analysts collected air and odor samples during the month of January 2024. See Hartley Affidavit ¶¶ 25 – 26. On April 1, 2024, V3 issued an Odor Assessment Report and an Emission Inventory Report based on air sample measures on January 2024. Hartley Affidavit ¶ 27. Prestige has shared these two reports with the Village. Pesoli Affidavit ¶ 49. True copies of the full Odor Assessment Report

and Emission Inventory Report dated April 1, 2024 (without their appendices) are attached as **Exhibits 4 and 5** to Ryan Hartley's Affidavit.

29. The two 2024 V3 reports, just like the previous Mostardi Platt reports from 2021 and 2022, conclude that Prestige's release of odorous matter from the Facility (i) does not constitute a nuisance to the surrounding neighbors; (ii) does not have a significant impact on the use and enjoyment of neighboring properties; and (iii) does not amount to a source of discomfort to neighboring uses. See Hartley Affidavit ¶¶ 28 – 30.

30. Through February 1, 2024, Prestige has invested $3,547,210.93 in combined buildout, production equipment, air mitigation equipment and reports, and litigation costs. Pesoli Affidavit ¶53. The buildout of 431 Lakeview Ct, Ste A cost $518,698.14; and the installation of feed processing equipment cost $1,691,898.68. In addition, between 2019 and 2024, to achieve zero measurable odors, comply with Village Code, be a good neighbor, and operate in good faith, Prestige has spent $1,188,841.02 in odor mitigation equipment and tests and reports; and $147,773.09 in legal expenses. Id. Since February 1, 2024 Prestige has continued to incur costs and expenses defending the lawsuit against the village, against various neighbors, and continuously improve the odor mitigation system installed at the Facility. Id. ¶ 54.

31. Currently, Prestige has 13 employees for its two shifts operating between the hours of 8 p.m. and 12:30 p.m. and to handle deliveries to and from the Facility. By operating two shifts a day for five days a week during the first quarter of year 2024, Prestige managed to generate approximately $439,000 in monthly gross revenue and approximately $172,000 in monthly gross profit. Id. ¶¶ 45 – 46.

32. Prestige is entitled to unfettered operation of its business because it is not a nuisance by any objective standard defined by law. Without injunctive relief, 13 Prestige employees will

lose their jobs, Prestige will default on its lease for the sum of $300,000 per year, Prestige will lose its investment of $3,547,210.93 for the Facility, Prestige will immediately default on its outstanding contract orders for delivery of product with serious financial consequences for Prestige and its customers, Prestige will not be able to enter into any additional contracts, Prestige will suffer irreparable damage to its business reputation, and Prestige will immediately lose the ability to generate the monthly gross revenue of approximately $439,000, and monthly gross profit of approximately $172,000 which it desperately needs after years of constant losses. Pesoli Affidavit ¶¶ 55 - 59.

LEGAL STANDARD

I. Combined Motions Under § 2-619.1. Section 2-619.1 of the Code of Civil Procedure allows a party to file a combined § 2-615, § 2-619, and/or § 2-1005 motion. (735 ILCS 5/2-619.1).

(a) *Motions for Judgment on the Pleadings (735 ILCS 5/2-615(e))*. Pursuant to 735 ILCS 5/2-615(e), any party may seasonably move for judgment on the pleadings. *Delgatto v. Brandon Associates, Ltd.*, 172 Ill. App. 3d 424, 122 Ill. Dec. 125, 526 N.E.2d 384 (1st Dist. 1988). A motion for judgment on the pleadings tests the pleading's sufficiency by requiring the court to determine whether a complaint entitles the claimant to relief. *Vivify Construction, LLC v. Nautilus Insurance Co.*, 2017 IL App (1st) 170192, 94 N.E.3d 281 (1st Dist. 2018). The sole issue raised by a motion for judgment on the pleadings is whether the complaint or counterclaim, when read in light of the respondent's answer, raises material questions of fact as to the existence of a cause of action. *Parkway Bank and Trust Co. v. Meseljevic*, 940 N.E.2d 215 (Ill. App. Ct. 1st Dist. 2010). A judgment on the pleadings is appropriate where the pleadings disclose no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Pekin Ins. Co. v. Wilson*, 2010 WL 1999669 (Ill. 2010). A judgment on the pleadings is appropriate where a judgment different from that pronounced could not be rendered, notwithstanding any evidence which might be produced. *Brown v. Gill*, 343 Ill. App. 460, 99 N.E.2d 393 (3d Dist. 1951).

(b) *Motion for Partial Summary Judgment (735 ILCS 5/2-1005).* Summary judgment is proper "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." 735 ILSC 5/2-1005. "The non-movant must do more than simply show that there is some metaphysical doubt as to the material fact." *Ty, Inc. v. Agnes M. Ltd.*, No. 00 C 358, 2001 WL 1414210, at * 1 (N.D. Ill. Nov. 9, 2001). Any inferences drawn in favor of the non-movant must be supported by evidence. *Destiny Health, Inc. v. Connecticut Gen'l Life Ins. Co.*, 2015 IL App (1st) 142530, ¶ 20. "Summary judgment is 'the put up or shut up moment in a lawsuit' where a party lays its proverbial cards on the table, showing what evidence it possesses to convince a trier of fact to agree with its version of the events." *Phyllis Schlafly's Am. Eagles*, 451 F. Supp. 3d. 910, 916; (*North Community Bank v. 17011 South Park Ave., LLC*, 2015 IL App (1st) 133672, ¶ 15 (2015)). "A scintilla of evidence in support of the non-movant's position is not sufficient to oppose successfully a summary judgment motion; there must be evidence on which the jury could reasonably find for the non-movant." *Ty. Inc.*, 2001 WL 1414210, at *1.

ARGUMENT

The Third Amended Counterclaim raises no material questions of fact and Prestige is entitled to judgment in its favor, and in the alternative, partial summary judgment should be entered in favor of Prestige and against the Village, for the reasons stated below.

I. Prestige is entitled to a judgment on the pleadings pursuant to § 2-615(e) because the Counterclaim fails to allege that Prestige violates the applicable Village Ordinances and the Illinois Administrative Code.

The Counterclaim contains 26 pages and 175 sections. However, the Counterclaim fails to make a single allegation that Prestige is releasing odors detectable in the ambient air after it is diluted with 24 volumes of odor free air as measured by a Scentometer. The Counterclaim also fails to allege that an objectionable odor nuisance from the Facility exists on neighboring properties surrounding the Facility. On all four sides, Prestige's Facility is surrounded to the East, North, South, and West by industrial zoned businesses. There are four other businesses to the South of Prestige. Pesoli Affidavit ¶¶ 2, 3. These businesses, such as the Illinois Bone and Joint Institute and MPI Sports Development Center, have a large daily public clientele. Neither the businesses nor their customers have complained about any odors to Prestige or to the Village. Id. ¶59.

The Counterclaim has no allegations that the Village or the other complainers have performed any objective, measurable, or scientific test of the ambient air that they complain about. In fact, there is not a single allegation in the Counterclaim that Prestige is releasing odors above threshold levels specified by Illinois or Municipal law. The Village fails to allege that Prestige is violating the objectionable odor nuisance determination in 35 IAC 245.121 by releasing odors which are detectable in the ambient air after it is diluted with 24 volumes of odor free air as measured by the Scentometer. Therefore, judgment on the pleadings should be entered in favor of Prestige and against the Village on the Village's Third Amended Counterclaim because it fails to allege that Prestige is releasing odorous matter across residence or business district boundary line at ground level or habitable elevations in concentrations exceeding the odor threshold level.

II. The Court should enter a judgment on pleadings in favor of Prestige pursuant to §2-615(e) because the Village has failed to allege facts justifying permanent injunctive relief.

All three counts of the Counterclaim seek only permanent injunctive relief against Prestige. The Counterclaim asks the Court to enjoin Prestige from operating (if not completely, during normal business hours), unless and until it can (i) come into a conforming Light Manufacturing

Use (Count I); [and] (ii) operate the Facility so as not to cause a source of discomfort to neighboring uses [and] so as not to cause a nuisance to neighboring uses (Count II); [and] (iii) so as not to cause a nuisance (Count III). All three Counts ask for substantially the same relief, that is enjoin Prestige from operating. This is the only relief sought by the Counterclaim, other than the boilerplate request for "*Any additional damage or remedy that is appropriate*." This relief sought is permanent injunctive relief. *See, e.g., Universal Metro Asian Servs. Ass'n v. Mahmood*, 2021 IL App (1st) 200584, ¶ 22, stating that "An injunction has been defined as a judicial process, by which a party is required to do a particular thing, or to refrain from doing a particular thing."

The Counterclaim fails to designate any of the three counts as a claim for permanent injunction and fails to plead a claim for permanent injunction. The Village is not entitled to a permanent injunction because it seeks to alter, and not preserve, the status quo. Further, Village has not, and cannot, satisfy the elements of irreparable injury and inadequate remedy at law or in equity. The Village also cannot succeed on the merits of the case on the facts alleged in the Counterclaim. As a result, Prestige is entitled to a judgment on the pleadings in its favor. [Citations to judge Quish September 9 Order?]

"Permanent injunctions are designed to extend or maintain the status quo indefinitely when the plaintiff has shown irreparable harm and has shown that there is no adequate remedy at law." Alpha Sch. Bus. Co. v. Wagner, 391 Ill. App. 3d 722, 743 (1st Dist. 2009). "A party seeking permanent injunctive relief must demonstrate: (1) a clear and ascertainable right in need of protection; (2) irreparable harm if injunctive relief is not granted; (3) no adequate remedy at law; and (4) success on the merits." *Hasco, Inc. v. Roche*, 299 Ill. App. 3d 118, 126 (1st Dist. 1998). "The burden of proof is heavier for obtaining permanent, as compared to preliminary, injunctive relief." *Sheehy v. Sheehy*, 299 Ill. App. 3d 996, 1004 (1st Dist. 1998). "An injunction, however, is an extraordinary remedy to be granted only in exigent circumstances." *Crawley v. Bauchens*, 57 Ill. 2d 360, 366, 312 N.E.2d 236, 239 (1974). (*See also*, *Vulcan Detinning Co. v. St. Clair*, 315 Ill. 40, 44 (1924), stating that "Injunction is an extraordinary remedy, and, where human liberty is involved the writ should be used with great caution.").

(a) The Village seeks to alter, not preserve, the status quo, through injunctive relief.

Prestige has operated at the Facility since 2019. The current status quo is that Prestige operates two shifts a day for five days a week, and one shift one day a week. During weeknights, Prestige typically runs its production equipment between the hours of 8 p.m. and 12:30 p.m. the following day. On Saturday mornings, Prestige stops its equipment at 6 a.m. Prestige has hired 13 employees to man these shifts and to handle deliveries to and from the Facility.

In its Counterclaim, the Village seeks to alter this status quo and shut Prestige down indefinitely or permanently alter its operating hours. If Prestige shuts down its operations, Prestige will immediately lose the ability to generate the monthly gross revenue of nearly $439,000, and monthly gross profit of nearly $172,000 which it desperately needs after years of constant losses. If Prestige shuts down its operations, Prestige will immediately default on its outstanding contract orders for delivery of product with serious financial consequences for Prestige and its customers. Prestige will also not be able to enter into any additional contracts and suffer irreparable damage to its business reputation. If Prestige shuts down its operations, Prestige will default on payment of its Lease obligations to its Landlord, which for year 2024 alone are nearly $300,000, and over $300,000 per year until the end of the term on January 31, 2029. If Prestige shuts down its operations, Prestige will lose its investment in the Facility, which to date exceeds $3.5 million.

(b) The Village failed to satisfy the elements of irreparable injury.

A claim for injunctive relief must allege in particular terms the manner in which the movant will be injured. *Mingare v. DeVito*, 67 Ill.App.3d 371, 373 (1st Dist. 1978). "Such facts must be alleged with certainty and precision; it is incumbent upon the plaintiff to allege, as well, in particular terms the irreparable harm." *Alms v. Peoria Cnty. Eletion Comm'n*, 2022 IL App (4th) 220976, ¶ 33. "Mere conclusions are inadequate." *Id*. (See also *Smith v. Dep't of Nat. Res.*, 2015 IL App (5th) 140583, ¶ 27, stating that "The requirement of the showing of imminent injury is not satisfied by proof of a speculative possibility of injury and such relief will not be granted to allay unfounded fears or misapprehensions."). A party seeking to obtain injunctive relief must set forth "specific facts to sufficiently apprise the court that immediate and irreparable injury, loss or damage will result if notice and hearing are had." *Lake Cnty. v. Spare Things*, 27 Ill.App.3d 149, 183 (2nd Dist. 1975). "An alleged injury is defined as irreparable when it is of such nature that the injured party cannot be adequately compensated therefor in damages or when damages cannot be measured by any certain pecuniary standard." *Kalbfleisch ex rel. Kalbfleisch v. Columbia Community Unit School No. 4*, 396 Ill.App.3d 1105, 1116 (5th Dist. 2009).

The Counterclaim pleads no actual facts that would establish the existence of irreparable harm. Specifically, Prestige has been operating its business at this location for five years. There are no facts pleaded in the Village's Third Amended Counterclaim, its supporting affidavits, or its exhibits, that explain how any alleged injury is irreparable or could not be compensated by monetary damages or measured by any pecuniary standard. Indeed, if there truly existed any irreparable harm caused by Prestige's operations, the Village should have taken swift action to have Prestige closed five years ago. Instead, to satisfy the Village and the complainers, Prestige has invested over one million dollars in odor mitigation equipment and scientific reports which the Village has approved and received numerous times during the past five years.

(c) The Village failed to plead the elements of an inadequate remedy at law or in equity.

"[A] remedy at law is considered inadequate when monetary damages cannot compensate the injury and the injury cannot be measured by pecuniary standards." *Bd. Of Educ. Of Dolton Sch. Dist. 149 v. Miller*, 349 Ill.App.3d 806, 814 (1st Dist. 2004). "For purposes of a permanent injunction, an inadequate remedy can be the threat of irreparable harm or other harm that cannot be adequately corrected by the payment of monetary damages." *Sheehy*, 299 Ill. App. 3d at 1004.

The Counterclaim does not allege that there is no adequate remedy at law due to Prestige's actions. Indeed, an adequate remedy at law for monetary damages could compensate the alleged injuries sustained by the Village's constituents. Those same constituents that the Village uses to support its claim are themselves plaintiffs in a class action suit before this Court and are seeking monetary damages from Prestige. (See Case No. 2024-CH-01504, Mary Beth Stillmaker and Sargon Merza, et.al., v. Prestige Feed Products, LLC and Cereal Byproducts Company).

(d) Prestige will succeed on the merits because there are no allegation that Prestige is emitting odors over and above legal threshold levels.

As previously stated, the Counterclaim fails to allege that Prestige's use at the Facility emits odors over and above legal threshold levels to violate the Village code or Illinois law. The only objective, measurable and scientific evidence present in the Counterclaim and in Prestige's Verified Complaint and in Prestige's answer shows that Prestige is emitting odors which are either non-detectable (non-odors) or at levels well below legal thresholds. The Counterclaim itself makes no allegations that Prestige is emitting odors above and beyond legal thresholds. Therefore, the Court should enter judgment in favor of Prestige and against the Village as to all counts of the Counterclaim.

III. Prestige is entitled to partial summary judgment in its favor pursuant to 735 ILCS 5/2-1005 because there are no material questions of fact that Prestige is emitting odors over and above legal threshold levels.

There are no material questions of fact and Prestige is entitled to partial summary judgment in its favor as to all three counts pleaded in the Counterclaim, because the only objective, measurable, and scientific evidence collected in this case shows that Prestige is emitting odors which are either non-detectable (non-odors) or at levels well below legal thresholds.

The June 2, 2021 Mostardi Platt Investigation Odor Report states:

> "…The Olfactometer results of all four Tedlar Bag samples collected at the boundaries of the neighboring real properties adjacent to the Facility had detection readings of 3 or lower. The Scentometer results at all 21 tested locations had detection readings of less than 2. Therefore, no objectionable odor nuisance from the Facility exists on the properties surrounding the Facility. As a result, the normal operation of the Facility does not have a significant impact on the use and enjoyment of neighboring real properties."

See Ryan Hartley Affidavit, Exhibit 2, PREST000062.

The October 31, 2022, Mostardi Platt Investigation Odor Report provides:

> "…Based on our analysis of the data collected at the Facility during our investigation and in preparation of both these reports, we conclude that Prestige's operation of the feed producing machinery does not emanate objectionable odor nuisances anywhere near to the applicable threshold levels. As a result, this operation does not impact the use and the enjoyment of neighboring properties, and it does not constitute a nuisance.
>
> Since our first report of June 14, 2021, Prestige has installed at the Facility additional odor control measures including newer air filtration and vapor units. As a result, key readings at the Real Property boundaries improved significantly. The Scentometer readings were **zero (0)** at 7 of the 8 tested fence-line locations. The only one noticeable Scentometer reading of **less than two (2)** was at the location directly by the Facility's discharge bay in the North-East corner of the Real Property. These results demonstrate that the Facility's operation does not reach or surpass the nuisance threshold Scentometer readings under applicable law (8 along the Real Property's southern border and 24 everywhere else)."

See Ryan Hartley Affidavit, Exhibit 3, PREST000173.

Further, the V3 Odor Assessment Report dated April 1, 2024, concludes:

> "…The odor strength at the real property boundaries lines is either non-existent or below the threshold levels established in *Illinois Administrative Code, Title 35: Environmental Protection, Subtitle B: Air Pollution, Chapter I: Pollution Control Board, Subchapter L: Air Quality Standards and Episodes, Part 245 Odors, Section 245.121 Objectionable Odor Nuisance Determination* ("35 IAC

> 245.121”). The onsite Scentometer readings and odor panel Olfactometer results of air samples collected at the real property lines and adjacent properties in January 2024 are depicted in **Table 1** below and are similar to or lower than those of the 2022 Report. Also, the addition of the Strobic Fan at the Facility has increased air dispersion to further reduce any odor impacts at the real property line and the neighboring properties. **Based on these results, Prestige’s operation at the Facility does not constitute a nuisance […]”**

See Ryan Hartley Affidavit, Exhibit 4, PREST000252.

Between 2019, when Prestige began operating and July 19, 2024, when the Village filed its Third Amended Counterclaim, the Village failed to commission a single objective scientific or measurable study concerning the odors that Prestige allegedly releases from the Facility. Instead of measurable scientific data, the Village relies entirely on hearsay complaints from Village agents and constituents and Des Plaines residents.

CONCLUSION

Prestige is entitled to a judgment on the pleadings in its favor as to the Counterclaim pursuant to §2-615(e) because (1) the Counterclaim does not sufficiently allege that Prestige is violating applicable law; and because (2) the sole relief that the Village seeks in its Counterclaim amounts to a permanent injunction against Prestige, but (a) the Village seeks to alter (not maintain) the status quo, and (b) the Village fails to sufficiently allege that (i) it has suffered irreparable injury, that (ii) it has no adequate remedies at law, and that (iii) it will succeed on the merits. In the alternative, Prestige is entitled to partial summary judgment in its favor pursuant to 735 ILCS 5/2-1005 because the Counterclaim raises no genuine issue of material fact that Prestige is emitting odors above odor legal threshold levels.

WHEREFORE, Prestige Feed Products, LLC respectfully requests that the Court enter a judgment in its favor and against the Village of Mount Prospect on its Third Amended Verified Counterclaim for Injunctive Relief pursuant to §2-619.1 of the Illinois Code of Civil

Procedure, enter a partial summary judgment pursuant to 735 ILCS 5/2-1005, and for any further relief the Court deems just.

Respectfully submitted,

Prestige Feed Products, LLC

/s/ Riccardo A. DiMonte
By: ______________________
One of its attorneys

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