

State of Illinois
Pollution Control Board
James R. Thompson Center
100 W. Randolph Street, Suite 11-500
Chicago, Illinois 60601

RECEIVED
CLERK'S OFFICE
DEC 01 2008
STATE OF ILLINOIS
Pollution Control Board

In The Matter Of:)
)
Anne McDonagh & David Fishbaum)
1464 Linden Avenue)
Highland Park, IL 60035)
)
Complainants,)
v.) PCB 08-76
)
Richard and Amy Michelon) (Citizens Enforcement – Noise)
1474 Linden Avenue)
Highland Park, IL 60035)
)
Respondents.)

NOTICE OF FILING

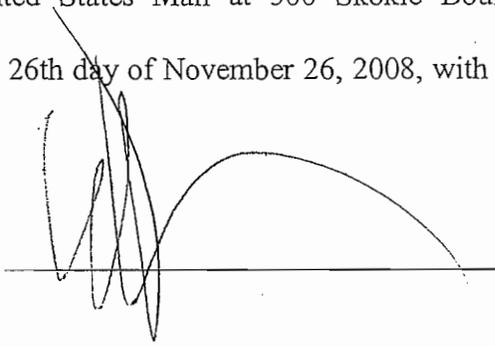
TO: Anne McDonagh and David Fishbaum Bradley P. Halloran, Hearing Officer
1464 Linden Avenue Illinois Pollution Control Board
Highland Park, IL 60035 James R. Thompson Center, #11-500
100 W. Randolph Street
Chicago, IL 60601

PLEASE TAKE NOTICE that on November 26, 2008, the undersigned filed with the State of Illinois Pollution Control Board, James R. Thompson Center, 100 W. Randolph Street, Suite 11-500, Chicago, Illinois 60601, a copy of Respondents' Motion for Extension of Time and Response to Motion to Bar, a copy of which is attached hereto and served upon you.

Elliot S. Wiczer
WICZER & ZELMAR, LLC
500 Skokie Boulevard, Suite 350
Northbrook, IL 60062
(847) 849-4800
Attorney No. 37886

CERTIFICATE OF SERVICE

I, Elliot S. Wiczer, an attorney, on oath state that I caused a copy of the foregoing Notice, Response and Motion for Extension of Time to be served upon the person(s) named above by depositing the same in the United States Mail at 500 Skokie Boulevard, Northbrook, Illinois, before 5:00 p.m. on this 26th day of November 26, 2008, with proper postage prepaid.

A handwritten signature in black ink, appearing to read "Elliot S. Wiczer", is written over a horizontal line. The signature is stylized and somewhat cursive.

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PCB 20

08-76

**RESPONDENTS' MOTION FOR EXTENSION OF TIME
TO COMPLETE DISCOVERY**

NOW COME the Respondents, RICHARD and AMY MICHELON, by and through their attorneys, Wiczer & Zelmar, LLC, and for their Motion For Extension of Time to Complete Discovery, state as follows:

1. On August 14, 2008, this Hearing Board adopted the discovery schedule agreed to by Claimants and Respondents. Exhibit 1.
2. Both Claimants and Respondents issued written discovery and have since answered written discovery.
3. Respondents' expert has been engaged and is currently working on preparing a report and further testing on the site.
4. The Claimants have filed a Motion to Bar suggesting that the disclosure of Respondents' expert has not been made.

5. The Respondents by this motion are seeking additional time to supplement their answers to interrogatories.¹

6. The Respondents will suffer no prejudice by allowing the Respondents to supplement their interrogatories by providing the written report containing the opinions of the expert.

7. While Respondents' expert has indicated that the report will be available no later than December 31, 2008, with the holidays, the Respondents are seeking that the expert report be provided to the Claimants no later than January 6, 2008.

8. No trial date has been set in this matter.

WHEREFORE, the Respondents, RICHARD and AMY MICHELON, pray this Honorable Court enter an order granting their Motion for Extension of Time to supplement their answers to interrogatories and for any other relief this Court deems just and fit.

Respectfully submitted,

RICHARD and AMY MICHELON

By: _____

One of Their Attorneys

Elliot S. Wiczer
WICZER & ZELMAR, LLC
500 Skokie Boulevard, Suite 350
Northbrook, IL 60062
(847) 849-4800
Attorney No. 37886

¹ In their Answers to Interrogatories the Respondents specifically reserved the right to supplement their interrogatories when the report was made available by their expert.

Attn: Mr. Elliot Wiczer

WICZER & ZELMAR, LLC
— ATTORNEYS AT LAW —

BERNARD WICZER
MICHAEL A. ZELMAR
ELLIOT S. WICZER
TRESSA A. PANKOVITS
JOHANNAH K. HEBL*

*Admitted in Wisconsin

Suite 350
500 Skokie Boulevard
Northbrook, Illinois 60062
Telephone (847) 849-4800
Facsimile (847) 205-9444
www.wiczierzelm.com

August 14, 2008

Anne McDonagh
David Fishbaum
1464 Linden Avenue
Highland Park, IL 60035

Re: McDonagh & Fishbaum v. Michelin

Dear Ms. McDonagh and Mr. Fishbaum:

Pursuant to Mr. Halloran's Order I am proposing the following discovery schedule:

- 1. Written discovery to be propounded on or before ~~August 31~~, 2008;
- 2. Expert disclosures to be completed by October 15, 2008; and
- 3. All depositions to be completed by November 30, 2008.

Sept. 5

We were out of town 8/13-22.

In addition, based on the State of Illinois testing standards, measurements by our clients' expert are required to be taken from your property. Please let me know if you have any objection to our expert entering on to your property for the limited purpose of taking the required measurements.

If you have no objection to the foregoing, please sign a copy of this letter acknowledging your agreement that I will submit this letter as part of our discovery plan. Thank you.

I have no objection to your expert entering our property though I need to be on site during process. I am free most days but

Very truly yours,

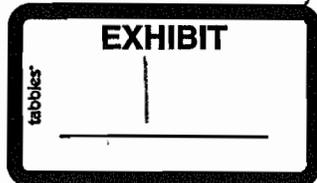
Elliot S. Wiczer

ESW:hr

AGREED:

Anne McDonagh

daytime noise not start until Linden Ave street construction is completed, likely by 8/29. Thank you. Evening hours would be fine.



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08-76

RESPONDENTS' RESPONSE TO CLAIMANTS'
MOTION TO BAR EXPERT DISCLOSURE

NOW COME the Respondents, RICHARD and AMY MICHELON ("Respondents"), by and through their attorneys, Wiczer & Zelmar, LLC, and for their Response to Claimants', ANNE MCDONAGH and DAVID FISHBAUM, Motion to Bar Expert Disclosure, state as follows:

1. On or about August 14, 2008, the parties exchanged a discovery schedule in the form of correspondence drafted by counsel for the Respondents. Exhibit 1 hereto.
2. The parties agreed to the discovery schedule set forth therein and the hearing officer adopted the schedule.
3. In accordance with the parties Agreement, the parties propounded written discovery on or before September 5, 2008.

4. In accordance with the parties agreement, the Claimants and the Respondents timely answered all written discovery.

5. Contained in the Respondents Answers to Interrogatories, in fact, is the name, address of Stuart Bagley, respondent's expert. The Respondents provided a CV of Mr. Bagley as document bates number 70. A copy of the Respondent's Answer is attached hereto as Exhibit B. Thus, Respondents have timely disclosed their expert as required by the August 14, 2008, discovery schedule.

6. In addition the Respondents reserved the right to supplement the disclosure by producing the written report that was not yet available when the disclosure was made.

7. The rules of discovery are designed to garner compliance with discovery rule orders and not to punish dilatory parties. *Blakey v. Gilbane Building Corp.*, 303 Ill.App.3d 872 708 N.E.2d 1187, 1191 (4th Dist. 1999).

8. The Respondents here have hardly been dilatory. In fact in contravention of Supreme Court Rule 201(k) the Claimants have failed to attempt to garner compliance by the Respondents in accordance with the aforesaid rule. The Claimants do not suggest that they have fulfilled the requirements of Supreme Court Rule 201(k) and therefore their Motion to Bar is premature.

9. In addition, as a mitigating factor, the Claimants and Respondents have engaged in settlement discussions and as of the date of the filing of this response, continue to engage in such discussions.

10. Furthermore, even though the Respondents have fully complied with the disclosure requirement of the discovery scheduling letter, it should be noted that no

hearing date has been set and a supplement to the discovery disclosure of the Respondents' expert would not be untimely. In addition, the Respondents have filed a motion for an extension of time to complete any discovery, including depositions and supplement to January 15, 2008.

11. Thus, having no trial date set there is no prejudice to the Claimants by the Hearing Board allowing for an extension of time to answer and/or supplement discovery.

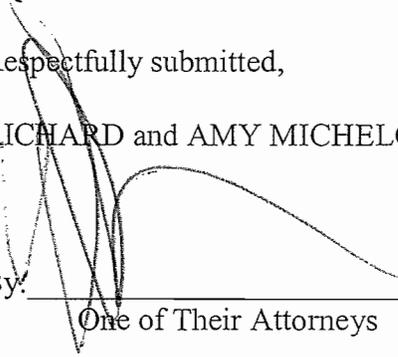
12. However, there would be extreme prejudice to the Respondents if the Hearing Board would not permit Respondents to provide the report of their expert.

13. Thus, based on the foregoing, the Claimants' motion should be denied.

WHEREFORE, the Respondents, RICHARD and AMY MICHELON, pray this Honorable Court enter an order denying the Motion to Bar and for any other relief this Court deems just and fit.

Respectfully submitted,

RICHARD and AMY MICHELON

By: 

One of Their Attorneys

Elliot S. Wiczer
WICZER & ZELMAR, LLC
500 Skokie Boulevard, Suite 350
Northbrook, IL 60062
(847) 849-4800
Attorney No. 37886

Attn: Mr. Elliot Wiczer

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August 14, 2008

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Re: McDonagh & Fishbaum v. Michelin

Dear Ms. McDonagh and Mr. Fishbaum:

Pursuant to Mr. Halloran's Order I am proposing the following discovery schedule:

- 1. Written discovery to be propounded on or before ~~August 31~~ ^{Sept. 5}, 2008;
- 2. Expert disclosures to be completed by October 15, 2008; and
- 3. All depositions to be completed by November 30, 2008.

We were out of town 8/13-22.

In addition, based on the State of Illinois testing standards, measurements by our clients' expert are required to be taken from your property. Please let me know if you have any objection to our expert entering on to your property for the limited purpose of taking the required measurements.

If you have no objection to the foregoing, please sign a copy of this letter acknowledging your agreement that I will submit this letter as part of our discovery plan. Thank you.

I have no objection to your expert entering our property though I need to be on site during process.

I am free most days but

ESW:hr

I would ask that testing not start until street construction is completed, likely by 8/29. Thank you. Evening hours would be fine.

Very truly yours,

Elliot S. Wiczer

AGREED:

Anne McDonagh



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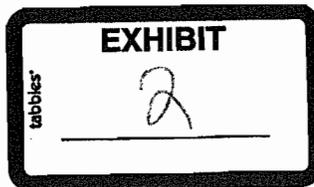
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| |) | (Citizens Enforcement – Noise) |
| Richard and Amy Michelin |) | |
| 1474 Linden Avenue |) | |
| Highland Park, IL 60035 |) | |
| Respondents. |) | |

RESPONDENTS' ANSWERS TO INTERROGATORIES

NOW COME the Respondents, RICHARD MICHELON and AMY MICHELON (“Respondents”), by and through their attorneys, Wiczer & Zelmar, LLC, and for their Answers to the Complainants, ANNE MCDONAGH and DAVID FISHBAUM (“Complainants”) Interrogatories and pursuant to Supreme Court Rule 213 state as follows:

I. GENERAL RESPONSES AND OBJECTIONS

1. Respondents object to Claimant’s interrogatories to the extent they call for information protected by the attorney-client privilege, work-product immunity, or any other privilege or immunity. Should Respondents inadvertently provide any information protected by any such privileges or immunities, such disclosure shall in no way be intended, nor should it be construed, as a waiver of those privileges or immunities.



2. The following responses are submitted subject to, and without in any way waiving or intending to waive, the above objection, as well as:

(a) the right to object to competency, relevancy, materiality, privilege, and admissibility as evidence for any purpose of any of the responses given or the subject matter thereof in any subsequent proceeding in, or the trial of, this action or any action or proceeding;

(b) the right to object to other discovery procedures involving or related to the same subject matter as the interrogatories herein responded to; and

(c) the right at any time to revise, correct, add to, or clarify any of the responses set forth herein.

The following specific responses and objections are expressly subject to, do not constitute a waiver of, and implicitly incorporate all of the above general objections.

II. ANSWERS TO INTERROGATORIES

1. ANSWER: Richard and Amy Michelin
1474 Linden Avenue
Highland Park, IL 60035

Mr. and Mrs. Michelin have knowledge relating to the air conditioning units, the Claimants' claims, the work performed on Respondents' air conditioning units to quiet the units, the Zoning Board of Appeals hearing, all efforts to remediate the alleged sound emanating from the air conditioning units, generally the allegations of Claimants' Complaint, Respondents' Motion to Dismiss, and Answer.

2. ANSWER: Stuart D. Bagley, MS CIH CSP
IAQ Services, Inc.
11236 Harrington Street
Fishers, IN 46038-3208

CV is produced herewith. Mr. Bagley has yet to provide a written report. However, the Respondents specifically reserve the right to supplement their answer to interrogatory number 2 at a later date.

3. ANSWER: Respondents object to interrogatory number 3 as vague and not tending to lead to relevant admissible evidence.

4. ANSWER: To the extent that there is information to satisfy interrogatory number 4, the Respondents have provided the same in their answer to Claimants' request for production of documents.

5. ANSWER: The Respondents object to interrogatory number 5 as vague and overbroad. Further answering, the Respondents state that the units are sited plus or minus 13 ½ feet from the Claimants' side yard setback. The units are each approximately 5 tons.

6. ANSWER: The Respondents object to interrogatory number 6 as not tending to lead to relevant admissible evidence, vague and overbroad. Notwithstanding the objection, the Respondents state that they do not know how many days per year that the subject air conditioners are turned on, the unit hours of operation, their cycle frequency and duration. The Respondents further state that they are not experts but readily believe that the decibel ratings measured at the units are 65 decibels.

7. ANSWER: The Respondents object to interrogatory number 7 as said interrogatory calls for conclusions of law and therefore said interrogatory cannot be answered in its current form.

8. ANSWER: The Respondents object to interrogatory number 8 as vague and overbroad in terms of the word "visits". Notwithstanding said objection, the Respondents have listened to the air conditioning units on a number of occasions.

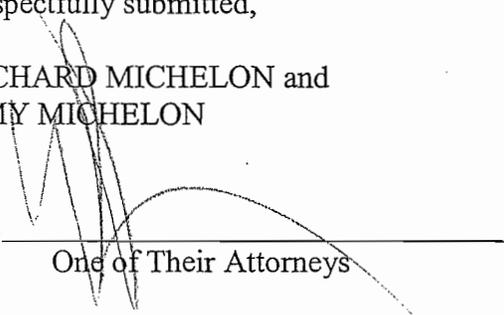
9. ANSWER: The Respondents have not occupied the residence since in or about May, 2007, and have continuously occupied the residence since that date.

10. ANSWER: The Respondents object to interrogatory number 10 as said interrogatory concludes a fact that is not accurate.

11. ANSWER: The Respondents have not yet determined who they will call at trial but reserve the right to supplement interrogatory number 11 at a later date.

Respectfully submitted,

RICHARD MICHELON and
AMY MICHELON

By: 
One of Their Attorneys

Elliot S. Wiczer
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500 Skokie Boulevard, Suite 350
Northbrook, IL 60062
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