

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

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STATE OF ILLINOIS
Pollution Control Board

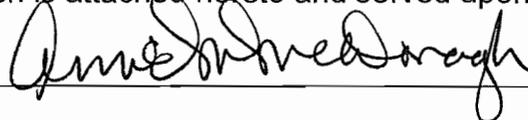
<http://www.ipcb.state.il.us/>

In The Matter Of:)
Anne McDonagh & David Fishbaum)
1464 Linden Avenue)
Highland Park, IL 60035)
Complainant(s),)
v.) PCB 2008 - 076
Richard and Amy Michelin) (*For Board use only*)
1474 Linden Avenue)
Highland Park IL 60035)
Respondent(s))

NOTICE OF FILING TO:

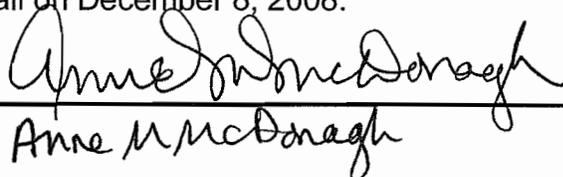
Eliot Wiczer, Wiczer & Zelmar,
500 Skokie Valley Road, Suite 350
Northbrook IL 60067

PLEASE TAKE NOTICE THAT ON December 8, 2008, THE UNDERSIGNED MAILED to the State of Illinois Pollution Control Board, James R. Thompson Center, 100 W. Randolph Street, Suite 11-500, Chicago, IL 60601, a copy of Complainants' Response to Respondents' Motion for Extension of Time, a copy of which is attached hereto and served upon you.



CERTIFICATE OF SERVICE

I, Anne McDonagh, do state that I have sent a copy of this Response to be served upon the persons named above by sending it via U.S. Mail on December 8, 2008.


Anne M. McDonagh

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

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COMPLAINANTS' RESPONSE TO
RESPONDENTS' MOTION FOR EXTENSION OF TIME

Summary

Complainants file this Response to Respondents' Motion for Extension of Time to Complete Discovery. We oppose this Motion on the grounds that Section 101.522 of Part 101 (Title 35, Environmental Protection, Subtitle A; General Provisions, Chapter I: Pollution Control Board) Motions for Extension of Time states: "The Board or hearing officer, for good cause shown on a motion after notice to the opposite party, may extend the time for filing any document or doing any act which is required by these rules to be done within a limited period, either before or after the expiration of time." (Underline added.) We posit that the Respondents have failed to show good cause, or indeed, any cause, for this extension. Neither have they notified the Opposite Party. Third, there is no documentation provided for their contention that measurement is actually in process at this time. Fourth, testing their air conditioning

system in freezing temperatures cannot replicate summertime levels of usage and noise. Finally, their proposed schedule adjustment will truncate the amount of time allowed Complainants to prepare for and complete expert depositions to one week, an unreasonably short amount of time.

Detail

First, Respondents have failed to supply any reason for the delay. As initial Complaint was filed on April 15, 2008, they had six full months of time to assess noise while their air conditioner was running. There was no reason they could not complete one hour's worth of assessment during that six-month period.

Second, they have failed to notify us that they were seeking an extension.

Third, their filing is devoid of any documentation to support their contention that the Expert has been hired and work is in process. There has been no testing on our land that we know of and we have not been contacted so that any work can take place in the future.

Fourth, their air conditioners have not operated, to our knowledge, since October 15, 2008. From years of suffering from this noise, we have learned that air conditioners operate less frequently in cooler temperatures so it is unclear how Respondents and Expert will replicate summer levels of operation in freezing temperatures. As air conditioners operate much more frequently in hotter temperatures, any testing will not replicate summer-level incidences of noise. It is disingenuous to offer data from December as a representative sampling of summertime noise incidents.

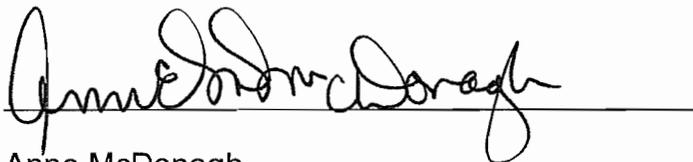
Fifth, Complainants are confounded by the dates proposed in Respondents' two filings of November 26, 2008. Respondents seek to compress the time allotted to Complainants to prepare for Deposition of Expert to one week. Respondents propose to deliver Expert Report "no later than January 6, 2008." (Item #7, Respondents' Motion for Extension of Time to Complete Discovery) In Respondents' Response to Claimants (sic, Complainants?) Motion

to Bar Expert Disclosure, Item #10, Respondents state they have "filed a motion for extension of time to complete any discovery, including depositions and supplement to January 15, 2008." (sic) As Respondents file via U.S. Mail on delivery dates, Complainants expect to receive the Expert Report a few days later. So that would allow about six-seven days, including a weekend, to review said report, prepare for depositions, and depose an Expert who resides outside Indianapolis, Indiana. (The abbreviated schedule is not immediately apparent, as the two dates do not appear together in one document.)

REQUEST

In light of these issues, the Complainants, Anne McDonagh and David Fishbaum, ask the Hearing Officer to enter an order denying Respondents' Motion for Extension of Time.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Anne McDonagh", written over a horizontal line.

Anne McDonagh

12/8/08

Date

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

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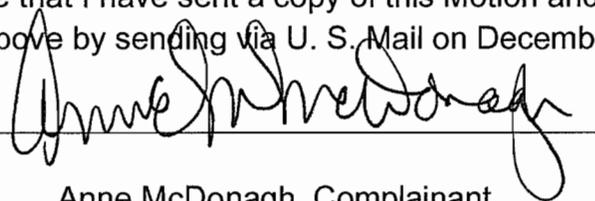
NOTICE OF FILING TO:

Eliot Wiczer, Wiczer & Zelmar,
500 Skokie Valley Road, Suite 350
Northbrook IL 60067

PLEASE TAKE NOTICE THAT ON December 8, 2008, THE UNDERSIGNED MAILED to the State of Illinois Pollution Control Board, James R. Thompson Center, 100 W. Randolph Street, Suite 11-500, Chicago, IL 60601, Complainants' Motion for leave to file attached Reply Memorandum in Support of Complainants' Motion to Bar Respondents' Expert's Opinions, a copy of which is attached hereto and served upon you.

CERTIFICATE OF SERVICE

I, Anne McDonagh, do state that I have sent a copy of this Motion and Reply to be served upon the persons named above by sending via U. S. Mail on December 8, 2008.



Anne McDonagh, Complainant

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

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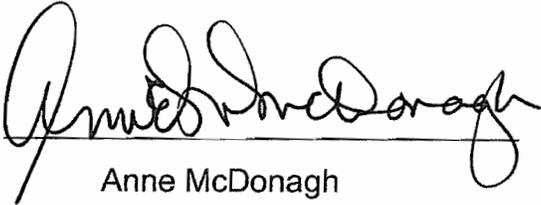
**COMPLAINANTS' MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF
COMPLAINANTS' MOTION TO BAR RESPONDENTS' EXPERT**

Complainants, Anne McDonagh and David Fishbaum, respectfully make this motion to the Hearing Officer, pursuant to Section 101.500(e) of Title 35 of the Illinois Administrative Code, to allow Complainants leave to file the attached reply in support of Complainants' motion to bar Respondents' expert from testifying or filing an affidavit about any opinions in this case.

The attached Reply is necessary to respond to several errors and incomplete statements in Respondents' response to the Motion to Bar. It is also important to stress the

prejudice that would be caused to Complainants if Respondents are allowed to delay these proceedings any further and disclose their expert opinions after the deadline that they agreed to and which was approved by the Hearing Officer.

Respectfully submitted,



Anne McDonagh

12/2/08



David Fishbaum

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

<http://www.ipcb.state.il.us/>

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Respondent(s))		

**COMPLAINANTS' REPLY IN SUPPORT OF
COMPLAINANTS' MOTION TO BAR RESPONDENTS' EXPERT**

Complainants, Anne McDonagh and David Fishbaum, have filed a Motion to Bar Respondents' expert to avoid material prejudice to their rights in this case, arising from the Respondents' failure to deliver their expert report as required by the Hearing Officer's order dated September 11th, 2008 (see Appendix A). Complainants request the Hearing Officer to grant their Motion to Bar.

**RESPONDENTS WERE REQUIRED TO DISCLOSE
THEIR EXPERT'S OPINIONS AND REPORT BY THE OCTOBER 15, 2008 DEADLINE**

Both parties were ordered by the Hearing Officer to make complete expert disclosures to the other party by October 15, 2008. All Depositions, including experts, were ordered completed by November 30, 2008. [See Hearing Officer's 9/11/08 Order, Appendix A].

On September 5, 2008, Complainants hand-delivered requests for documents and interrogatories to the office of Respondents' counsel. [Appendix B]. Complainants' document request no. 8 requested:

Respondents' expert's report on the subject air conditioner units' sound emissions, and all data and scientific works relied upon by respondents' expert, and any information about respondents' expert's professional background and qualifications.

The Respondents failed to produce any expert report or data and scientific works relied upon by their expert.

Complainants' interrogatory no. 2 asked respondents to "[i]dentify respondents' expert(s), describe their professional background and qualifications, and state their opinions." Respondents' answer to this interrogatory provided the name and address and a CV of their expert, but no opinions. Instead, the answer stated that Respondents' expert "has yet to provide a written report." Respondents try to make much of their answer's statement that "Respondents specifically reserve the right to supplement their answer to interrogatory answer number 2 at a later date." Whatever right Respondents might have to supplement their answer does not empower them to ignore and disobey a Hearing Officer order deadline for disclosure, nor allow them to avoid a Motion to Bar.

On this issue, the Hearing Officer may take guidance from Supreme Court Rule 213(f)(3) which describes expert witness disclosure information:

Controlled Expert Witnesses. A "controlled expert witness" is a person giving expert testimony who is the party, the party's current employee, or the party's retained expert. For each controlled expert witness, the party must identify: (i) the subject matter on which the witness will testify; (ii) the conclusions and opinions of the witness and the bases therefor; (iii) the qualifications of the witness; and (iv) any reports prepared by the witness about the case.

Illinois Supreme Court Rule 213(f)(3) (2008).

Based on the Hearing Officer's order, the interrogatories and document requests of each party, and the Illinois Supreme Court Rule, Respondents should have known that they were required to make a complete expert disclosure, including their expert's opinion and report, by October 15, 2008. It is misleading for Respondents to assert, in the last sentence of paragraph 5 of their response to the Motion to Bar, that by merely providing their expert's name and address and CV, "[t]hus, Respondents have timely disclosed their expert as required by the August 14, 2008 discovery schedule" and to fail to mention that the October 15, 2008 deadline for complete expert disclosures in the parties' agreed-to schedule was made an integral part of the Hearing Officer's September 11, 2008 Order.

Thus, it is indisputable that Respondents were required to disclose their expert's opinions and report by October 15, 2008. It is also beyond dispute that they failed to do so, without any explanation, justification, or request for extension before the deadline passed. The Complainants filed a Motion to Bar Expert due to Respondents' inexcusable delay, which if condoned, will greatly prejudice Complainants' rights.

THE HEARING OFFICER HAS AUTHORITY TO BAR RESPONDENTS' EXPERT

Contrary to Respondents' contention, the Complainants have not filed their Motion to Bar the Respondents' expert witness report as some kind of punishment or penalty for Respondents' failure to comply with the discovery schedule, but as the only remedy to avoid prejudice to the Complainants, from Respondents' violation of the very disclosure deadline that the parties agreed to and which was incorporated into the Hearing Officer's September 11, 2008 order. Time is of the essence to the Complainants. They have suffered three years of excessive noise and don't want to have to suffer another year. The Complainants foresee that the delays of the Respondents will take the parties into another air conditioning season before a final outcome is determined. And if that decision is made in favor of the Complainants, the Respondents will likely argue hardship at that point in time (suffering the heat of a Highland Park summer) which evidence shows begins in April for the Respondents and so won't be able to implement a solution until the winter of 2009.

The Hearing Officer may take guidance from Illinois Supreme Court Rule 219(c) that allows the barring of a party's expert report as remedy or a sanction. The Rule states:

If a party . . . fails to comply with any [discovery] order entered under these rules, the court, on motion, may enter, in addition to remedies elsewhere specifically provided, such orders as are just, including, among others, . . . [t]hat a witness be barred from testifying concerning that issue.

Illinois Supreme Court Rule 219(c)(iv) (2008).

In paragraph 7 of their response to the Motion to Bar, Respondents cite a court opinion from a Champaign construction lawsuit, *Blakey v. Gilbane Building Corp.*, saying that the rules of discovery are "not to punish dilatory parties." In that case, the judge had thrown plaintiff's case out of court as a sanction for not disclosing a prior hospitalization, which had occurred five years before the accident that he sued over, in an interrogatory answer about his medical history. The appeals court said that "an order of dismissal with prejudice or a sanction that results in a default judgment is a drastic sanction to be invoked only in those cases where the party's actions show a deliberate, contumacious, or unwarranted disregard of the court's authority." *Blakey v. Gilbane Bldg. Corp.*, 708 N.E. 2d 1187, 1191 (Ill. App. Ct. 4th Dist. 1999).

The case at bar is a very different case from the *Blakey* case. Complainants are not asking for a default judgment against Respondents. Respondents will still have the opportunity to have their lawyer cross-examine Complainants' expert at the hearing. Unlike Respondents, Complainants did provide their expert's report, and opinions, and the bases of his opinions on April 15, 2008, long before the October 15, 2008 deadline. Respondents have had the opportunity to review those opinions and the report with their own expert to prepare to cross-examine Complainants' expert at the hearing. Complainants have been denied that opportunity and right by Respondents' failure to abide by the Hearing Officer's order.

The Complainants are not looking to punish Respondents, but to protect their rights to an orderly and timely litigation process. The remedy, barring Respondents' expert, is commensurate with the Respondents' misconduct, willfully violating an order that was intended to safeguard Complainants' right to prepare to cross-examine Respondents' expert

at the hearing. The deadline was set for October 15, 2008 not arbitrarily, but as an important date to enable the trial to proceed to a decision well before the next air-conditioning season.

Rule 201(k) Is No Defense for Respondents' Disobedience of the Order

It is unreasonable for the Respondents to argue that Complainants have not complied with Supreme Court Rule 201(k). An agreed to discovery schedule is included in the Respondents' reply and there was a follow-up letter to Respondents' attorney, September 11, 2008 reminding him of the days his expert could come on Complainants' property (see Appendix C). So even if Rule 201(k) applies to the deadline order, Complainants satisfied the letter and spirit of the rule by going out of their way to try to get the Respondents to meet the deadline.

Complainants Will Be Prejudiced If Respondents' Expert Is Not Barred

Respondents state that because no trial date has been set, there is no prejudice to the Complainants. This is not true. The Complainants have suffered three years of excessive noise. If the Hearing Officer does not enforce his Order's expert disclosure deadline, then it is likely the Complainants will have to suffer another year of these excessively noisy air conditioners, even if the PCB rules in their favor.

Additional prejudice can be seen the Respondents' new suggested schedule; their expert report would be due January 6, 2008 (sic) (we assume what is meant is 2009 and not 2010), Respt.'s Mot. Extension Time ¶7 (Nov. 26, 2008), and the end of the depositions would be January 15, 2008 (sic), Respt's Response Complainants Mot. Bar ¶10 (Nov. 26, 2008). So whereas the Respondents will have seven months to review Complainants' expert report, the Respondents provide Complainants nine days in total to review their expert's report and to depose him. (It should be noted that the expert resides in Indiana.) This is prejudicially unfair to the Complainants.

The Illinois Supreme Court states that "(w)here it becomes apparent that a party has willfully disregarded the authority of the court, and such disregard is likely to continue, the interests of that party in the lawsuit must bow to the interests of the opposing party." *Sander v. Dow Chem. Co.*, 651 N.E.2d 1071, 1081 (Ill. Sup. Ct. 1995). The Respondents' expert

report was due October 15, 2008 under the Hearing Officer's September 11, 2008 order. Respondents ignored Complainants' letter to their counsel trying to schedule a date for Respondents' expert to enter on Complainants' property to conduct noise testing so that Respondents would timely comply with the deadline. Respondents did not trouble themselves to ask for an extension before the October 15 deadline, even though they knew it was going by.

It is now almost two months after the ordered deadline, and the Respondents have not even bothered to make a good faith effort to rectify the situation by attaching a completed expert report with their response to the Motion to Bar. Instead they now ask for seven more weeks of time without even providing the Hearing Officer with any explanation of any kind for the delay.

Respondents' intentional delays are willful and unjustified, although consistent with their long-standing indifference to the harm they have been inflicting on their next-door neighbors. The test is not complicated (involving about two hours worth of work) and the Respondents had many months during the air conditioning season in which to complete the testing, as Complainants encouraged them to do. Having squandered all that time for no good reason, the Respondents are now asking for permission to complete their test of the air conditioners during the coldest time of the year.

Clearly, the Respondents have willfully disregarded the Hearing Officer's authority and the integrity of the discovery process. If their misconduct is condoned they will simply do it again in the future. Severe prejudice to Complainants can only be avoided, and Respondents deterred from future misconduct in these proceedings, by imposition of a Rule 219(c) sanction that is exactly commensurate with Respondents' violation of the discovery rules and the complete expert disclosure deadline in the September 11, 2008 order. If parties willfully fail to disclose an expert's opinions and the bases for the opinions, and his/her report, they should be barred from using that expert or his/her opinions in the case.

6

**Recent Settlement Discussions Between the Parties are No Defense
for Respondents' Violation of the October 15, 2008 Disclosure Deadline.**

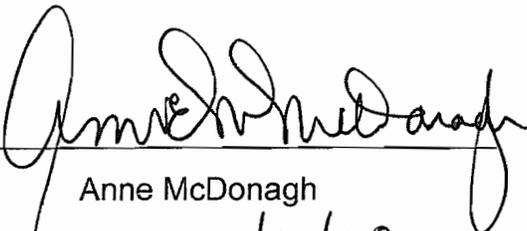
It is true that the Complainants and Respondents have recently engaged in settlement discussions but the Complainants don't view this as a reason not to accept the motion. After two years of attempts by the Complainants to resolve this issue out of court, the Respondents' first response to settlement came after receiving the filing of the Motion to Bar.

Complainants have always been willing to work out an amicable resolution and will always be willing to do that, even if Complainants win this case. But if Respondents' defiance of the rules and the Hearing Officer's deadlines are condoned and the litigation schedule is allowed to drift, there will be no impetus for Respondents to ever reach an amicable settlement.

REQUEST

In summary, delay of the whole litigation process is very prejudicial to the Complainants need to have a final decision before the next air conditioning season (which for the Respondents begins in April) and that still allows the Respondents time to make any necessary modifications. The Complainants don't view the motion to bar as punishment but as a request for the Hearing Officer to maintain an orderly and timely litigation process. If the motion is viewed as a Rule 219(c) sanction, there is enough evidence to justify one.

Due to the Respondents' failure to produce this report, we respectfully ask the Hearing Officer to bar Respondents from submitting an expert report or allowing the expert to submit an affidavit or testify at the hearing.


Anne McDonagh
12/7/08

Respectfully submitted,


David Fishbaum

Appendix A

ILLINOIS POLLUTION CONTROL BOARD
September 11, 2008

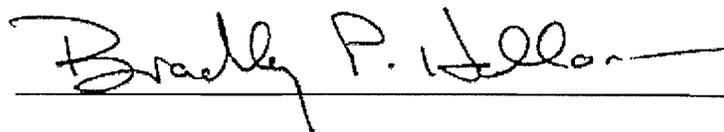
ANNE MCDONAGH and DAVID)	
FISHBAUM,)	
)	
Complainants,)	
)	PCB 08-76
v.)	(Citizens Enforcement – Noise)
)	
RICHARD and AMY MICHELON,)	
)	
Respondents.)	
)	
)	

HEARING OFFICER ORDER

On September 11, 2008, all parties participated in a telephonic status conference with the hearing officer. The complainants represented that discovery is proceeding. The agreed discovery schedule is as follows. Written discovery must be propounded on or before September 5, 2008. Expert disclosures must be completed on or before October 15, 2008. All depositions must be completed on or before November 30, 2008. Complainant has agreed to allow respondents expert witness access to their property for completion of sound measurements.

The parties or their legal representatives are directed to appear at a telephonic status conference with the hearing officer on November 13, 2008, at 9:00 a.m. The telephonic conference must be initiated by the complainant, but each party is nonetheless responsible for its own appearance. At the conference the parties must be prepared to discuss the status of the above-captioned matter and their readiness for hearing.

IT IS SO ORDERED.



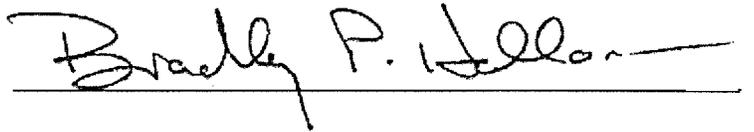
Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 W. Randolph Street
Chicago, Illinois 60601
312.814.8917

CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing order were mailed, first class, on September 11, 2008, to each of the persons on the attached service list.

It is hereby certified that a true copy of the foregoing order was hand delivered to the following on September 11, 2008:

John T. Therriault
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph St., Ste. 11-500
Chicago, Illinois 60601

A handwritten signature in black ink that reads "Bradley P. Halloran". The signature is written in a cursive style and is positioned above a solid horizontal line.

Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, Illinois 60601
312.814.8917

Appendix B

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

September 5, 2008

Elliot Wiczer
Wiczer & Zelmar LLC
500 Skokie Blvd., Suite 350
Northbrook IL 60062

Re: McDonagh & Fishbaum v. Michelin

Pursuant to the Pollution Control Board Rules, respondents are requested to produce documents and answer interrogatories, as follows, within the time allowed by the Rules:

Requests for Documents

1. All documents that support the contention in Respondents' Motion to Dismiss (May 9, 2008) that the subject air conditioner units are "state of the art."
2. All of the Manufacturer's Documentation that supports the contention in Exhibit A of Respondents' Motion to Dismiss (May 9, 2008) that the subject air conditioner units are "71 decibels."
3. All purchase orders, sales receipt/invoices, operating manuals, and manufacturer's specifications for the subject Air Conditioning units.
4. Final Heating and Air Conditioning Plan for the property at 1474 Linden, showing locations of at least two furnaces and three air conditioner units and supporting pipelines, including Manufacturer's and/or Manufacturers' operating manuals and installation specifications.
5. Documentation on any other brand and model air conditioner units that Respondents considered or shopped for.
6. All of Respondents' submissions to the HP ZBA for a side-yard variance for the subject air conditioner units.
7. All communications to and from the City of Highland Park about the subject air conditioner units, and noise complaints.
8. Respondents' expert's report on the subject air conditioner units' sound emissions, and all data and scientific works relied upon by respondents' expert, and any information about respondents' expert's professional background and qualifications.
9. All audio recordings of the subject air conditioner units.
10. All videotapes, video-DVD's, and photographs of the subject air conditioner units.
11. All statements from any witness about the subject air conditioner units and sound emissions from the units.
12. All exhibits that respondents may offer into evidence at the hearing in this case.

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13. All documentation of communications between the Complainants and Respondents, including Respondents' notes.

Interrogatories

1. Identify all people (including name, home and work address, telephone numbers, and email addresses) who have knowledge or information about the allegations of the complaint, the denials in respondents' answers to the complaint, and describe each person's knowledge or information, and how it was obtained.

2. Identify respondents' expert(s), describe their professional background and qualifications, and state their opinions.

3. Describe in detail how respondents' went about selecting the subject air conditioner units.

4. Identify all oral and written communications between the complainants and the respondents.

5. Regarding Respondents' denial of the first paragraph of paragraph 4 of the complaint, state the number of subject air conditioner units on respondents' property, the capacity ("tonnage") of each unit, and the distance of the units from the property line between complainants' and respondents' properties.

6. State the number of days per year that the subject air conditioner units are turned on, the units' hours of operation, their cycle frequency and duration, and their decibel ratings.

7. Regarding respondents' denial of the second paragraph of paragraph 5, state respondents' contention about the daytime and nighttime decibel limits under Illinois law, and explain the basis for the contention.

8. State whether respondents have visited complainants' property for the purpose of listening to or recording the A/C units, and the date(s) and time(s) of any such visits.

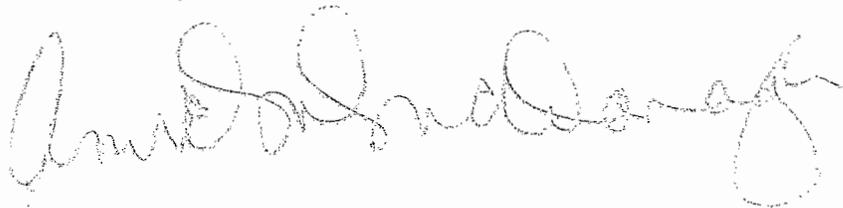
9. State the date that respondents first occupied the residence at 1474 Linden Avenue, and whether they have continuously occupied the residence since that date.

10. Explain all the reasons why respondents have objected to relocating the subject air conditioner units to another part of their property further away from the property line.

11. Identify all witnesses whom respondents may call to testify at the hearing in this case, and the anticipated substance of their testimony.

Complainants reserve the right to serve respondents with additional document requests and interrogatories within the time allowed by the Rules.

Signed:



Appendix C

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

September 11, 2008

Elliot Wiczer
Wiczer & Zelmar LLC
500 Skokie Blvd., Suite 350
Northbrook IL 60062

Mr. Wiczer:

We gave our approval August 30, 2008 for your expert to enter our property for the purpose of testing the noise. I asked to be notified in advance so I can be present during the testing. I am home a lot so this should not be cumbersome.

We will be home and available for testing to be done on Friday, Sept. 12th and all of next week (Sept. 15-19.)

We will be traveling four days of the following week, Monday through Thursday, Sept. 22-25.

Friday, Sept. 26th and Monday, Sept. 29th, I will be at home if testing is scheduled.

Religious holidays for us fall on Sept. 30th and October 1st so those days are not good.

October 2-8th are acceptable days for testing.

We will again be travelling from October 9th through to October 15th, so the last available date for testing would be Wednesday, October 8th.

I can be reached at 847-433-6971 or at AnneMcDonagh@comcast.net or via fax at 847-433-1344 but please call to confirm we have received any faxes sent.

Sincerely,


Anne McDonagh

Faxed: 4:31pm
THURSDAY 9/11/08
CONFIRMED By machine

Melissa
confirmed
receipt
9/11/08
4:34pm.