

**BEFORE THE
ILLINOIS POLLUTION CONTROL BOARD**

RECEIVED
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JUL 17 2003

STATE OF ILLINOIS
Pollution Control Board

Mr. Martin E. & Kathy L. Geber)	
)	
Complainants,)	
)	
v.)	PCB 03-96
)	
Carri Scharf Trucking and Materials,)	
Carri Scharf Materials Company, and)	
East Side Materials, L.L.C.)	
)	
Respondents.)	

**EAST SIDE MATERIALS L.L.C.
OBJECTION TO HEARING OFFICERS ORDER
OR IN THE ALTERNATIVE
MOTION TO DISMISS**

NOW COMES the East Side Materials, L.L.C. by and through its attorney, Clayton W. Moushon and in support of its Objection to Hearing Officers Order or in the Alternative, Motion to Dismiss, states as follows:

**A.
THE AMENDED COMPLAINT FAILED
TO ADD EAST SIDE AS A RESPONDENT.**

1. On May 15, 2003, this Board issued an order allowing the Complainants 30 days to file an amended complaint adding East Side Materials L.L.C., hereinafter referred to as "East Side", as a respondent in the above captioned case;
2. On June 11, 2003, the Complainants filed an Amended Complaint;
3. On June 25, 2003, the Hearing Officer issued a "HEARING OFFICERS ORDER" in which the Hearing Officer states that "On June 11, 2003, complainant filed an amended complaint to add CSM and East Side."

4. Said Hearing Officers Order further order the caption of the case to be changed to add "East Side Materials, L.L.C." as a respondent.
5. East Side objects to the Hearing Officers conclusion that the Amended Complaint properly added East Side as a respondent.
6. The Amended Complaint failed to add East Side as a respondent. The Amended Complaint does not identify East Side as a respondent anywhere in the Amended Complaint. Most notably, the caption in the Amended Complaint does not name East Side. The Amended Complaint, as filed, was captioned as follows:

<p>Mr. Martin E. & Kathy L. Geber</p> <p style="text-align: center;">Complainants,)</p> <p style="text-align: center;">v.)</p> <p>Clayton W. Moushon 12025 N. Knoxville Dunlap, Illinois 61525</p> <p>Carri Scharf Trucking and Materials, Co. P.o. Box 305 Bloomington, Illinois 61702-0305</p> <p style="text-align: center;">Respondents.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>PCB 03-96</p>
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7. Furthermore, the only reference to East Side is in Paragraph 1 of the Amended Complaint wherein the Complainants allege "The property emitting the noise is owned by East Side Materials, L.L.C." This cursory reference is not sufficient to name East Side as a respondent in the Amended Complaint. The Amended Complaint also states in Paragraph 1 that "We allege the respondents . . .". The only "respondents" identified in the Amended Complaint are "Carri Scharf Trucking and Materials, Co." and "Clayton W. Moushon".
8. Pursuant to this Boards Order dated May 15, 2003, Clayton W. Moushon was dismissed from these proceedings, with prejudice. Consequently, the Complainants have failed to amend the complaint to add East Side within the stated time lines set forth in this Board's May 15, 2003 Order.

B.
**THE AMENDED COMPLAINT FAILS
TO STATE A CAUSE OF ACTION AGAINST EAST SIDE**

In the alternative, should this Board conclude that the Amended Complaint is sufficient to add East Side as a respondent, East Side would hereby move to dismiss the Amended Complaint against East Side for failure to state sufficient facts to state a cause of action against East Side for the following reasons:

9. The Amended Complaint only makes one reference to East Side. As set forth above, Paragraph 1 alleges that East Side is the owner of the property. There are no other allegations against East Side.

10. Absent additional allegations, ownership of property is insufficient to state a cause of action against East Side. As noted in this Board's Order of May 15, 2003, the property in question is leased exclusively to Carrie Scharf Materials Company. The Amended Complaint fails to allege:

1. That East Side owns or operates any of the equipment on the property;
2. That East Side owns or operates any of the trucks entering or exiting the mining operations ;
3. That East Side has any control over the equipment and or trucks entering or leaving the property;
4. Or that East Side has taken or failed to take any action within its control to limit or otherwise control the noise allegedly being generated by the mining operations;

11. As this Board noted in its May 15, 2003, Order:

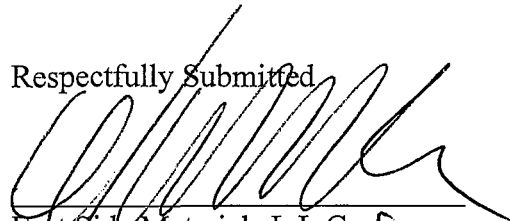
“A complaint therefore “must show that the alleged polluter has the capability of control over the polluter or that the alleged polluter was in control of the premises where the pollution occurred.”

12. The Amended Complaint fails to allege any facts that East Side has the “capability of control over the polluter” or that East Side is the source of the pollution. As such, the Amended Complaint fails to set forth facts giving rise to a cause of action against East Side.

WHEREFORE, the East Side Materials requests the following relief:

- A. That the Board issue an order finding that the Complainant failed to properly add East Side as a respondent in the above captioned case;
- B. That the complainants failure to properly add East Side is a jurisdictional issue and the complainant's are barred from further attempts to amend the complaint to add East Side;
- C. In the alternative, if the Board finds that the Amended Complaint did properly add East Side as a respondent, East Side requests that the Amended Complaint be dismissed, with prejudice, as it pertains to East Side Materials, L.L.C.

Respectfully Submitted



East Side Materials L.L.C.

By: Clayton W. Moushon
Its Attorney

Clayton W. Moushon, Esq
12025 N. State Route 40, Suite 104
Dunlap, Illinois, 61525
Off: (309) 243-1005
Fax: (309) 243-5098

Illinois ARDC #6192933

PROOF OF SERVICE

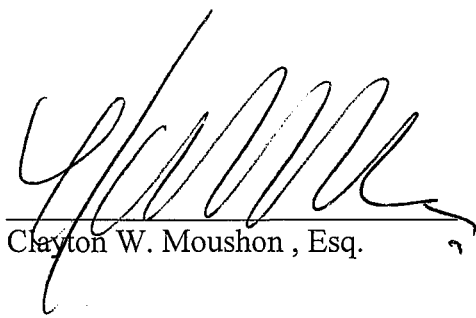
Under the penalties as provided by law pursuant to 735 ILCS 5/1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the foregoing **MOTION TO DISMISS** was served upon all parties to the above cause or the attorney(s) of record herein at the respective address(es) disclosed on the pleadings on the 14th day of July, 2003.

TO: Carol Sudman
Hearing Officer
Illinois Pollution Control Board
600 S. Second Street, Suite 402
Springfield, IL 62704

Martin E. and Kathy I. Geber
116 Donald Court
East Peoria, IL 61611

Ms. Dorothy Gunn
Clerk of the Board
100 W. Randolph St., Suite 11-500
Chicago, Illinois 606012

BY: U.S. Mail Fax Hand Delivered
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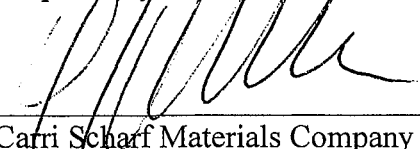
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**ANSWER TO AMENDED COMPLAINT
BY
CARRI SCHARF MATERIALS COMPANY**

NOW COMES the Carri Scharf Materials Company, by and through its attorney, Clayton W. Moushon and for its Answer to the Amended Complaint states as follows:

1. Carrie Scharf Materials Company, hereinafter referred to as CSM, ADMITS that it operates a property owned by East Side Materials, L.L.C., but DENIES the remaining statements and/or allegations set forth in Paragraph 1 of the Amended Complaint;
2. Paragraph 2 of the Amended Complaint does not make any allegations but only alleges that the Complainant has been documenting noises. To the extent Paragraph 2 of the Amended Complaint makes any allegations, CSM denies such allegations;
3. Paragraph 3 of the Amended Complaint does not make any allegations but only alleges that the Complainant home vibrates. To the extent Paragraph 3 of the Amended Complaint makes any allegations, CSM denies such allegations;
4. Paragraph 4 of the Amended Complaint does not make any allegations but only states the Complainant opinion of how the Complainants feel the "operation" should be managed. To the extent that Paragraph 4 of the Amended Complaint makes any allegations, CSM denies such allegations.

Respectfully Submitted



Carri Scharf Materials Company
By: Clayton W. Moushon, Attorney

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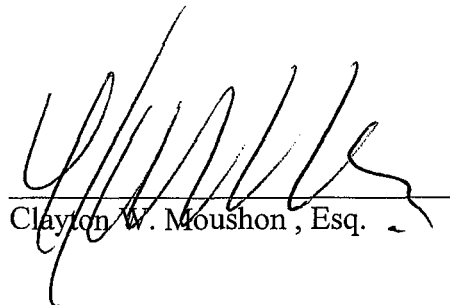
Under the penalties as provided by law pursuant to 735 ILCS 5/1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the foregoing **ANSWER TO AMENDED COMPLAINT** was served upon all parties to the above cause or the attorney(s) of record herein at the respective address(es) disclosed on the pleadings on the 14th day of July, 2003.

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Hearing Officer
Illinois Pollution Control Board
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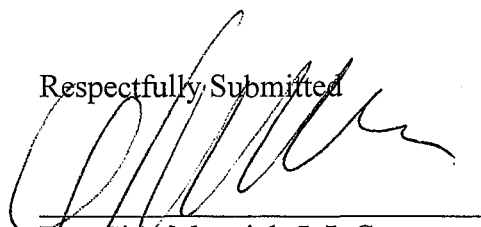
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)
Respondents.)

ENTRY OF APPEARANCE

Now comes the undersigned, Clayton W. Moushon, and here hereby enters his appearance on behalf of Carri Scharf Trucking and Materials and Carrie Scharf Materials Company, and further states as follows:

1. The undersigned is an attorney in good standing, dully licensed to practice law in the State of Illinois, in good standing;
2. The undersigned is registered with the Illinois Bar Association, ARDC #6192933;
3. The undersigned hereby enters his appearance on behalf of Carri Scharf Trucking and Materials and Carrie Scharf Materials Company.

Respectfully Submitted



East Side Materials L.L.C.
By: Clayton W. Moushon
Its Attorney

Clayton W. Moushon, Esq
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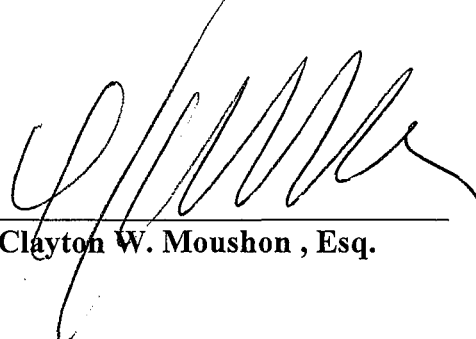
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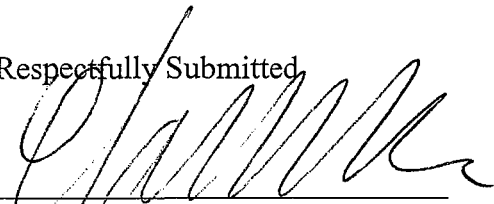
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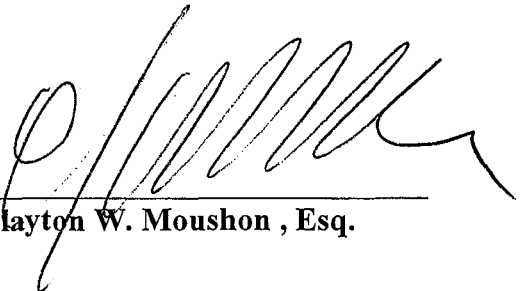
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