

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

VINCENT AND JENNIFER NERI,)	
)	
Complainants,)	
)	
v.)	PCB No. 05-213
)	(Enforcement – Noise)
TNT LOGISTICS NORTH AMERICA)	
INC.,)	
)	
Respondent.)	

NOTICE OF FILING

TO: Ms. Dorothy M. Gunn	Bradley P. Halloran, Esq.
Clerk of the Board	Hearing Officer
Illinois Pollution Control Board	Illinois Pollution Control Board
100 West Randolph Street	100 West Randolph Street
Suite 11-500	Suite 11-500
Chicago, Illinois 60601	Chicago, Illinois 60601
(VIA ELECTRONIC MAIL)	(VIA FIRST CLASS MAIL)

(PERSONS ON ATTACHED SERVICE LIST)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board **RESPONDENT'S OBJECTION TO COMPLAINANTS' "AMENDED COMPLAINT," MOTION TO DISMISS COMPLAINT AS ORIGINALLY FILED, AND ALTERNATIVE MOTION FOR REVERSAL OF HEARING OFFICER'S ORDER**, a copy of which is herewith served upon you.

Respectfully submitted,

TNT LOGISTICS NORTH
AMERICA INC.,
Respondent,

By: /s/ Thomas G. Safley
One of Its Attorneys

Dated: January 16, 2007

Edward W. Dwyer
Thomas G. Safley
HODGE DWYER ZEMAN
3150 Roland Avenue
Post Office Box 5776
Springfield, Illinois 62705-5776
(217) 523-4900

THIS FILING SUBMITTED ON RECYCLED PAPER

CERTIFICATE OF SERVICE

I, Thomas G. Safley, the undersigned, hereby certify that I have served the attached RESPONDENT'S OBJECTION TO COMPLAINANTS' "AMENDED COMPLAINT," MOTION TO DISMISS COMPLAINT AS ORIGINALLY FILED, AND ALTERNATIVE MOTION FOR REVERSAL OF HEARING OFFICER'S

ORDER upon:

Ms. Dorothy M. Gunn
Clerk of the Board
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

via electronic mail on January 16, 2007; and upon:

Bradley P. Halloran, Esq.
Hearing Officer
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

Mr. Vincent Neri
Ms. Jennifer Neri
6530 Lakeview Lane
Monee, Illinois 60449

by depositing said documents in the United States Mail, postage prepaid, in Springfield, Illinois on January 16, 2007.

/s/ Thomas G. Safley
Thomas G. Safley

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

VINCENT AND JENNIFER NERI,)	
)	
Complainant,)	
)	
v.)	PCB No. 05-213
)	(Enforcement – Noise)
TNT LOGISTICS NORTH AMERICA)	
INC.,)	
)	
Respondent.)	

**RESPONDENT'S OBJECTION TO COMPLAINANTS'
"AMENDED COMPLAINT," MOTION TO DISMISS
COMPLAINT AS ORIGINALLY FILED, AND ALTERNATIVE
MOTION FOR REVERSAL OF HEARING OFFICER'S ORDER**

NOW COMES Respondent, TNT LOGISTICS NORTH AMERICA INC.

("TNT"), by its attorneys, HODGE DWYER ZEMAN, and for its Objection to Complainants' "Amended Complaint," Motion to Dismiss Complaint as Originally Filed, and Alternative Motion for Reversal of Hearing Officer's Order, states as follows:

I. INTRODUCTION

1. During the month of June 2005, six complaints were filed against TNT before the Illinois Pollution Control Board ("Board") alleging that TNT's operation of a facility in Monee, Illinois ("Facility") results in violations of the Board's numeric noise standards.

2. On December 14, 2006, TNT participated in a telephonic status conference in the four remaining cases in which such allegations are made, PCB 05-212 (Maracic), PCB 05-213 (Neri), PCB 05-216 (Haser) and PCB 05-217 (Blouin). See Hearing Officer Orders in these cases dated January 4, 2007.

3. During this teleconference, each Complainant moved the Hearing Officer to cancel the hearings in these matters then scheduled for December 18 – 20, 2006, and for time to file Motions with the Board seeking leave to file amended complaints. Id.

4. TNT objected to these motions, but over TNT's objections, the Hearing Officer cancelled the hearings 4 days prior to the date they were scheduled to begin. Id.

5. In addition, the Hearing Officer granted each Complainant's request for a deadline by which they could seek leave of the Board to file amended complaints. Id.

6. On January 3, 2007, in PCB 05-212 and PCB 05-213, and on January 4, 2007, in PCB 05-216 and PCB 05-217, Complainants filed documents purporting to be Amended Complaints with the Board.

7. However, Complainants did not simultaneously file Motions seeking leave of the Board to file Amended Complaints.

8. TNT was served with these "Amended Complaints" on January 2, 2007 (PCB 05-212), January 4, 2007 (PCB 05-216), and January 9, 2007 (PCB 05-213 and PCB 05-217).

9. TNT timely files this Objection to the "Amended Complaint" filed in PCB 05-213. TNT simultaneously is filing this same Objection in the other three remaining Board matters noted above.

II. TNT'S OBJECTION TO COMPLAINANTS' "AMENDED COMPLAINT"

A. Complainants failed to Request and Obtain Leave to Amend their Complaint from the Board.

10. Complainants failed to request leave of the Board prior to filing an amended complaint.

11. Section 103.206(d) of the Board's procedural rules requires that:

If a party wishes to file an amendment to a complaint ... that sets forth a new or modified claim against another person, the party who wishes to file the pleading must move the Board for leave to file the pleading.

35 Ill. Admin. Code § 103.206(d). (Emphasis added.)

12. A motion for leave to file an amended complaint under Section 103.206(d) cannot be directed to the Hearing Officer, but must be directed to the Board. Kassella v. TNT, PCB 06-1, at p. 2 (Ill.Pol.Control.Bd. March 16, 2006).

13. In other cases where a complainant has submitted a filing denominated as an "Amended Complaint" without first seeking and obtaining leave of the Board to make such filing, the Board has stricken such filing and has ordered that any future proposed amended complaint filed by the complainant "must be accompanied by a motion for leave directed to the Board." Morton F. Dorothy v. Flex-N-Gate Corporation, PCB 05-049, at pp. 11-12 (Ill.Pol.Control.Bd. Nov. 2, 2006).

14. Furthermore, the Hearing Officer informed Complainants both during the December 14, 2006 telephonic status conference, and in his Order dated January 4, 2007, that Complainants must file a Motion seeking leave of the Board to file an Amended Complaint, and also must attach their proposed Amended Complaint to that Motion. See January 4, 2007, Hearing Officer Order.

15. Here, Complainants seek to “file an amendment to a complaint ... that sets forth a new or modified claim against another person” (35 Ill. Admin. Code § 103.206(d); specifically, Complainants seek to file an Amended Complaint that would “include a Nuisance Complaint which can be documented and filed in addition to the Numeric Complaint that was to be heard next week,” that is, beginning December 18, 2006. Complainants’ Motion to Cancel Hearing And [for time to seek] Leave to Refile Amendment to Existing Numeric Complaint, dated December 14, 2006. (Emphasis added.)

16. Therefore, Complainants were required to file a Motion for Leave to Amend with the Board; Complainants, however, failed to do so.

B. Complainants’ “Amended Complaint” is Frivolous.

17. Even if Complainants had sought and received leave of the Board to amend their Complaint, Complainants’ “Amended Complaint” is frivolous.

18. First, the document purporting to be Complainants’ “Amended Complaint” alleges that TNT has violated of Section 23 of the Illinois Environmental Protection Act (“Act”) (415 ILCS 5/23). Complainants’ “Amended Complaint” at ¶5.

19. With regard to an alleged violation of Section 23 of the Act, however, “[b]ecause Section 23 sets forth the General Assembly’s findings on excessive noise and states the purpose of the Act’s Title VI on noise, Section 23 cannot be violated,” and the Board thus will dismiss as frivolous an allegation that a respondent violated Section 23. See, e.g., Daniel J. Beers v. Dave Calhoun (Let It Shine Car Wash), PCB 04-204 (Ill.Pol.Control.Bd. July 22, 2004).

20. Based upon the foregoing, the Board must strike Complainants' allegations here of a violation of Section 23 of the Act as frivolous.

21. Second, Complainants' "Amended Complaint" alleges that TNT has violated Section 24 of the Act ("Amended Complaint" at ¶5), but this allegation also is frivolous.

22. The Complainants in this matter are seeking a cease and desist order; that is, the "Amended Complaint" requests that the Board "stop the noise" from the Facility. "Amended Complaint" at ¶9.

23. As attested to in the Affidavit of TNT employee Steve McNeal, attached hereto as Exhibit A, however, beginning January 22, 2007:

- TNT will no longer lease or operate the Facility;
- TNT will no longer have any employees present at the Facility;
- TNT will not have any authority or control over any equipment, operations or activities of any new tenant at the Facility;
- TNT will not have any ability to make any changes in any equipment located at, or any operations or activities taking place at, the Facility.

See Exhibit A.

24. Rather, it is TNT's understanding that after January 22, 2006, another company, not related in any way to TNT, will operate the Facility. Id.

25. According to the Act, a hearing will be scheduled unless the Board determines that a complaint is "duplicative or frivolous." 415 ILCS 5/31(d)(1); 35 Ill. Admin. Code § 103.212(a).

26. According to Section 101.200 of the Board's regulations, a complaint is "frivolous" where the Complainants have "...made a request for relief that the Board does not have the authority to grant...." 35 Ill. Admin. Code § 101.200; Beers, PCB 04-204 (Ill.Pol.Control.Bd. July 22, 2004).

27. The Board has held that where a complainant alleging violations of noise prohibitions seeks an order requiring the respondent to cease and desist from further violations, and that respondent leaves the location at issue and no longer has the authority to implement modifications necessary to comply with any such order, "the Board is unable to effectively grant the relief requested," and therefore, that "the Board must dismiss the case as frivolous." James M. Tonne and Jeanine F. Tonne v. Leamington Foods, PCB 93-044, at p. 2 (Ill.Pol.Control.Bd. April 21, 1994).

28. With TNT no longer operating the Facility after January 22, 2007, were any cease and desist order to be issued by the Board, such order would be ineffective, since by the time the Board issued any such order, TNT will not be in a position to implement any changes necessary to comply with any such order, and any new operator of the Facility, as a non-party, would not be bound by any such order (which order, in any event, would evaluate only TNT's actions, not the actions of any such new operator). See Exhibit A.

29. Once TNT leaves the Facility on January 22, 2007, TNT will file a Supplemental Affidavit in support of this Motion attesting to the fact that it has left, and no longer has any control of, the Facility.

30. In light of the above, Complainants' proposed "Amended Complaint" also is frivolous to the extent it alleges a violation of Section 24 of the Act, and the Board should strike Complainants' proposed "Amended Complaint" for this reason as well.

III. MOTION TO DISMISS COMPLAINT AS ORIGINALLY FILED

31. Complainants' original Complaint in this matter alleges that TNT's operation of the Facility violates numeric noise limitations contained in the Board's rules, and, like Complainants' "Amended Complaint," seeks a cease and desist order. See Complainants' Complaint at ¶¶5, 9.

32. For the reasons just discussed, in light of the fact that TNT is leaving the Facility, Complainants' original Complaint also is frivolous, and the Board should dismiss it. See discussion above.

33. In Tonne, the Board held that where the respondent left the facility at issue, the Board would reconsider its previous finding that the complainant's complaint was not frivolous, and, as noted above, would find the complaint frivolous and dismiss it on that basis. Tonne, PCB 93-044, at p. 2 (Ill.Pol.Control.Bd. April 21, 1994).

34. Likewise, here, TNT is leaving the Facility at issue in this case, and the Board must dismiss Complainants' original Complaint as frivolous.

IV. TNT'S ALTERNATIVE MOTION FOR REVERSAL OF THE HEARING OFFICER'S ORDER.

35. In the alternative, should the Board not strike Complainants' "Amended Complaint" and dismiss Complainants' original Complaint as frivolous, and should Complainants intend their Amended Complaint to assert both numeric and noise nuisance claims, as to such numeric claims, Respondent, pursuant to 35 Ill. Admin. Code § 101.518, appeals the ruling of the Hearing Officer canceling the hearings set in these matters and granting Complainants time to move the Board for leave to file an Amended Complaint.

A. Scope of Alternative Motion

36. As discussed above, Complainants' "Amended Complaint" alleges that TNT's operations at the Facility result in violations of "Section 24" of the Act. See Complainants' Complaint, ¶5.

37. Section 24 of the Act provides that:

No person shall emit beyond the boundaries of his property any noise that unreasonably interferes with the enjoyment of life or with any lawful business or activity, so as to violate any regulation or standard adopted by the Board under this Act.

415 ILCS 5/24.

38. Section 24 of the Act encompasses both nuisance claims under Section 900.102 of the Board's regulations, as well as numeric claims under Part 901 of the Board's regulations. Shelton v. Crown, PCB 96-53 (Ill.Pol.Control.Bd. Oct. 2, 1997) ("The Sheltons allege that the Crowns have violated Sections 23 and 24 of the Act and the Board's rules at [35 Ill. Adm. Code 900.102](#), [901.102\(a\)](#), [901.102\(b\)](#), and [901.104](#)).

Comp. at 2. These statutes and regulations prohibit noise pollution in Illinois which exceeds specified numeric limits or which produces nuisance noise.”) (Emphasis added.)

39. Therefore, Complainants’ allegation that TNT’s operations violate “Section 24” could constitute an allegation of only nuisance violations, only numeric violations, or both; however, Complainants do not state which alleged violations they are claiming. See Complainants’ “Amended Complaint,” at ¶5.

40. In the event that Complainants intend to assert only a nuisance claim under 35 Ill. Admin. Code §900.102, the issue of a hearing on their previous numeric claims is moot, and this alternative Motion is inapplicable.

41. However, to the extent that Complainants intend to continue to assert, in whole or in part, numeric claims, for the reasons discussed below, TNT moves the Board to reverse the Hearing Officer’s Order canceling the previously scheduled hearings on those claims.

B. The Cancellation of the Hearings was in Error

42. The cancellation of the hearings scheduled for December 18-20, 2007, was in contravention of the Board’s procedural rules.

43. First, Complainants did not file the required Motion to Cancel Hearing. Section 101.510(b) of the Board’s procedural rules requires that

All motions to cancel a hearing must set forth a proposed date to reschedule the hearing and must be supported by an affidavit of the person or persons with knowledge of the facts that support the motion. The affidavit must include the factual basis for the request to cancel and a complete status report that describes the progress of the proceeding and sets forth the number of cancellation requests previously granted to the movant.

35 Ill. Admin. Code § 101.510(b).

44. Complainants here did not file any written motion to cancel the hearing before orally asking the Hearing Officer to cancel the hearing. See Board Docket, Hearing Officer Order dated January 4, 2007.

45. Rather, after the telephonic status conference on December 14, 2006, Complainants filed their “Motion To Cancel Hearing And [for time to seek] Leave To Refile Amendment to Existing Numeric Complaint,” dated December 14, 2006. However, this “Motion” did not include an affidavit as required by Section 101.510(b).

46. For these reasons alone, the Hearing Officer should have denied Complainants’ oral motion to cancel the hearings, and the Board should reverse the Hearing Officer’s order canceling the hearings.

47. Second, Complainants did not comply with Section 101.510(a) of the Board’s rules, which governs the timing of a properly filed motion to cancel a hearing. Section 101.510(a) states as follows:

Time to File. Unless the Board or the hearing officer orders otherwise the hearing officer may grant motions to cancel hearings that are filed no fewer than 10 days or, if all parties agree to the motion, 5 days before the scheduled hearing date. The hearing officer may grant a motion filed after the prescribed time only if the movant demonstrates that the movant will suffer material prejudice if the hearing is not canceled.

35 Ill. Admin. Code § 101.510(a). (Emphasis added.)

48. As stated in the rule, absent agreement, a party must move to cancel a hearing at least 10 days prior to the scheduled date for the hearing unless the movant will suffer material prejudice.

49. In this case, the Complainants orally moved to cancel the hearing, and the Hearing Officer in fact cancelled the hearing, over TNT's objections, 4 days prior to the hearing. See Hearing Officer Order dated January 4, 2007.

50. The Hearing Officer stated in his Order canceling the hearing that the "...complainants could possibly be materially prejudiced and that in the interests of administrative efficiency, the hearing must be cancelled." (Hearing Officer Order, January 4, 2007.) (Emphasis added.)

51. Pursuant to Section 101.510(a), absent agreement, there must be a finding of actual material prejudice to cancel a hearing fewer than 10 days prior to the hearing. In this case, the Hearing Officer did not even state the alleged prejudice to Complainants, much less make such a finding. Furthermore, administrative efficiency is not contemplated by Section 101.510 as grounds for canceling a hearing. In fact, Section 101.510 was amended to its current form by the Board in its 2000 amendments to its procedural rules to avoid the administrative inefficiency of hearings being cancelled at the last minute, as happened in this case. See Board Order, R00-20, at 13-14 (Ill.Pol.Control.Bd. March 16, 2000).

52. For these reasons as well, the Hearing Officer should not have cancelled the hearings, and the Board should reverse the Hearing Officer's Orders doing so.

53. Third, the actual reason for cancellation of the hearing in this matter is Complainants' lack of diligence. As stated in the Hearing Officer's Order, "Complainants represented that they recently became aware that their complaint...only alleged a numeric noise violation...Complainants argued that to proceed with the

previously scheduled hearing would be a waste of time and resources.” Order, January 4, 2007. The Hearing Officer’s Order continues by stating, “[t]he complainants were made aware of their omission as early as September 1, 2005...Nevertheless, the complainants’ motion was granted and the hearing was canceled.” Id.

54. Section 101.510(b) states, in pertinent part that, “[t]he hearing officer will grant the motion only if the movant demonstrates that the request to cancel is not the result of the movant’s lack of diligence.” 35 Ill. Admin. Code § 101.510(b). (Emphasis added.)

55. Complainants’ failure to plead all causes of action available in the Complaint does not constitute “material prejudice.” Further, for this fact to be pointed out to Complainants more than 100 days before hearing, and for Complainants to make no effort to address the issue, can be nothing but Complainants’ lack of diligence.

56. Given that Complainants’ stated reason for requesting that the hearing be canceled constitutes a lack of diligence, pursuant to Section 101.510(b), the hearing should not have been canceled.

57. If Complainants desired to cancel the hearing in this matter, the only method available to Complainants was voluntary dismissal of their Complaint pursuant to Section 2-1009 of the Illinois Code of Civil Procedure.

58. Section 2-1009 of the Illinois Code of Civil Procedure states: “[t]he Plaintiff may, at any time before trial or hearing begins, upon notice to each party who has appeared or each such party’s attorney, and upon payment of costs, dismiss his or her

action or any part thereof as to any defendant, without prejudice, by order filed in the cause.” 735 ILCS 5/2-1009.

59. The Board has noted that Section 2-1009 allows a complainant to voluntarily dismiss a complaint filed before the Board. Gina Pattermann v. Boughton Trucking and Materials, Inc., PCB 99-187 (Ill.Pol.Control.Bd. Feb. 17, 2005).

60. Therefore, if Complainants continue to assert their numeric claims, TNT alternatively moves the Board to reverse the Hearing Officer’s ruling canceling the hearings set in these matters, and to reschedule the hearing on Complainants’ original Complaint, absent dismissal of this matter either by the Board (see above) or voluntarily by the Complainants.

V. CONCLUSION

WHEREFORE, Respondent, TNT LOGISTICS NORTH AMERICA INC., respectfully objects to Complainants’ filing purporting to be Complainants’ “Amended Complaint,” and moves the Board to dismiss that “Amended Complaint” and

Complainants' original Complaint as frivolous. Alternatively, TNT moves the Board to reverse the Hearing Officer's Order and reschedule this matter for hearing on the Complainants' original Complaint. Finally, TNT moves the Board to grant TNT all other relief just and proper in the premises.

Respectfully submitted,

TNT LOGISTICS NORTH AMERICA INC.,
Respondent,

By: /s/ Thomas G. Safley
One of Its Attorneys

Dated: January 16, 2007

Edward W. Dwyer
Thomas G. Safley
Ryan E. Mohr
HODGE DWYER ZEMAN
3150 Roland Avenue
Post Office Box 5776
Springfield, Illinois 62705-5776
(217) 523-4900

TNTL:002/Fil/Neri/Objection to Amended Complaint

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

KEN BLOUIN,)
)
Complainant,)
)
v.)
)
TNT LOGISTICS NORTH AMERICA)
INC.,)
)
Respondent.)
)

PCB No. 05-217
(Enforcement – Noise)

WAYNE HASER,)
)
Complainant,)
)
v.)
)
TNT LOGISTICS NORTH AMERICA)
INC.,)
)
Respondent.)
)

PCB No. 05-216
(Enforcement – Noise)

JOHN MARACIC AND)
LINDA MARACIC,)
)
Complainants,)
)
v.)
)
TNT LOGISTICS NORTH AMERICA)
INC.,)
)
Respondent.)
)

PCB No. 05-212
(Enforcement – Noise)

VINCENT NERI and JENNIFER NERI,)	
)	
Complainants,)	
)	
v.)	PCB No. 05-213
)	(Enforcement – Noise)
TNT LOGISTICS NORTH AMERICA)	
INC.,)	
)	
Respondent.)	

AFFIDAVIT OF STEVE MCNEAL

Steve McNeal, being first duly sworn, deposes and states under oath, and if sworn as a witness, would testify, as follows:

1. I have personal knowledge of the matters set forth in this affidavit.
2. I currently am employed as Properties Director for TNT Logistics North America, Inc. ("TNT").
3. TNT currently leases and operates a facility located 25850 Ridgeland, Monee, Illinois 60449 ("Facility"), which Facility is at issue in the above-captioned matters.
4. As of January 22, 2007, TNT will no longer lease or operate the Facility.
5. Further, as of January 22, 2007, TNT will not have any employees present at the Facility, nor will TNT have any authority or control of any equipment, operations or activities of any new tenant at the Facility.
6. Further, as of January 22, 2007, TNT will not have any ability to make any changes in any equipment located at, or any operations or activities taking place at, the Facility.

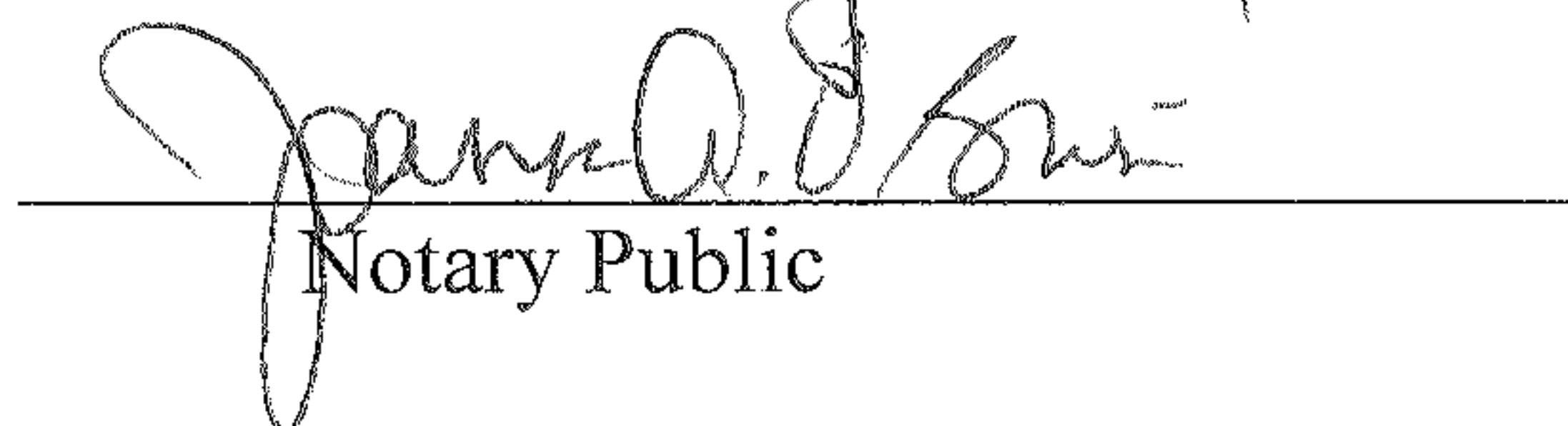
7. It is TNT's understanding that as of January 22, 2007, another company, not related in any way to TNT, will begin operations at the Facility.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

FURTHER AFFIANT SAYETH NOT.


Steve McNeal

Subscribed and sworn to before
me this 16th day of January, 2007.


Notary Public



Joanne A. O'Brien
MY COMMISSION # DD194006 EXPIRES
June 1, 2007
BONDED THRU TROY FAIN INSURANCE, INC.

TNTL:002/Fil/Affidavit of Steve McNeal