KYLE NASH, Complainant, Complainant, PCB 07-97 LOUIS JIMENEZ, Respondent. ILLINOIS POLLUTION CONTROL BOARD RECEIVED CLERK'S OFFICE AUG 0 5 2008 CORIGINAL STATE OF ILLINOIS PCB 07-97 (Citizens Enforcement - Noise)

NOTICE OF FILING AND PROOF OF SERVICE

TO: Kyle Nash

1630 W. 33rd Place Chicago, IL 60608

PLEASE BE ADVISED that on the 5th day of August, 2008, Respondent Luis A. Jimenez, by his attorney James M. Knox, filed Respondent's Appearance and Motion to Dismiss herein, with the Clerk's Office, State of Illinois, Pollution Control Board, copies of which are attached hereto and herewith served upon you.

NAME:

James M. Knox, Attorney for Luis A. Jimenez

ADDRESS:

121 W. Chestnut, #3104, Chicago, IL 60610

TELEPHONE:

312/587-1356

CERTIFICATE OF SERVICE

Under penalties as provided by law pursuant to Sec. 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that a copy of this Notice of Filing and Proof of Service, with attached Appearance and Motion to Dismiss, was served on the Complainant, Kyle Nash, at the address shown above, by depositing true and correct copies thereof in a sealed, properly addressed, postage pre-paid envelope, and depositing the same in the USPS drop box located at 121 W. Chestnut Street, Chicago, IL 60610, before 4:30 p.m., on August 5, 2008.

Witnessed and certified to this 5th day of August, 2008.

Iames M Knox

LAW OFFICES OF JAMES M. KNOX

ILLINOIS POLLUTION CONTROL BOARD

RECEIVED CLERK'S OFFICE

KYLE NASH,)	0.5	AUG 0 3 2003
Complainant,)	ORIGINAL	STATE OF ILLINOIS Pollution Control Board
v.)	PCB 07-97	
LOUIS JIMENEZ,)	(Citizens Enforcement - Noise)	
Respondent.)		

APPEARANCE BY ATTORNEY

ATTORNEY APPEARANCE I HEREBY FILE MY APPEARANCE AS ATTORNEY FOR: THE RESPONDENT

Luis A. Jimenez, (incorrectly named herein as "Louis Jimenez")

Same M.K

IN THE ABOVE ENTITLED CAUSE.

Name:

James M. Knox, Attorney at Law

Address:

121 W. Chestnut St. #3104

Chicago, IL 60610

Telephone:

312-587-1356

Date:

August 5, 2008

PROOF OF SERVICE

Under penalties as provided by law pursuant to Sec. 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that a copy of this Notice of Filing with all attachments was mailed to Kyle Nash, 1630 W. 33rd Place, Chicago, IL 60608, postage pre-paid, on August 5, 2008, before 4:30 p.m.

Witnessed and certified to this 5th day of August, 2008.

Jame M.K.

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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AUG 0 5 2008

KYLE NASH,) COLOLAL STATE OF ILLINOIS
Complainant,	ORIGINATE OF ILLINOIS
v.) PCB 07-97
LOUIS JIMENEZ,) (Citizens Enforcement - Noise)
Respondent.))

MOTION TO DISMISS

NOW COMES respondent LUIS A. JIMENEZ, incorrectly named in the Complaint filed herein, by and through his attorney, JAMES M. KNOX, and moves the Board to dismiss the Amended Complaint and Amended Motion for Summary Judgment (*hereinafter*, "amended pleadings"), pursuant to Section 101.506 of the Pollution Control Board Procedural Rules; in support thereof states:

- 1. As noted in its Order of July 10, 2008, the Board takes into account that this matter has a long history, leading to the current Amended Complaint filed on March 7, 2008, and Amended Motion for Summary Judgment, filed herein on July 30, 2008 (the "amended pleadings"), alleging violation of Title VI, Section 24, of the Environmental Protection Act, *viz* noise emitted beyond the boundaries of respondent's residence that unreasonably interferes with complainant's enjoyment of her property, so as to violate any regulation or standard adopted by the Board under this Act.
- 2. As stated in the amended pleadings, the relief sought by complainant is that the Board "order that the respondent stop polluting."
- 3. By "polluting," the complainant refers to certain wind chimes allegedly located on respondent's residential two-flat property, adjacent to complainant's residence, based on her observations and recordings that she obtained in "the summer of 2007."
- 4. In complainant's unnumbered paragraph of her Amended Motion for Summary Judgment, styled "Statement of Facts Relevant to this Motion," complainant states unequivocally

- that 1) "[t]he second (backyard) windchime was removed several weeks after the Respondent was served..." and, 2) "[t]he Respondent removed the front porch chime after the initial status hearing on August 9, 2007..."
- 5. Nothing in complainant's amended pleadings, in either her amended Formal Complaint, or in her amended Motion for Summary Judgment, suggests that the "polluting," viz noise emitting wind chimes allegedly located on respondent's property, was continued, or is continuing, or that there was at any time since the admitted voluntary removal of these devices from respondent's property, a repetition of this noise emitting phenomena on respondent's property, since August 9, 2007, in violation of 415 ILCS 5/24, 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, " nor has complainant cited any regulation or standard adopted by the Board under the act that was allegedly violated.
- 6. Therefore, the only relief that complainant can be seeking in this proceeding is an Order from this Board that the respondent cease and desist hanging, using, or in anyway allowing the installation or use of wind chimes on his property in the future, since, by complainant's own admission in her amended pleadings, these devices were voluntarily removed from respondent's property on August 9, 2007, which was in direct response to complainant's proceedings before this Board and they have never been reinstalled (see copies of photographs taken of the respondent's property on August 3, 2008, attached hereto).
- 7. There is thus no "case in controversy" before this Board regarding noise pollution on respondent's property, and there is thus no relief that this Board can provide in the premises in that the subject of complainant's complaint has by her own admission been removed one year ago, as of August 9, 2008, thus her pleadings request relief for only a purely hypothetical nuisance, which is speculative only, because the noise complained of was voluntarily abated by respondent, based on complainant's own admission in her pleadings, and thus her continued proceeding before this Board is without merit in that the issue raised is moot.
 - 8. Accordingly, respondent respectfully requests that the Board not accept the

amended pleadings for hearing, and that the Board find that the amended pleadings are frivolous within the meaning of Section 31(d) of the Act (415 ILCS 5/31(d)) and Section 101.202 of the Board's procedural rules (35 III. Adm. Code 101.202), because the amended pleadings fail to state a cause of action upon which the Board can grant relief. While the Board unquestionably has the authority to order a respondent to stop polluting, or to implement abatement measures, the amended pleadings fail to make out a prima facie case for a continuing violation, where abatement was voluntarily completed over one year ago by complainant's own admission, and there is no polluting occurring for the Board to order to stop.

WHEREFORE, based on the foregoing, respondent respectfully requests that the Board dismiss these proceedings, with prejudice.

Respectfully submitted,

Attorney for Respondent

James M. Knox Attorney for Respondent Chestnut Tower 121 W. Chestnut, #3104 Chicago, Illinois 60610 312/587-1356

ILLINOIS POLLUTION CONTROL BOARD

KYLE NASH,)
Complainant,)
v.)) PCB 07-97
LOUIS JIMENEZ,) (Citizens Enforcement - Noise
Respondent.)

AFFIDAVIT

NOW comes James M. Knox, the affiant herein, and competently states from his personal knowledge that the attached copies of photographs of respondent's property, located at 1628 W. 33rd Place, Chicago, Illinois, were taken by your affiant personally on August 3rd, 2008, in the front and rear of respondent's home, and that no "wind chimes" were in evidence on said date.

Name:

James M. Knox

Address:

121 W. Chestnut St. #3104

Chicago, IL 60610

Telephone:

312-587-1356

Date:

August 5, 2008

