

**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/>

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)		
1474 Linden Avenue)		
Highland Park IL 60035)		
)		
Respondent(s))		

February 20, 2009

**Complainants' Interlocutory Appeal of
Hearing Officer's Denial of Motion to Bar Expert**

SUMMARY

Complainants are asking the Pollution Control Board to assure that rules and orders will be enforced in this case, to avoid great prejudice to Complainants. Complainants filed a noise complaint about three air conditioners, which was accepted. Respondents were rightly granted time over a six-week period to do their own Expert testing on the Complainants' property, which was to be completed last summer or fall. However, Respondents never did any testing on the property nor did they respond to Complainants' open invitation to make a site visit.

Each time that Respondents have failed to meet successive deadlines for producing their Expert Report to Complainants, without any excuse, they have been rewarded with yet another extension to file their Report. The most recent extension takes Complainants right down to the wire of the Hearing. Complainants had asked that Respondents' Expert Report be barred due to the fact that Respondents failed to deliver their Report as ordered. Hearing Officer denied that Motion. Instead, he is allowing Respondents to withhold any report until just a few days before Hearing. The delay denies Complainants their right to adequately

prepare for the Hearing. The inexcusable has repeatedly been excused without justification, leading to great prejudice to the procedural and substantive rights of the Complainants.

Therefore, Complainants respectfully request the Pollution Control Board to reverse the Hearing Officer's denial of their Motion to Bar Respondents' Expert from testifying at the Hearing.

BACKGROUND

Anne McDonagh and David Fishbaum, residents at 1464 Linden Avenue in Highland Park, Illinois, filed their Complaint on April 15, 2008 alleging that the three air conditioners of the Respondents, Richard and Amy Michelin, violated the State of Illinois Noise Code (ref: 35 Ill. Adm. Code 35, Subtitle H.) Acoustic Associates (Complainants' Expert) report found that:

- a. "Noise is 18 decibels higher than allowed in Illinois at night (Sec. 901.102b).
- b. Prominent Discrete tone is present, making noise additional 10 decibels over limit (Sec. 901.106)
- c. "Acoustic beating characteristic" "exacerbates the nuisance." [See Attachment 1, Motion to Bar Respondents' Expert's Opinions, Expert Report, Appendix A]

Complainants' Expert's Report was delivered to Respondents with the Complaint on April 15, 2008.

The PCB accepted the case for hearing on July 10, 2008. A telephonic Status Conference took place on August 7, 2008 with both sides agreeing to negotiate a discovery schedule. As part of Discovery, Respondents specifically requested the right to enter the Complainants' property to take their own Expert readings. Complainants timely granted permission for Respondents to enter property to take readings. [See Attachment 1, Motion to Bar Respondents' Expert's Opinions, Complainants' Signed Response, Appendix B]

Both parties were Ordered by the Hearing Officer to report Expert findings to the other party by October 15, 2008. All Depositions were ordered completed by November 30, 2008. [See Attachment 1, Motion to Bar Respondents' Expert's Opinions, Hearing Officer's Sept. 11, 2008 Order, Appendix C]

Despite Complainants' reminder to Respondents and granting of permission for testing on Complainants' property, Respondents failed to conduct any tests on the affected land, disclose any Expert opinions, or produce any Expert Report. [See Attachment 1, Motion to Bar Respondents' Expert's Opinions, Complainants' Reminder, Appendix D]

At the time of the Hearing Officer's Deadline of October 15, 2008, they did not even request an extension of time. On November 10, 2008, due to the Respondents' disregard of the Hearing Officer's Sept. 11, 2008 Order, Complainants moved to Bar Respondents' Expert's

Opinions. At the next Telephonic Status Conference on November 13, 2008, Respondents' Attorney did not attend, despite the fact that time was changed to meet his schedule.

CURRENT SITUATION

On December 1, 2008, Respondents filed a Motion for Extension of Time to January 6, 2009. [Attachment 2] This Motion provided no reason for Respondents failure to deliver Expert's Report nor offer any "good cause" for the Motion to Extend. Neither had Respondents notified Complainants that they were seeking an extension. Respondents had never contacted Complainants in any way to do any testing on the affected property (Complainants' home), yet promised that the completed report would be delivered in January. [See Attachment 3, Respondents' Response to Motion to Bar]

On December 8, Complainants responded to both of Respondents' filings. [See Attachment 4, Reply Memo in Support of Motion to Bar and Response to Motion for Extension of Time].

On the next Telephonic Status Conference on December 19, 2008, Respondent's Attorney, Elliot Wiczer, once again failed to attend and his partner was unable to provide any insight into the status of the Noise Testing. The January 6th deadline, which Respondents had set, passed, again without their Expert Report being produced. Nor did any report appear by January 29, 2009, the date of the next Telephonic Status Conference.

Date	Expectation	Occurrence
Oct. 15	Expert Report	Fails to Appear
Nov. 29	Lead Attorney for Telephonic Status Conference	Fails to Appear
Dec. 19	Lead Attorney on Telephonic Status Conference	Fails to Appear
Jan. 6	Expert Report	Fails to Appear
Jan. 29	Expert Report in advance of Telephonic Status Conference	Fails to Appear

On January 29, 2009, during the Telephonic Status Conference, upon learning that there was still no Expert Report forthcoming from Respondents, Hearing Officer Halloran extemporaneously offered Respondents the month of April 2009 to do testing and set Hearing for May 13, 2009. Respondents did not request this latest extension, either verbally or in writing. Again, there was no "good cause" ever given as to why Respondents needed yet another four months for testing when they were able to promise in their November 26 Motion that report would be delivered in January. Additionally, Complainants were not notified in advance, nor did they concur. Immediately after this conference, Hearing Officer Halloran denied our Motion to Bar. [See Attachment 5, Hearing Officer's Order, Feb. 3, 2009]

On February 5, 2009, we received Hearing Officer's Order with all scheduled dates through hearing. As shown by the chart below summarizing the schedule, the scheduled dates make it impossible for Complainants to adequately prepare for the Hearing:

Sun	Mon.	Tuesday	Wednesday	Thursday	Friday	Sat.
5/3	5/4	5/5 Expert Report to be mailed. All Discovery to be Completed.	5/6 Expert Report unavailable to Complainants.	5/7 Expert Report likely not available before 2pm. All pre-Hearing Motions due.	5/8 Expert Report might still not have arrived. All Responses to pre-Hearing motions due @ 4:30pm.	5/9
5/10	5/11 Give Notice of Deposition of Respondent's Expert (although after 5/5 disc. cut-off date)	5/12 Depose Expert and Prepare for Hearing	5/13 HEARING DATE			

The Respondents have been allowed an additional three months (almost 7 months after the original October 15, 2008 ordered deadline for their Expert Report) to prepare and mail the Report to us, while we are relegated to waiting to hear from them regarding possible testing dates over a six-week period. Complainants have no assurance that they will even receive the Expert Report before the Hearing. The Hearing Officer decided that the Mailbox Rule will not hold for Motions, yet the Respondents are still allowed to mail their Expert Report. Therefore, they can mail the Report on May 5, 2009 but are not required to ensure that we receive it before Hearing, set for eight calendar days after mailing. We will likely not receive the Respondents' Expert Report until the afternoon of Thursday, May 7, 2009, at the very earliest, the very same date that Pre-Hearing Motions are due and two days after Discovery is scheduled to close. This schedule allows us at most three business days to receive and review the Report, consult with our Experts, schedule a deposition of Respondents' Expert, who resides and works in Indianapolis, Indiana, the day before the Hearing, and prepare for the Hearing the same day as the deposition. This obvious prejudice is being inflicted on the Complainants, the only parties in this case who have consistently respected Hearing Officer orders and deadlines, ostensibly to avoid prejudice to the Respondents, who have consistently ignored Hearing Officer orders and deadlines, without any excuse. Justice is not served by punishing diligence and rewarding indifference to rules and orders.

LAW

1. The Hearing Officer has not followed PCB Rules for Motions to Extend on two occasions. The first Motion to Extend (see Appendix E), which was filed six full weeks after their Expert Report was due, did not contain any "good cause" for the delay in producing the report nor any "good cause" for requesting the extension. Nor did they notify Complainants that they would file.

Section 101.522 Motions for Extension of Time

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.

With this first Request for Extension, not only did they not indicate "good cause," we cannot imagine any reason why they were unable to comply. Indeed, they had never requested a site visit during the six weeks proffered (prior to the report due date) and they were in full control of the creation of the noise so they were always able to do testing. There could not have been mechanical failure, bad weather or illness--valid reasons that may have compromised their ability to comply. And indeed, the noise runs 24 hours a day, seven days a week, under their direction. In 2007, their air conditioners operated up to October 31st, so they could have completed testing in late October, should they have chosen to be in compliance with the Hearing Officer's Order.

On the Respondents' first Motion to Extend, though the Hearing Officer never formally granted this Motion, he did so in all practicality by allowing the date to pass without making a decision on Complainants' motion to bar Respondents' Expert.

The second time that PCB procedures were not followed was with this latest extension. This Extension does not follow PCB rules on both Motions *and* Discovery. There was not only no "good cause," there was never any written or oral Motion made by Respondents. Additionally, this time, the PCB rule mandating completion of discovery at least 10 days prior to hearing, Section 101.616(c), was abrogated without good cause. The truncated schedule imposed upon Complainants is unnecessarily permissive for the non-compliant Respondents, allowing them endless extensions while reducing the Complainants to pleading to receive Respondents' Expert Report two or three days before the Hearing.

Complainants' Motion to Bar was well within PCB Guidelines as a response to the delays. 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 their Motion to Bar Respondents' Expert due to Respondents' inexcusable strategy of delay, as authorized by the Board's rules:

Section 101.800 Sanctions for Failure to Comply with Procedural Rules, Board Orders, or Hearing Officer Orders

- a) *If any person unreasonably fails to comply with any provision of 35 Ill. Adm. Code 101 through 130 or any order entered by the Board or the hearing officer, including any subpoena issued by the Board, the Board may order sanctions. The Board may order sanctions on its own motion, or in response to a motion by a party.*
- b) *Sanctions include the following:*

* * *
- 2) *The offending person may be barred from filing any . . . document relating to any issue to which the refusal or failure relates;*

* * *
- 6) *The witness may be barred from testifying concerning that issue.*
- c) *In deciding what sanction to impose the Board will consider factors including: the relative severity of the refusal or failure to comply; the past history of the proceeding; the degree to which the proceeding has been delayed or prejudiced; and the existence or absence of bad faith on the part of the offending party or person.*

The legal remedies of the PCB are also utilized by the Illinois Courts, supporting this Motion further. The PCB should 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).

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).

PRECEDENT

Beyond the written law, the PCB routinely enforces the Guidelines cited:

PCB 09-10 (Citizens Enforcement – Noise): HEARING OFFICER ORDER On November 13, 2008, a telephonic status conference was held. The parties represented that they are proceeding with discovery, but that respondents requested an extension of discovery dates. On November 13, 2008, the respondents filed an agreed and amended proposed discovery schedule. As it was agreed to, that amended discovery schedule was accepted. No further extensions will be entertained without good cause.

The Respondents have now missed two deadlines for providing their expert report. The first deadline, October 15, 2008 was suggested by the Respondents and approved and ordered by the Hearing Officer. The second deadline of January 6 was based on the Respondents' Motion for Extension, filed on December 1, 2008, six full weeks after their report was first due. Evidence of the prejudice to the Complainants is the 100 days already granted for Respondents to produce their Expert Report.

In the Denial of the Motion to Bar, the Hearing Officer states that "to bar Respondents' Expert from completing his Report would be prejudicial to the Respondents." In reaching this conclusion, the Hearing Officer has disregarded the fact that the Respondents repeatedly ignored the deadlines for Expert Disclosures in this case. The Respondents have repeatedly violated the PCB's rules and the Hearing Officer's Orders, so any "prejudice" to the Respondents is entirely self-inflicted. The Complainants, who disclosed their Expert Findings in April 2008, will now be allowed a mere 2-3 days to Depose that Expert and prepare for Hearing. The Respondents have failed twice to deliver their expert report on agreed-to deadlines. It is unfair for their delays to create the prejudice being borne the Complainants.

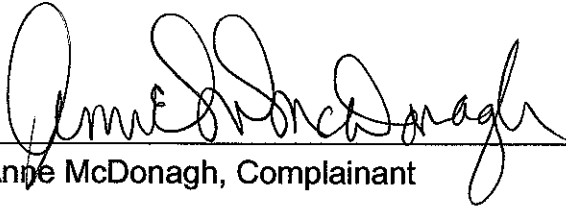
REQUEST

As we stated in the Motion to Bar, unnecessary delay of the whole litigation process is very prejudicial to the Complainants. The prejudice to their procedural and substantive rights that Complainants were trying to avoid is now being inflicted upon them. If the PCB does not overturn the Hearing Officer's denial of the Motion to Bar and the granting of a second extension for additional time, the result will be a lopsided allotment of 400 days for Respondents versus 3-4 days for Complainants to prepare for Hearing.

This is a clear case of Respondents deliberately and cavalierly ignoring PCB rules and orders, without even bothering to present any excuse. To safeguard the rights of the only party who have respected the PCB's rules and orders, it is requested that the PCB follow precedent and exercise its authority to grant Complainants' Motion to Bar Expert's Opinions,

based on failure to perform, and deny the repeated extensions that are proposed. The case can then move toward Hearing with both sides having had a fair opportunity to prepare their cases, although Respondents squandered their opportunity by defying PCB rules and orders. We respectfully ask the Pollution Control Board to reverse the Hearing Officer's denial and order him to grant our Motion to Bar Respondents' Expert from testifying at the Hearing due to their repeated failure to disclose his opinions and Report.

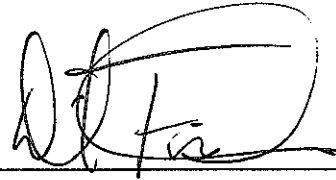
Respectfully submitted,



Anne McDonagh, Complainant

2/20/09

Date



David Fishbaum, Complainant

20-FEB-09

Date

Attachment 1

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

RECEIVED
CLERK'S OFFICE
NOV 12 2008
STATE OF ILLINOIS
Pollution Control Board

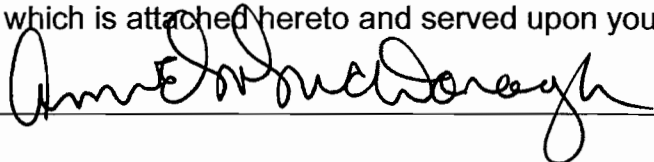
<http://www.ipcb.state.il.us/>

In The Matter Of:)
Anne McDonagh & David Fishbaum)
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Richard and Amy Michelin) (*For Board use only*)
1474 Linden Avenue)
Highland Park IL 60035)
Respondent(s))

NOTICE OF FILING TO:

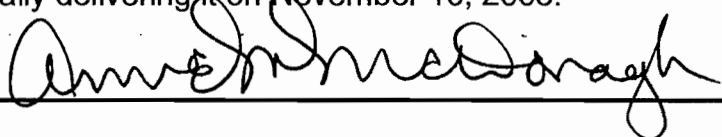
Eliot Wiczer, Wiczer & Zelmar,
500 Skokie Valley Road, Suite 350
Northbrook IL 60067

PLEASE TAKE NOTICE THAT ON November 10, 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' 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 Filing and Response to be served upon the persons named above by personally delivering it on November 10, 2008.



COMPLAINANTS' MOTION TO BAR RESPONDENTS' EXPERT'S OPINIONS

The Complainants in Case 2008-076, Anne McDonagh and David Fishbaum, file this request to Bar Respondents' Expert from offering any opinions in this case (or filing an untimely report) due to Respondents' failure to comply with a PCB Hearing Officer order to make their expert disclosures by October 15, 2008. Respondents' unexplained and inexcusable delay effectively denies Complainants adequate time for depositions and document preparation that the parties have been ordered to complete by November 30, 2008.

BACKGROUND

Anne McDonagh and David Fishbaum, owners of a residence in Highland Park, Illinois, filed a Complaint in April of 2008 alleging that the three air conditioners of the Respondents, Richard and Amy Michelon, violated the State of Illinois Noise Code (ref: 35 Ill. Adm. Code 35, Subtitle H.)

Acoustic Associates (Complainants' Expert) report found:

- a. Noise is 18 decibels higher than allowed in Illinois at night (Sec. 901.102b).
- b. Prominent Discrete tone is present, making noise additional 10 decibels over limit (Sec. 901.106)
- c. "Acoustic beating characteristic" "exacerbates the nuisance." [See Expert Report, Appendix A]

Complainants' Expert's Report was delivered to Respondents with Complaint on April 15, 2008.

Once PCB accepted the case for hearing, Respondents specifically requested the right to enter the Complainants' property to take their own Expert readings. Complainants timely granted permission for Respondents to enter property to take readings. [See Complainants' Signed Response, Appendix B]

Both parties were Ordered by the Hearing Officer to report Expert findings to the other party by October 15, 2008. All Depositions were ordered completed by November 30, 2008. [See Hearing Officer's 9/11/08 Order, Appendix C]

The very same day that Hearing Officer Bradley Halloran entered his Order, Complainants sent a letter to Respondents listing many dates suitable for acoustical testing on Complainants' property prior to Order's expert disclosure deadline. [See 9/11/08 Letter, Appendix D]

CURRENT SITUATION

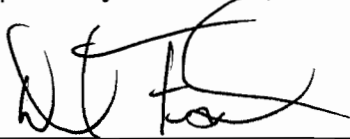
Despite Complainants' reminders and granting of permission for testing, Respondents have failed to conduct any tests, disclose any expert opinions, or produce any expert report. They did not request an extension of time from the Hearing Officer. Nor did they ever contact Complainants' to notify them that testing would be done. Now that the weather is turning cold, Respondents' Air Conditioners seem to be turned off for the season and any testing could not fairly represent warm weather levels of activity and noise. While Respondents have submitted the resume of an individual in Indiana, that is the extent of their "Expert" information. They have not disclosed a single expert opinion, despite knowing full well that the Hearing Officer had mandated October 15th as the due date for all expert disclosures.

Respondents have been aware of the need to conduct their own testing and retain an expert (if they chose to contest this case) since April 15, 2008, when they were served with the complaint. That is a full six months before the Hearing Officer's Order's October 15, 2008 deadline for full expert disclosures. That was more than adequate time for testing and an assessment to take place. The air conditioners were turned on within hours of the Respondents being served with the complaint (April 15, 2008) and were running until at least October 10, 2008.

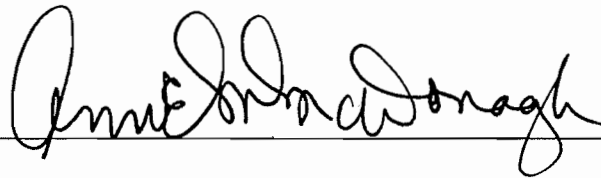
REQUEST

Due to the Respondents' failure to produce this report--stalling this case and ignoring a written order of the Hearing Officer—we respectfully ask the PCB to bar Respondents from submitting an expert report or allowing the expert to testify at the hearing.

Respectfully submitted,



David J. Fishbaum



Anne McDonagh

9-Nov-08

November 9, 2008

Date

APPENDIX A

Acoustic Associates, Ltd.



Specialists in Hearing and Acoustics

1278 W. Northwest Hwy - Suite 904, Palatine, Illinois 60067
Office: 847-359-1068 • Fax: 847-359-1207
Website: www.AcousticAssociates.com
E-mail: info@AcousticAssociates.com

Tom Thunder, AuD, FAAA, INCE - *Principal*
Roger Harmon, BSEE, PE - *Acoustical Engineer*
Steve Hallenbeck, AuD, FAAA - *Audiologist*
Steve Thunder, BSE Cand. - *Engineering Intern*

June 8th, 2007

Anne McDonagh
1464 Linden Ave.
Highland Park, IL 60035

Re: Noise Emissions

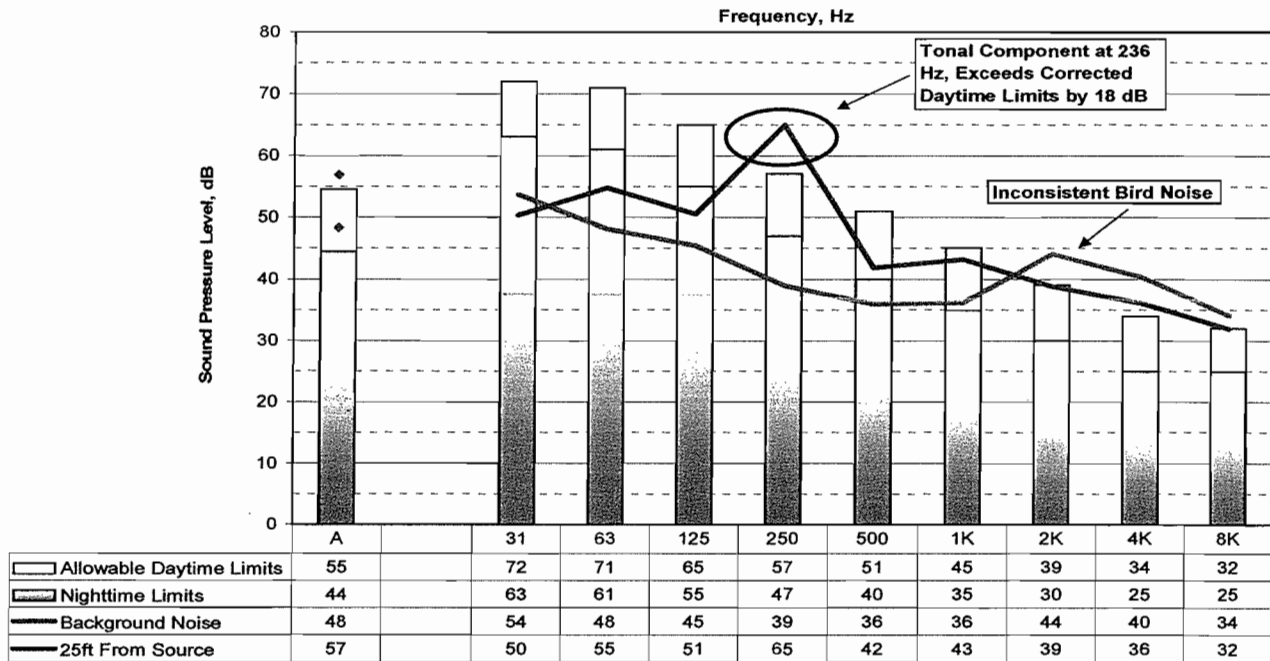
Dear Mrs. McDonagh:

This letter reports the findings of our recent noise assessment of the A/C units next to your property. As you asked we have assessed this noise relative to the State of Illinois noise code (ref: 35 Ill. Adm. Code Subtitle H). Under this code, your residence is classified as Class A (residential) land and the neighboring home from which the noise is emitting is also classified as Class A (residential) land. Since the measurements were taken at approximately 11:30 AM, the applicable code here is Section 901.102a which pertains to residential noise radiated to another residential property during daytime hours (7am – 10pm). Although the limits are specified in each of nine octave frequencies, the overall (total) limit often used for simple monitoring purposes is 55 dBA. Also, it was found that there was a Prominent Discrete Tone. Accordingly, Section 901.106 of the code also applies. This applies a -10 dB correction to the frequency at which the tone occurs.

To conduct our study, we set up our equipment next to the house that was being disturbed, 25 ft from the source. Our equipment consisted of a high precision sound level meter connected to a digital recorder. A calibration tone was placed on the recording so that the recording could be accurately analyzed in our laboratory. The recording began around 11:30 AM on Tuesday, May 29, 2007. Our intern was on site documenting his recordings and observing acoustic surroundings. It was indicated that the noise being recorded at the time was representative, although it was even louder on other occasions.

In our lab analysis, we generated 1/3-octave and octave frequency spectra. The 1/3-octaves were used to determine the presence on a Prominent Discrete Tone, as required by IL code. And the octave bands were used to present the data in a simplified form. The resultant octave band frequency spectrum is shown in FIGURE 1. The overall level of this spectrum is 57 dBA. As seen in the figure, the octave level at 250 Hz (65 dB) far exceeds the Illinois daytime limit of 57 dB, as well as the nighttime limit of 47 dB. Furthermore, when the daytime limit is corrected for the presence of the prominent discrete tone (-10 dB), it exceeds the allowable limit by 18 dB. It is also necessary to correct the levels due to background noise. In this case the correction was 0 dB. As shown in FIGURE 1, the background noise is far below the measurement level (greater than 10 dB) at 250 Hz.

Figure 1- A/C Noise



There are a total of 3 A/C units. But at the time of the measurement, there was only one unit running. The second unit was the same as the first, so a 3 dB increase in the noise level can be expected when the second unit is running at the same time as the first unit. The 3rd unit, however, was not the same as the other two. Therefore, an increase in the noise when all three units run is likely, but we can not predict by how much. At the time of the test, it was 80 degrees outside and the units were determined to have about a 50% duty (on-off) cycle after an hour of measurement /observation. On hotter days it can be assumed that the duty cycle will increase therefore increasing the noise. During the measurements one unit ran part of the time and two units ran part of the time. Therefore, data from only one unit running was taken and then extrapolated to an equivalent of a 1-hour measurement.

The character of this noise can also contribute to the nuisance. In addition to the annoyance of the tonal quality of the noise, there is also an acoustic beating characteristic where the level of the hum oscillates. This characteristic exacerbates the nuisance. The beating is likely caused by the 2 A/C units running at nearly the same speed creating the beating effect. Note, that there is no beating when just one unit is running.

I hope this report meets your expectations in addressing this noise issue. We appreciate the opportunity of working with you and ask that you call us if you have any questions.

Sincerely,

Steve Thunder
Purdue University Acoustical Engineering Intern

Reviewed by,

Tom Thunder, AuD, INCE
Acoustical Engineer and Audiologist

APPENDIX B

WICZER & ZELMAR, LLC
ATTORNEYS AT LAW

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

*Admitted in Wisconsin

Attn: Mr. Elliot Wiczer
This was faxed on 8/30/08
& 8/31/08 to
Mr. Wiczer.

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

1 page 9/11/08
Attn:
Brad Halloran

August 14, 2008

PCB-08-76

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~~ ^{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

Very truly yours,

Elliot S. Wiczer

ESW:hr

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

AGREED:

Anne McDonagh

APPENDIX C

RECEIVED
CLERK'S OFFICE

SEP 11 2008

STATE OF ILLINOIS
Pollution Control Board

ILLINOIS POLLUTION CONTROL BOARD
September 11, 2008

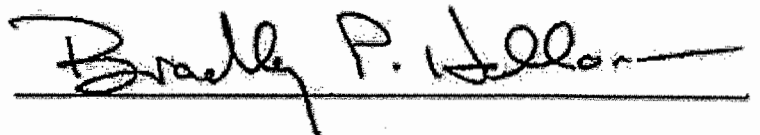
ANNE MCDONAGH and DAVID)
FISHBAUM,)
)
Complainants,)
)
v.) PCB 08-76
) (Citizens Enforcement – Noise)
)
RICHARD and AMY MICHELON,)
)
Respondents.)
)
)
)

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.



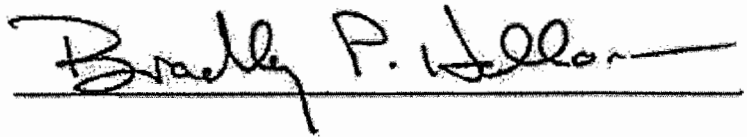
Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 W. Randolph Street
Chicago, Illinois 60601
312.814.8917

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

PCB 2008-076
David Fishbaum
Anne McDonagh & David Fishbaum
1464 Linden Avenue
Highland Park, IL 60035

PCB 2008-076
Amy Michelin
Richard Michelin
1474 Linden Avenue
Highland Park, IL 60035

PCB 2008-076
Elliot S. Wiczer
Wiczer & Zelmar, LLC
500 Skokie Blvd.
Suite 350
Northbrook, IL 60062

APPENDIX D

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.

Attachment 2

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

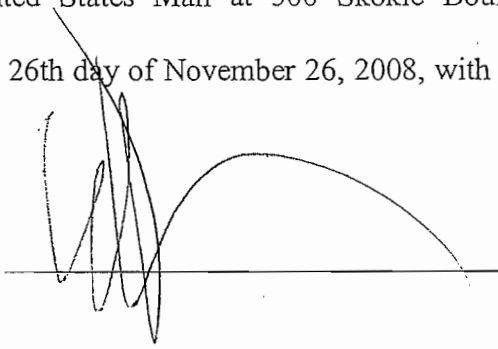
TO: Anne McDonagh and David Fishbaum Bradley P. Halloran, Hearing Officer
1464 Linden Avenue Illinois Pollution Control Board
Highland Park, IL 60035 James R. Thompson Center, #11-500
100 W. Randolph Street
Chicago, IL 60601

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.

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.)
)
Richard and Amy Michelin)
1474 Linden Avenue)
Highland Park, IL 60035)
)
Respondents.)

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.

We were out of town 8/13-22.

Sept. 5

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,

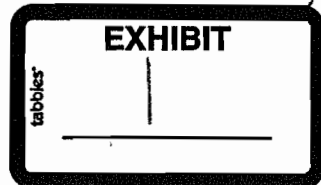
Elliot S. Wiczer

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.



Attachment 3

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

RECEIVED
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DEC 01 2008
STATE OF ILLINOIS
Pollution Control Board

In The Matter Of:)
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Anne McDonagh & David Fishbaum)
1464 Linden Avenue)
Highland Park, IL 60035)
)
Complainants,)
v.)
)
Richard and Amy Michelin)
1474 Linden Avenue)
Highland Park, IL 60035)
)
Respondents.)

PCB 20

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

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.wiczerzelmar.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~~ ^{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



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

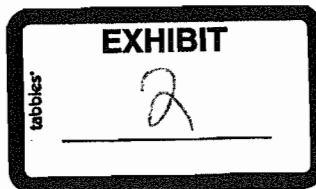
In The Matter Of:)	
)	
Anne McDonagh & David Fishbaum)	
1464 Linden Avenue)	
Highland Park, IL 60035)	
Complainants,)	
)	
v.)	PCB 08-76
)	(Citizens Enforcement – Noise)
Richard and Amy Michelin)	
1474 Linden Avenue)	
Highland Park, IL 60035)	
Respondents.)	

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

Attachment 4

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

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DEC 09 2008
STATE OF ILLINOIS
Pollution Control Board

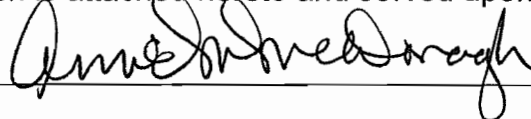
<http://www.ipcb.state.il.us/>

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:

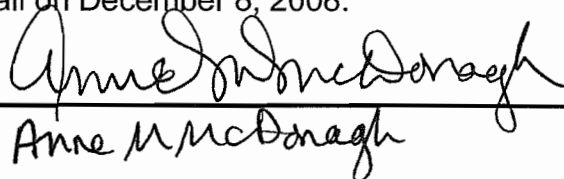
Eliot Wiczer, Wiczer & Zelmar,
500 Skokie Valley Road, Suite 350
Northbrook IL 60067

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

RECEIVED
CLERK'S OFFICE
DEC 09 2008
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.)
Richard and Amy Michelin)
1474 Linden Avenue)
Highland Park IL 60035)

PCB 2008 - 076

(For Board use only)

Respondent(s))

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.

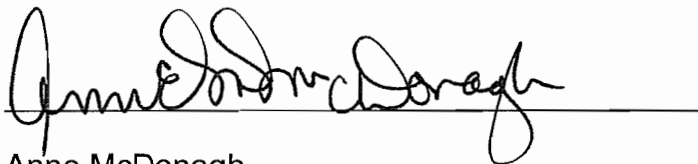
Fifth, Complainants are confounded by the dates proposed in Respondents' two filings of November 26, 2008. Respondents seek to compress the time allotted to Complainants to prepare for Deposition of Expert to one week. Respondents propose to deliver Expert Report "no later than January 6, 2008." (Item #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,



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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STATE OF ILLINOIS
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Richard and Amy Michelin) (*For Board use only*)
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)
Respondent(s))

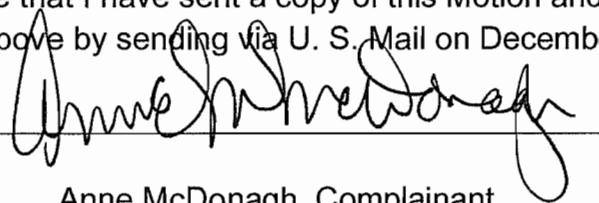
NOTICE OF FILING TO:

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, 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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DEC 09 2008
STATE OF ILLINOIS
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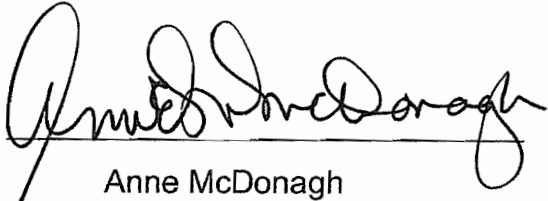
**COMPLAINANTS' MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF
COMPLAINANTS' MOTION TO BAR RESPONDENTS' EXPERT**

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,



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

Anne McDonagh

12/2/08



A handwritten signature in cursive script, appearing to read "David Fishbaum", written over a horizontal line.

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/>

In The Matter Of:)		
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)		
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)		
v.)	PCB 2008	- 076
Richard and Amy Michelin)	<i>(For Board use only)</i>	
1474 Linden Avenue)		
Highland Park IL 60035)		
)		
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.**

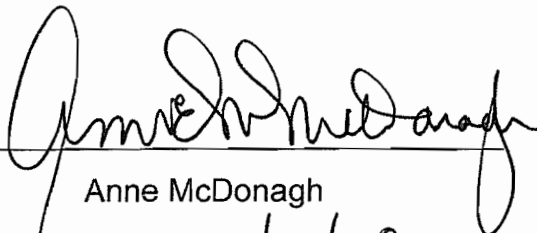
It is true that the Complainants and Respondents have recently engaged in settlement discussions but the Complainants don't view this as a reason not to accept the motion. After two years of attempts by the Complainants to resolve this issue out of court, the Respondents' first response to settlement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

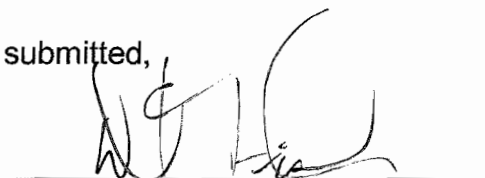
REQUEST

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
12/2/08

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.



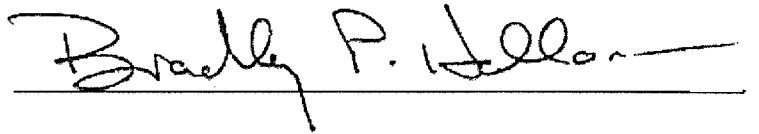
Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 W. Randolph Street
Chicago, Illinois 60601
312.814.8917

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.

PHOTOCOPY OF ORIGINAL
DELIVERED TO EW. 1
9/15/08

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.

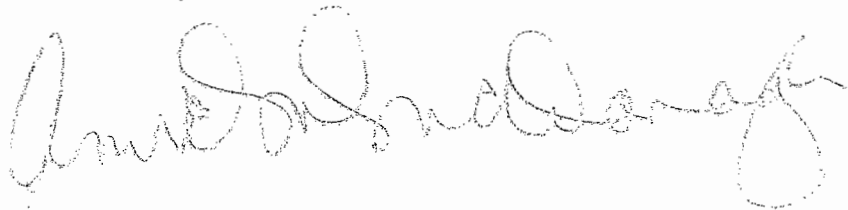
9. State the date that respondents first occupied the residence at 1474 Linden Avenue, and whether they have continuously occupied the residence since that date.

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.

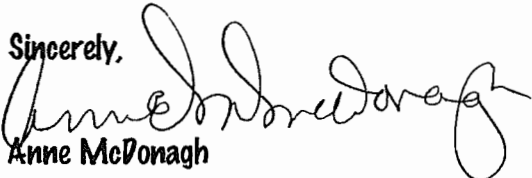
Religious holidays for us fall on Sept. 30th and October 1st so those days are not good.

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.

Attachment 5

ORIGINAL

RECEIVED
CLERK'S OFFICE

FEB - 3 2009

STATE OF ILLINOIS
Pollution Control Board

ILLINOIS POLLUTION CONTROL BOARD

February 3, 2009

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

HEARING OFFICER ORDER

On January 29, 2009, all parties participated in a telephonic status conference with the hearing officer. Discussions centered on complainants' Motion to Bar Respondents' Expert Opinions, filed November 12, 2009. The respondents filed a Motion for Extension of Time to Complete Discovery on December 1, 2009. Respondents' motion also addresses complainants' motion to bar. On December 9, 2008, the complainants filed their response.

Complainants' motion states that the respondents have not complied with the discovery schedule as set forth in the Hearing Officer Order of September 11, 2008. Specifically, the complainants allege that the respondents failed to serve their experts report as required by the discovery schedule. The complainants further state that any testing of the respondents air conditioners now "could not fairly represent warm weather levels of activity and noise", and therefore, respondents' expert and his report must be barred. (Mot. at 3).

In their motion, respondents represent that written discovery has been served and responded to, and that respondents' expert was still in the process of testing and preparing a report. Respondents represent that the expert report will be provided to the complainants on or before January 6, 2009.

The complainants response continues to request that respondents' expert be barred from participating and that "testing their air conditioning system in freezing temperatures cannot replicate summertime levels of usage and noise" (Response at 1-2).

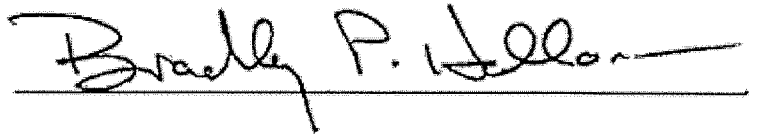
While it appears to be true, and as conceded by the complainants, an air conditioning system cannot be properly tested for noise when temperatures fall in the winter. To bar respondents expert from completing his report would be prejudicial to the respondents and may also be prejudicial to the complainants as well. Complainants' motion to bar is denied.

During the status conference, the complainants requested that a hearing date be set a reasonable time after the respondents completed their testing. It was agreed that testing could recommence as early as April 2009. Therefore, respondents' expert report is due to be served on or before May 5, 2009. All discovery to be completed on or before May 5, 2009. Any pre-hearing motions, including motions *in limine*, must be filed on or before May 7, 2009. Any responses must be filed on or before May 8, 2009. The mailbox rule will not apply to the pre-hearing motions and responses, and all electronic or approved telefax filings must be received by the Clerk's Office no later than 4:30 p.m. of the due date. A hearing in this matter was scheduled for May 13, 2009.

Also discussed at the status conference was respondents' representation that a hearing may not be necessary. Respondents represented that they have requested from the local government a variance so that the air conditioners could be moved to the opposite side of the house. This would presumably alleviate any noise issues and the complaint could be dismissed. Further discussion will be entertained at the next telephonic status conference.

The parties or their legal representatives are directed to appear at a telephonic status conference with the hearing officer on March 5, 2009, at 10:00 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.

A handwritten signature in black ink, reading "Bradley P. Halloran", is written over a horizontal line.

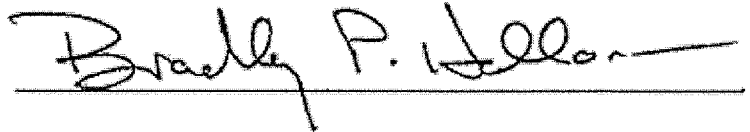
Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 W. Randolph Street
Chicago, Illinois 60601
312.814.8917

CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing order were mailed, first class, on February 3, 2009, 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 February 3, 2009:

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

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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

PCB 2008-076
David Fishbaum
Anne McDonagh & David Fishbaum
1464 Linden Avenue
Highland Park, IL 60035

PCB 2008-076
Amy Michelin
Richard Michelin
1474 Linden Avenue
Highland Park, IL 60035

PCB 2008-076
Elliot S. Wiczer
Wiczer & Zelmar, LLC
500 Skokie Blvd.
Suite 350
Northbrook, IL 60062