ILLINOIS POLLUTION CONTROL BOARD
August 19, 2010

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

ORDER OF THE BOARD (by C.K. Zalewski):

This is a citizen's enforcement action brought by Kyle Nash (Nash) against her next-door neighbor, Luis Jimenez (Jimenez). Nash alleges that wind chimes on Jimenez's residence caused noise nuisance violations, and seeks a Board decision ordering Jimenez to cease and desist from the alleged noise pollution.

The matter comes before the Board on five motions. After filing an amended complaint, Nash filed a motion for summary judgment. Nash also filed a motion to amend the caption. Jimenez later filed a motion to dismiss. After Nash responded, Jimenez filed a motion to consolidate and a motion for leave to file a reply, accompanied by a reply. The Board denies the motions for summary judgment and dismissal, and following the dismissal of a related case,[1] the Board also denies the motion to consolidate as moot. The Board grants the motion to amend and the motion for leave to reply *instanter*. Below, the Board details the procedural history and legal framework of the case before discussing the grounds for the Board's findings.

## PROCEDURAL MATTERS

### Procedural History

On March 26, 2007, Kyle Nash filed a complaint against Luis Jimenez, which the Board accepted for hearing by order of July 26, 2007. Kyle Nash v. Louis Jimenez, PCB 07-97 (July 26, 2006). The complaint alleged that Jimenez violated Section 24 of the Environmental Protection Act (Act) (415 ILCS 5/24 (2008)) by hanging wind chimes on his front porch and in his back yard. The complaint concerns Nash's property located at 1630 West 33rd Place,

[1] The related case of Kyle Nash v. Karen Sokolowski was accepted for hearing by the Board on the same date as the instant case. *See* PCB 07-96 (July 26, 2007). On July 12, 2010, the Hearing Officer issued a status order stating that Sokolowski no longer resides at the site of the nuisance alleged in PCB 07-96, removing authority from the Board to grant the requested relief. The Board dismissed the claims as frivolous under the Board's rules. *See* PCB 07-96, slip op. at 2 (Aug. 5, 2010).

Chicago, Cook County. Jimenez's property lies closely adjacent to Nash's at 1628 West 33rd Place, Chicago, Cook County.

On February 21, 2008, the Board found that Nash's original complaint failed to state a claim because it did not allege that any Board rules or regulations were violated, which is a condition for violation of Section 24 of the Act. PCB 07-97, slip op. at 1 (Feb. 21, 2008). Nash filed an amended complaint on March 7, 2008, rectifying the earlier inadequacy by alleging that Jimenez violated Section 900.102 of the Board's regulations, which prohibits noise emissions beyond the boundary of a property so as to cause noise pollution. 35 Ill. Adm. Code 900.102. The amended complaint was accepted by the Board on July 10, 2008. Jimenez did not file an answer.

On November 16, 2007, Nash filed a motion for summary judgment, which the Board rejected on February 21, 2008 due to procedural deficiencies. Nash filed an amended motion on July 30, 2008, with the required proof of filing and certificate of service. Jimenez did not file a response. However, six days later, on August 5, 2008, Jimenez filed a motion to dismiss, claiming that Nash's complaint failed to state a claim because Jimenez had already removed the chimes from his property, arguing that this action rendered Nash's claims frivolous under the Act. On October 7, 2008, Nash filed a response (Resp. Mot. Dis.), arguing that the case should move forward regardless of whether the chimes were removed, and claiming that Nash continued to hear the chimes even though she could not see them. Resp. Mot. Dis. at 5. The response also raised novel allegations about various harassing acts that she claims Jimenez carried out, such as throwing trash onto Nash's yard. *Id.* at 3.

On November 21, 2008, Jimenez filed two motions jointly with Karen Sokolowski, moving the board to consolidate PCB 07-96 and 07-97 and to grant leave to file a reply *instanter*. A reply accompanied the motion, arguing that the novel allegations in Nash's response were irrelevant to her original claims. Reply at 2. The reply also alleged that the area in which the Nash and Jimenez properties sit is "anything but a completely quiet, sleepy area" due to ambient noise from emergency vehicles, children's' parks and residents. *Id.* at 6. Nash responded to the motions on December 5, 2008, arguing that consolidation would be inappropriate because of the factual differences between the cases and indicating that Nash was hesitant to enter a settlement agreement because she had no confidence that Jimenez would adhere to the terms. On October 22, 2009, Nash filed a document that might be viewed as a surreply, alleging further harassing activities but making no mention of wind chimes.

## Motion to Amend Filings

Nash filed a motion to amend all filings on October 7, 2008, stating that Jimenez's first name had been misspelled as Louis, but is correctly spelled Luis. The Board was first informed of this by Jimenez in his motion to dismiss. Mot. Dis. at 1. No objection or response to the motion to amend was received. The Board grants the motion and has accordingly recaptioned this order, which must be reflected in future filings.

## Motion to Consolidate

The motion to consolidate was rendered moot by the Board's dismissal of PCB 07-96 by order of August 5, 2010. On that ground, the Board denies this motion.

## Motion for Leave to File a Reply *Instanter*

On November 21, 2008, 45 days after Nash filed a response to Jimenez's motion to dismiss, Jimenez filed a motion for leave to file a reply, accompanied by a reply. He argued that his reply should be considered by the Board because Nash raised novel allegations in her response to Jimenez's motion to dismiss. The Board's rules state that a movant

> will not have the right to reply, except as permitted by the Board...to prevent material prejudice. A motion for leave to file a reply must be filed with the Board within 14 days after service of the response. 35 Ill. Adm. Code 101.500(e).

The Board, like Jimenez, views Nash's novel allegations as irrelevant to her original claims. The Board therefore considers the likelihood of material prejudice resulting from a denial of leave to be low. A decision to deny the motion would be well within the Board's discretion, especially in light of the lateness of filing. *See, e.g.*, In The Matter Of: Petition of Ford Motor Company for Adjusted Standard from 35 Ill. Adm. Code 215.204(a)(1), AS 91-2, slip op. at 3 (Feb. 28, 1991) (stating that where a filing is late, the Board may "justifiably find that any prejudice...is self imposed...", but accepting a last-minute motion for expedited consideration anyway). However, the Board notes that Jimenez could not predict the Board's assessment of Nash's novel allegations, and to avoid any possibility of prejudice to Jimenez, the Board grants this motion and accepts the reply for consideration.

## LEGAL FRAMEWORK

Under Act (415 ILCS 5 et seq. (2008)), noise nuisance violations occur when noise emitted by one person travels beyond the boundaries of that person's property so as to unreasonably interfere with the enjoyment of life, lawful business or activity of another person. 415 ILCS 5/24 (2008). The Board uses the factors in Section 33(c) of the Act (415 ILCS 5/33(c) (2008)) to determine if the noise unreasonably interferes with the enjoyment of life, lawful business or activity of another party. *See, e.g.*, Charter Hall Homeowner's Association and Jeff Cohen v. Overland Transportation System, Inc., and D. P. Cartage, Inc., PCB 98-81 (Oct. 1, 1998).

Section 24 of the Act prohibits any person from

> emit[ting] beyond the boundaries of his property any noise that unreasonably interferes with the enjoyment of life or with any lawful business or activity, so as to violate any regulation or standard adopted by the Board under the Act. 415 ILCS 5/24 (2008).

Section 900.102 of the Board's regulations provides,

> [n]o person shall cause or allow the emission of sound beyond the boundaries of his property, as property is defined in Section 25 of the Illinois Environmental Protection Act, so as to cause noise pollution in Illinois, or so as to violate any provision of this Chapter. 35 Ill. Adm. Code 900.102.

Section 33(c) of the Act requires that, when making orders and determinations of unreasonableness, the Board must

> take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges, or deposits involved including, but not limited to:
>
> i. The character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
>
> ii. The social and economic value of the pollution source;
>
> iii. The suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved;
>
> iv. The technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and
>
> v. Any subsequent compliance. 415 ILCS 5/33(c) (2008).

When determining whether an interference is substantial and unreasonable, "[t]he burden of proof lies with the complainant[]" to show that a preponderance of the evidence weighs in the complainant's favor. People of Illinois v. ESG Watts, Inc., PCB 96-107, slip op. at 115 (Feb. 5, 1998). The Board "need not find against [the respondent] on each of the [factors] of Section 33(c) factors in order to find a violation." *Id.* at 116.

## STANDARDS OF DECISION

### Motion for Summary Judgment

Summary judgment is appropriate when the pleadings, deposition, admissions on file, and affidavits disclose that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. 35 Ill. Adm. Code 101.516(b); *see* Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998). A genuine issue of material fact exists when "the material facts are disputed, or, if [they] are undisputed, reasonable persons might draw different inferences from the undisputed facts." Adames v. Sheahan, 233 Ill. 2d 276, 296, 909 N.E.2d 742, 754 (2009).

When ruling on a motion for summary judgment, the Board "must be construed strictly against the movant and liberally in favor of the opponent." *Id.*, 233 Ill. 2d at 295-96, 909 N.E. 2d at 754. A party opposing a motion for summary judgment may not rest on his pleadings, but must "present a factual basis which would arguably entitle [him] to judgment." Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2nd Dist. 1994). However, summary judgment "is a drastic means of disposing of litigation," and therefore it should be granted only when the movant's right to relief, based on all the evidence contained in the filings, is "clear and free from doubt." Dowd, 181 Ill. at 483, 693 N.E.2d at 370, citing Purtill v. Hess, 111 Ill. 2d 299, 240, 489 N.E.2d 867, 871 (1986).

## Motion to Dismiss

When ruling on a motion to dismiss, the Board must take all well-pled facts contained in the complaint as true, and must draw all inferences from those facts in the light most favorable to the non-movant. People v. Stein Steel Mills Svcs., Inc., PCB 02-1 (Nov. 15, 2001).

The Board's procedural rules codify the requirements for the contents of a complaint, including the

> dates, location, events, nature, extent, duration, and strength of discharges or emissions and consequences alleged to constitute violations [and a] concise statement of the relief that the complainant seeks. 35 Ill. Adm. Code 103.204(c).

A complaint should not be dismissed for failure to state a claim unless it is clear that no set of facts could be proven that would entitle the complainant to relief. People of Ill. v. Pattison Associates, LLC and 5701 S. Calumet L.L.G, LLC, PCB 05-181, slip op. at 9 (Sept. 15, 2005).

## BOARD ANALYSIS AND DECISION

The Board first discusses the claims that form the basis for the motions for summary judgment and dismissal. The Board then addresses Nash's motion for summary judgment, finding that the motion does not set forth the evidentiary facts necessary to preclude a hearing and that Jimenez raised a genuine issue of fact in his reply. The Board denies the motion on both grounds. The Board then denies Jimenez's motion to dismiss, finding that Nash adequately stated a claim and that the Board retains the power to grant the relief she has requested.

## Complaint

According to Nash's amended complaint, Jimenez has displayed wind chimes on his property since 1997, which can be heard "incessantly 24 hours a day often for days and days at a time." Am. Comp. at 3. Nash claimed that she and her two sons experienced numerous ill health effects, including hearing impairment, sleep disturbance, decreased productivity at work and

school, and reduced enjoyment of their property. *Id.* at 4. Nash asked the Board to "enter an order that the respondent stop polluting." *Id*. at 4.

The Board's orders of July 26, 2007 and July 10, 2008, accepting Nash's complaint and amended complaint for hearing, informed the parties that failure to file an answer within 60 days of receiving the complaint may have severe consequences. *See e.g.*, PCB 07-97, slip op. at 2 (Jul. 10, 2008). Generally, if a respondent fails within that time to file an answer, the Board will deem the allegations admitted by the respondent. *Id.* at 3, citing 35 Ill. Adm. Code 103.204(d). Because Jimenez has not filed an answer to the amended complaint, the Board deems Nash's claims admitted.

## Motion for Summary Judgment

Nash's amended motion for summary judgment (Mot. S.J.) was filed on July 30, 2008. The motion contained two pages of factual allegations about the wind chime noise that echoed the complaint, stating that the noise derives from the chimes and can be heard "incessantly 24 hour a day often for days...at a time," and listing effects of the noise on the sleeping habits, use of the home and concentration of Nash and her sons:

> The negative effects my two sons and I experience include, but are not limited to: pain and hearing fatigue; exacerbated hearing impairment problems including tinnitus; annoyance and interference with regular social behavior (e.g., increased irritation, agitation, anxiety, frustration, and helplessness); interference with speech communication; *sleep disturbance* and the attendant consequences of that on both long and short term bases; cardiovascular effects including heart palpitations and higher blood pressure; gastric, digestive, and nutrition problems, negative hormonal responses (*i.e.*, increased stress hormones) and their consequences on metabolism and the immune system (*e.g.* headaches, nausea, increased illness); cognitive problems including *loss of concentration* and memory difficulties; increased sense of alienation and hopelessness; and decreased performance and *loss of productivity at work and school.* (My older son and I work out of our home; my younger son is a college student who studies at home.)
> *My sons and I have experienced a marked loss of enjoyment of our lives and enjoyment of our property.* As a result of this noise pollution, we often don't want to come home anymore, we don't like being in our home when we are there, and we don't any longer enjoy the neighborhood we've lived in and loved for almost 20 years now. Mot. S.J. at 2 (emphasis added to portions relevant to pleading standards).

Nash included two items of evidence in her motion. These included a letter from a neighborhood Center for Conflict Resolution regarding her "failure to get a response from the Respondent," and a compact disc containing two pictures of the wind chimes and an audio file of the alleged chime noise. *Id.* at 3. Nash stated that she made the recording "on a mini hand recorder *without amplification* in the summer of 2007 while standing in my living room." *Id.* (emphasis in original).

Under Section 101.500(d) of the Board's procedural rules, "if no response is received [within 14 days of service], the party will be deemed to have waived objection to the granting of the motion..." 35 Ill. Adm. Code 101.500(d). Jimenez did not file a response, and the Board deems all objections waived.

**Discussion**

When ruling on a motion for summary judgment, the Board "must consider the pleadings, depositions, and affidavits strictly against [Nash] and in favor of [Jimenez]." Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998). The motion should be granted only if Nash's right to relief "is clear and free from doubt" because, first, there is no genuine issue of material fact, and second, Nash is entitled to judgment as a matter of law. *Id.*; *see* 35 Ill. Adm. Code 101.516(b).

Nash must establish numerous material facts to obtain summary judgment, including evidentiary facts that would permit a finding that the sounds emitted by Jimenez's chimes rose to the level of an "unreasonable interference" in her life and enjoyment of her property. *See* 415 ILCS 5/24 (2008). To do this, Nash must provide evidence "describing the noise, explaining the type and severity of the interference caused by the noise, and indicating the frequency and duration of the interference." Kvatsak v. St. Michael's Lutheran Church, PCB 89-182, slip op. at 7 (August 30, 1990) (citing Ferndale Heights Utilities Company v. IPCB and IEPA, 41 Ill.App.3d 962, 358 N.E.2d 1224 (1st Dist. 1976)). Illinois uses the "Ferndale standard," which allows the Board to find that a violation of applicable nuisance noise provisions has occurred based solely on testimonial evidence, rather than requiring physical evidence of a violation of numeric sound limits. *Id.* (adopting the Ferndale standard). "This type of testimony must be provided in any proceeding for the Board to make a finding regarding interference with the enjoyment of life." *Id.* at 8.

If Nash succeeds in supporting her allegations by showing that she should prevail by a preponderance of the evidence, the burden shifts to Jimenez, who need not prove his case but must "present a factual basis which would arguably entitle him to judgment." Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2nd Dist. 1994). Thus, Nash's motion must be denied if Nash fails to carry her evidentiary burden and leaves issues of fact in the record, or if Jimenez raises genuine issues of fact. The Board finds that the former has occurred.

**Lack of evidentiary facts preclude summary judgment**

Nash has not met the evidentiary burden necessary to compel judgment in her favor. In nuisance noise cases, "the threshold issue is whether sounds have caused an interference with the complainant['s] enjoyment of life or lawful business activity." Gina Patterman v. Boughton Trucking and Materials, Inc., PCB 99-187 at 21 (May 6, 2004). Not every sound "constitutes an interference solely because it could be heard;" the evidence on file must support a finding that the alleged noise caused an unreasonable interference rather than merely "'a trifling interference, petty annoyance or minor discomfort.'" *Id.* at 33 (quoting Wells Manufacturing Co. v. PCB, 73 Ill.2d 226, 383 N.E.2d 148, 150 (1978)). To be considered an unreasonable interference, the

sounds must "objectively affect" the complainant. *See, e.g.*, Village of Matteson v. World Music Theatre Jam Prod., Ltd. and Gierczyk Development, Inc., PCB 90-146, slip op. at 33 (Apr. 25, 1991) (citing Kvatsak, PCB 89-182 (Aug. 30, 1990), Zivoli v. Dive Shop, PCB 89-205 (Mar. 14, 1991)).

The Board determines whether an interference is unreasonable by evaluating the factors set forth in Section 33(c) of the Act, including the character and degree of the alleged injury; the social and economic value of the pollution source; the suitability of the source to the area, including priority of location; the technical and economic feasibility of reducing or eliminating the pollution; and any subsequent compliance. 415 ILCS 5/33(c) (2008). Nash's burden of proof with respect to Section 33(c) does not require her to prove unreasonableness within each of the five factors. Processing & Books Inc. v. PCB, 64 Ill. 2d 68, 76, 351 N.E.2d 865, 869 (1976) (citing Currie, *Enforcement Under the Illinois Pollution Law*, 70 Nw. U.L. Rev. 389, 460-63 (1975)). However, Nash "bears the burden of persuasion on the essential elements of the alleged violation[]," and on a motion for summary judgment, "[t]he facts to be considered by the court are evidentiary facts." Patterman, PCB 99-187 at 21; Carruthers v. B.C. Christopher & Co., 57 Ill. 2d 376, 380.

Nash has alleged a few evidentiary facts that go some way to supporting her claim that Jimenez's chimes create an unreasonable interference in her life. In terms of extent and duration, she stated that she could hear Jimenez's wind chimes "incessantly," or on a regular basis, over the course of about one year. Mot. S.J. at 3. She further stated that noise from the chimes was ongoing as of December 5, 2009. Reply at 11 ("the wind chimes were removed from sight, however I have continued to hear chimes on and off ever since"). Nash attempted to provide evidence of the intensity of the sounds emitted by the chimes by filing sound recordings along with her motion. In terms of intensity of the noise, Nash alleged a plethora of injuries that she claims to have suffered as a result of the noise, including loss of sleep, concentration and use of her property. Mot. S.J. at 2. Alleged ill health effects included

> exacerbated hearing impairment problems including tinnitus;...interference with speech communication;...gastric, digestive, and nutrition problems, negative hormonal responses (i.e., increased stress hormones) and their consequences on metabolism and the immune system (e.g. headaches, nausea, increased illness);...[and an] increased sense of alienation and hopelessness. . .. *Id.*

In filings subsequent to her motion for summary judgment, including the response and surreply to Jimenez's motion to dismiss, Nash also claimed that Jimenez engaged in various harassing actions. Those actions are irrelevant to her original claim and the Board does not consider them. The above allegations are thus the extent of the evidentiary facts provided by Nash to support her complaint.

The Board describes the inadequacy of this evidence to support a grant of summary judgment by pointing to forms of evidence that are commonly presented in nuisance noise cases but that are missing from this docket. First, although other neighbors likely live nearby and although Nash's sons allegedly live in the same house, Nash has not filed a single affidavit or public comment as evidence from another person attesting to the intensity or duration of the

sounds produced by the chimes. By contrast, in many nuisance noise cases, numerous neighbors testify at hearing and provide both affidavits and public comments. *See e.g.*, Stuart v. Fisher, PCB 02-164, slip op. at 6-9 (Sept. 16, 2004) (eight neighbors testified at hearing and filed six public comments from public officials and local businesses attesting to sounds emitted by agricultural cannons).

Similarly, although Nash has alleged the injuries required for a finding of unreasonable interference under the Ferndale standard, she has failed to provide any evidence of injury beyond her bare allegations. Over a decade of case law establishes that loss of sleep, loss of use of the home and loss of ability to concentrate due to noise pollution constitute "interfer[ence] with the enjoyment of life or with any lawful business or activity." Stuart, PCB 02-164 at 23 (granting a cease and desist order to prevent noise pollution from "scare crow" cannons causing loss of sleep, use of home and concentration). *See* Manarchy v. JJJ Associates, Inc., PCB 95-73, slip op. at 10 (July 18, 1996) (noise violation found due to sleeplessness caused by nightclub noise); Young v. Gilster-Mary Lee, PCB 00-90, slip op. at 10 (Sept. 6, 2001) (nuisance found where trucking and plant noise impacted sleep, use of home and concentration). However, those allegations must be supported by reliable evidence to compel a judgment. *See e.g.*, Manarchy, PCB 95-73 at 5 (several complainants kept logs of disturbances and submitted them in addition to testimony and affidavits); Patterman v. Boughton Trucking and Materials, Inc., PCB 99-187, slip op. at 11, 23 (May 6, 2004) (denying respondent's summary judgment motion respecting noise nuisance claims despite submission of several affidavits). Nash has not filed a doctor's note or any affidavits attesting to her alleged injuries. She has not submitted a journal or log of sleep or other kinds of disturbances. Nor has she submitted any evidence of a change in her or her sons' success at work or at school, in terms of income or grades. Holding Nash to the objective standard set out in Village of Matteson and construing the record strictly against her, the bare allegations on record fall far short of the evidentiary standard the Board requires for a grant of summary judgment.

Because Nash has not set forth evidentiary facts that compel a judgment in her favor, the Board denies Nash's motion for summary judgment.

## Motion to Dismiss

On August 6, 2008, the Board received Jimenez's motion to dismiss (Mot. Dis.), containing an appearance by his attorney, James M. Knox. Jimenez argued that the Board should dismiss Nash's complaint and motion for summary judgment with prejudice because Jimenez removed the chimes from his property in August, 2007, eliminating the Board's authority to grant Nash's sole requested relief of a cease and desist order. Mot. Dis. at 4. The motion claims that the Board's inability to provide relief renders Nash's claim "frivolous" under the Act. *Id.* at 4-5.

Nash filed a response on October 7, 2008 (Resp. Mot. Dis.), into which she injected numerous allegations that were not in her amended complaint. For example, the response claimed for the first time that Jimenez threw garbage and dog feces into Nash's back yard. Resp. Mot. Dis. at 4. The response also made the novel allegation that the noise from Jimenez's

chimes is ongoing even though the chimes have been hidden by lawn furniture, foliage or fences that obscured her view of Jimenez's back yard. *See id*. at 4 ("I was still hearing chimes but could no longer determine exactly where they were located...[Jimenez's] back yard, which is fully enclosed by a fence, has many objects in it. I cannot see all parts of it").

In a status hearing of December 15, 2008, Nash refused the hearing officer's suggestion of a stipulation and settlement under 35 Ill. Adm. Code 103.300, indicating that she wished to proceed with the litigation.

**Discussion**

When ruling on a motion to dismiss, the Board takes all well-pled allegations as true and draws all reasonable inferences in a light most favorable to the non-movant. *See* In re Chicago Flood Litigation, 176 Ill. 2d 179, 184, 680 N.E.2d 265, 268 (1997). The Board has stated that "Illinois is a fact-pleading state [that] requires the pleader to set out the ultimate facts [that] support his cause of action." Loschen v. Grist Mill Confections, Inc., PCB 97-174, slip op. at 4 (June 5, 1997). A complaint's allegations are "sufficiently specific if they reasonably inform the defendants by factually setting forth the elements necessary to state a cause of action." People ex re. William J. Scott v. College Hills Corp., 91 Ill. 2d 138, 145, 435 N.E.2d 463, 467.

Jimenez

**Issues of fact remain**

The crux of Jimenez's "frivolous" argument rests on the claim that the Board is without the power to remedy a wholly past violation in the form of a cease and desist order, which is the sole remedy that Nash seeks. *See* Mot. Dis. at 4; Comp. at 4. However, the Board notes that Nash has several times in her filings made reference to recurrent activity, including removing and then replacing or relocating wind chimes. *See, e.g.,* Am. Comp. at 2 (alleging that the chimes were removed "shortly before the winter holidays of 2006 [but] were put up again 24/7 in late February – early March 2007. A second wind chime was put up 24/7 in their back yard in mid-March, 2007.") Further, Nash's most recent filing alleges that wind chime noise continues to be audible although she cannot see the chimes any longer. Resp. Mot. Cons. at 16. These allegations raise a question of fact as to whether the chime noise is ongoing.

The Board finds that even if Jimenez is not currently displaying chimes on his property, the futuristic element of a cease and desist order may be of value to Nash in the avoidance of future nuisance noise violations. The Board finds that a cease and desist order would, if appropriate, provide at least a partial remedy for her alleged injury.

The Board has the authority to

> include [in an order] a direction to cease and desist from violations of this Act, [or] any rule or regulation adopted under this Act. 415 ILCS 5/33(b) (2008).

The Board distinguishes this case, where Jimenez and Nash continue to live as neighbors, from Blouin v. TNT Logistics North Am. Inc. There, the Board denied a request for a cease and

desist order despite finding a noise violation because TNT had relocated by the time the order was decided. PCB 05-217, slip op. at 21 (March 15, 2007). The Board had no power to issue an order to the new commercial residents of TNT's property. *Id.* By contrast, there is nothing in the pleadings now before the Board to suggest that Jimenez has moved or plans to move from his residence, located some six feet from Nash's residence. *See* Mot. Cons. at 2.

Finding that the Board retains authority to grant the relief requested by Nash, the Board denies Jimenez's motion.

## CONCLUSION

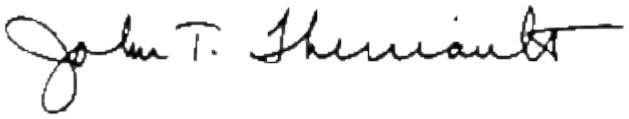
The Board denies three of the five pending motions in this case, including the motion for summary judgment, the motion to dismiss and the motion to consolidate. The Board grants Nash's motion to amend the caption as well as Jimenez's motion for leave to file a reply *instanter*, and accepts the accompanying reply for review.

Nash's motion for summary judgment is denied because the evidentiary facts alleged were insufficient to compel a finding in Nash's favor. Jimenez's motion to dismiss is denied because issues of fact remain as to whether the noise is ongoing. The Board denies Jimenez's motion to consolidate as moot following the Board's dismissal of PCB 07-96 by order of August 5, 2010. Finally, the Board grants Jimenez's motion for leave to file a reply, removing any danger of material prejudice.

The Board orders the Hearing Officer to proceed expeditiously to hearing.

IT IS SO ORDERED.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on August 19, 2010, by a vote of 5-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board