

ILLINOIS POLLUTION CONTROL BOARD

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MAY 27 2003

STATE OF ILLINOIS
Pollution Control Board

ANTHONY AND KAREN ROTI, PAUL)
ROSENSTROCK, AND LESLIE WEBER)
)
Complainants,)
)
v.)
)
LTD COMMODITIES,)
)
Respondent.)

PCB 99-19

NOTICE OF FILING

To: Joseph E. Kolar, Esq.
BAIZER & KOLAR, P.C.
513 Central Avenue, 5th Floor
Highland Park, Illinois 60035

Bradley P. Halloran
Illinois Pollution Control Board
100 W. Randolph, Suite 11-500
Chicago, Illinois 60201

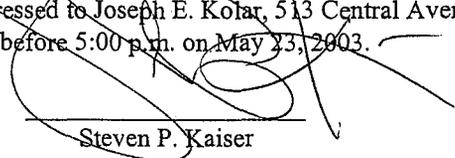
Please take notice that on Friday, May 23, 2003, I caused to be filed with the Clerk of the Illinois Pollution Control Board Complainants' Reply To LTD's Closing Brief Regarding Appropriate Remedies and Motion To Modify Briefing Schedule, copies of which are attached hereto.



Steven P. Kaiser

CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that he caused a copy of the Notice Of Filing to be served on counsel for Respondents by depositing the same in the United States Mail at 35 E. Wacker Drive, Chicago, Illinois 60601 enclosed in an envelope plainly addressed to Joseph E. Kolar, 513 Central Avenue, 5th Floor, Highland Park, Illinois 60035, with postage fully prepaid, before 5:00 p.m. on May 23, 2003.



Steven P. Kaiser

The Law Office Of Steven P. Kaiser
35 E. Wacker Drive, Suite 1750
Chicago, Illinois 60601
312.372.4779

Dated: May 23, 2003

SUBMITTED ON RECYCLED PAPER

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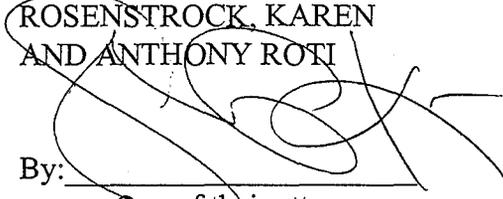
PCB 99-19

UNOPPOSED MOTION FOR LEAVE TO FILE
COMPLAINANTS' REPLY TO LTD'S CLOSING BRIEF REGARDING
APPROPRIATE REMEDIES

Complainants, by and through their attorney, Steven P. Kaiser, request leave to file *instanter* Complainants' Reply To LTD's Closing Brief Regarding Appropriate Remedies. The Complainants' Reply Brief is past due. Counsel for Complainants was unable to complete the brief by May 6, 2003, at least in part because certain exhibits were not on file with the Board and, instead, were in the custody of counsel for LTD. Counsel for LTD Commodities has advised counsel for complainants that LTD does not oppose the late filing of Complainants' Reply Brief. The Board may benefit from the analysis of LTD's arguments contained in the Reply Brief.

WHEREFORE, the complainants request that the Board allow the filing *instanter* of their Reply Brief.

Respectfully submitted,
LESLIE WEBER, PAUL
ROSENSTROCK, KAREN
AND ANTHONY ROTI

By: 
One of their attorneys

One of their attorneys

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Dated: May 23, 2003

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Noise Enforcement

COMPLAINANTS' REPLY TO LTD'S CLOSING BRIEF
REGARDING APPROPRIATE REMEDIES

I Summary of Complainants' Position.

Nothing in LTD's Closing Brief persuades the Complainants that the Illinois Pollution Control Board should not order LTD Commodities to do the following: (1) turn off the backup warning beeper on the yard tractors both during day time and night time hours of operation; (2) prohibit tractors and trailers from stopping, standing or parking on the ramp connecting the dock area with Lakeside Drive and on Lakeside Drive during day time and night time hours of operation; and (3) construct a noise wall with a length of approximately 520 feet and a top elevation of 710 feet above sea level (with an average height of 25 feet above grade).

II LTD should disconnect the backup warning beeper during day time and night time operations.

LTD states that it has committed to turning off the backup beeper on its yard tractor at night and has agreed to hire a dock pilot for use at night to keep trucks off Lakeside Drive. (Jack Voigt, October 16, 2002, p. 53 and Closing Brief, page. 4.) The Board should order LTD to implement these practices during both night time and day time operations.

Both the Complainants and members of the public complained about the backup warning devices on trucks and yard tractors. (See page 7. of the Board's February 15, 2001, Order.)

Karen Roti testified that she heard the beeping noise from LTD starting as early as 5:30 a.m. Tr. at 718-721. Dr. Schomer described the sound of the backup warning beeper as "piercing." (Tr. 10/15/02 at page 60.)

LTD can operate without relying upon the back up warning beeper as evidenced by its commitment to do so during nighttime hours of operations and by its willingness during the first phase of the hearing in November 1999 to curtail use of the back up warning beeper. The Board should order LTD to disconnect the backup warning beepers during day time operations as well as night time operations.

III Circumstances have not changed substantially at LTD's Bannockburn, Illinois facility.

On page 1. of its Closing Brief, LTD trumpets the fact that for the first time in six years it did not operate a second shift at its Bannockburn facility between the middle of October and middle of December. LTD buries on page 10. of its Closing Brief the fact that LTD, "could not guarantee that there would be no night shift in the future."

LTD chose a curious time to suspend nighttime operations. LTD suspended nighttime operations on the eve of hearing, aware that it had done virtually nothing to provide the Board with the information concerning noise reduction methods the Board requested in its order of February 15, 2001. LTD, however, will not commit to ending nighttime operations, instead it suspended operations while the remedy portion of the hearing is pending, and argued that because it had suspended operations, the Board should not order it to build a noise wall.

Contrary to LTD's assertion that circumstances have changed, the underlying circumstances at LTD's Bannockburn facility have not changed. LTD still has twenty-six loading docks located on the north end of its facility only a few hundred feet from the homes of the Roti, Weber and Rosenstock families. LTD still has hundreds of semi-tractors and semi-trailers come into its dock area each day. The trailers show up at the LTD facility as early as 5:30 a.m. The trailers are unhitched, hitched to a yard tractor, jockeyed into the docks, dropped, loaded or unloaded, hitched to a yard tractor, dragged out of the docks, dropped, parked in the dock area or on Lakeside Drive, hitched to long-haul tractors, and hauled away. Air brakes hiss, tractor engines groan, and the tractors' fifth wheels bang while engaging with the semi-trailers causing noise waves to reverberate throughout the length and height of the trailers. During the busy season of July through December between the years 1996 and 2001, and up through October 2002, LTD's dock activities often did not stop until after 2:00 a.m. and the operations of the independently operated yard tractor continued beyond 2:00 a.m.

Now, LTD asks the Board and the Roti, Weber and Rosenstock families - having made noise consistently for over six years and having done nothing to reduce noise at its Bannockburn facility or stop the noise from migrating off-site - to trust it, LTD won't make noise at night; that is, unless LTD needs to make noise at night. In which case, it will. LTD has demonstrated that it cannot reduce the migration of noise off-site through only operational changes. The Board must order LTD to construct a noise wall to substantially reduce the off-site migration of noise.

IV LTD has not made a commitment to ensure "subsequent compliance."

LTD's argument that because it didn't operate a night shift during a six week period in the Autumn of 2002 it has demonstrated "subsequent compliance" is meaningless without a

commitment by LTD to refrain from ever operating a night shift. Suspending the night shift is a temporary palliative measure; it is not a permanent solution to the noise problem that has plagued the Roti, Weber and Rosenstock families for six years.

LTD makes much of its increased processing capacity in the cities of Aurora and Naperville. Counsel for LTD implies that LTD opened these facilities in an effort to mitigate the noise nuisance. But Jack Voit, the only LTD representative to testify during the remedy phase, never suggested that LTD opened the Aurora and Naperville facilities to reduce noise. LTD opened the Aurora and Naperville facilities to increase its overall capacity to process orders and build profits.

The record in these proceedings demonstrates that LTD has grown consistently and will continue to grow. LTD's growth will require it to soon restart a second shift at Bannockburn. LTD began in Chicago but outgrew its Chicago facility. LTD acquired the Bannockburn facility to accommodate its growth and then expanded the size of the Bannockburn facility from 200,000 to almost 400,000 square feet. Initially, LTD operated only a single shift at Bannockburn. LTD continued to grow, however, and by 1996, began operating a second shift at Bannockburn during its busy season. At first, LTD's busy season began in September. Then, LTD's busy season began in late August. Then LTD's busy season began in early August. In 2000, LTD's busy season began in July!

LTD's record of growth supports the conclusion that it is only a matter of time before LTD will need to start again the second shift at the Bannockburn facility. Nothing in the record supports the conclusion that LTD will allow the Bannockburn facility's twenty-six truck docks and 400,000 square feet of processing space to remain idle sixteen hours of the day. Once LTD

begins nighttime operations, it will again create the same conditions that caused such distress to the Roti, Weber and Rosenstock families. The only long-term solution is a well-designed, well-constructed noise wall.

V **Dr. Schomer and Steve Mitchell guaranteed a noise wall would substantially reduce the off-site migration of noise, eliminating the nuisance.**

Dr. Schomer testified that if LTD constructed the noise wall he designed at the location he specified he could guarantee that the wall would reduce noise as measured at the second story of the Weber residence by 10 dB in the 1000 hertz octave band. Dr. Schomer testified that the reduction of noise in the 1000 hertz octave band as measured at the Roti and Rosenstock homes would be even greater. Steve Mitchell testified that The Huff Company would guarantee that any noise wall it built would meet or exceed the performance standards for which the wall was designed.

LTD then asked Messrs. Mitchell and Schomer whether they could guarantee that construction of the noise wall would eliminate all complainants. Dr. Schomer testified that he could not guarantee that even a well-designed noise wall that substantially reduced the off-site migration of noise would eliminate all complaints. Implicitly, he acknowledged that certain people - though not the Roti, Weber or Rosenstock families - might never be satisfied by LTD's efforts to reduce noise. Dr. Schomer did state, however, that in his opinion the Board would no longer consider the noise that migrated off-site from the LTD dock area a nuisance if LTD reduced the noise as measured at the second story of the Weber residence by 10 dB in the 1000 hertz octave band.

The evidence in the record demonstrates beyond any doubt that a well-designed , well-constructed noise wall can reduce substantially the off-site migration of noise. There is no excuse for LTD's failure to develop a noise wall of its own design or refusal to build the wall as designed by Dr. Schomer.

VI The noise wall designed by Dr. Schomer is technically practicable.

The Complainants have demonstrated that the wall designed by Dr. Schomer is technically practicable. LTD has failed to demonstrate that the wall designed by Dr. Schomer is not technically practicable.

A. LTD can gain approval from Bannockburn to build a twenty-five foot high noise wall immediately north of the dock area.

LTD argues that the wall is not technically practicable because a twenty-five foot wall is not currently authorized by the Bannockburn zoning ordinance. LTD states without any citation to the record that, “[w]hile LTD could request Bannockburn to amend some provision of its zoning code to approve a 25-foot high wall, such an amendment is unlikely since it would apply throughout Bannockburn. Bannockburn undoubtedly does not want to set a precedent for 25-foot high walls throughout the community.” Significantly, LTD concedes that it could request Bannockburn to amend some provision of its zoning code to approve a 25-foot high wall.

In the past, the Village of Bannockburn has shown itself willing to allow LTD to do what is necessary to prosper within its boundaries. Complainants' Exhibits D and E show the extent to which the Village will go to accommodate LTD's growth. Exhibit D is a copy of an “Ordinance Amending The Zoning Map and Granting A Special Permit and A Height Variation For A Business Headquarters Planned Development Of 2800 Lakeside Drive.” Exhibit E is a copy of a

document entitled, "Amending Zoning Ordinance To Provide For A Business Headquarters Planned Development As A Special Use For Lots In Excess Of 25 Acres In The "E" Commercial Park District." These amendments paved the way for LTD's 1994 expansion and included authorization for LTD to build a building to the previously prohibited height of thirty-six feet.

In addition to the zoning changes approved to aid LTD, the Village approved construction of an approximately eighteen foot high enclosure surrounding the air-conditioning units for the Corporate 100 Development adjacent to LTD. See Complainants' Group Exhibit B. In light of the Village's past conduct, there is no reason to think that the Village would deny LTD, a substantial source of tax revenue to the Village, permission to build a noise wall if the Board orders LTD to either build a wall or stop operating a second shift.

B. LTD can build a twenty-five foot high noise wall immediately north of the dock area.

LTD argues that the wall cannot be built where first proposed by Thomas Thunder and later recommended by Dr. Schomer. This is not true. The wall can be built immediately north of the dock area. LTD could demolish the existing retaining wall and build the retaining wall and noise wall as a unified structure. (Edward Anderson, October 16, 2002, p. 26.)

LTD argues, "Based on the safety concern of a wall towering 35 feet above a work area, Dr. Schomer's proposed wall is not technically practicable." LTD's engineer, Edward Anderson, did not testify that a twenty-five foot noise wall was not technically practicable or unsafe. He only testified that he had limited experience with noise walls of any dimension. Steve Mitchell, who builds noise walls for a living, testified that The Huff Company could build a twenty-five foot high noise wall that could withstand one hundred mile per hour wind loads. Significantly,

the wall proposed by Dr. Schomer does not run its entire length on a straight line. Rather, the wall consists of six segments that join at various angles.¹ The angles in the wall design have the effect of reinforcing the stability of the individual wall segments.

C. LTD can afford a noise wall costing between \$1.5 and \$3 million dollar noise wall.

LTD argues that a unified retaining wall and noise wall could be built but it would be too expensive. LTD concludes, "A wall costing at least \$1.5 million is not economically reasonable under any definition of that phrase." The Complainants have found no precedent in Board decisions supporting the proposition that a \$1.5 million remedy to reduce noise or any other form of pollution is *per se* unreasonable.

The Board might have a basis for making a determination that a noise wall costing \$1.5 million was unreasonable if LTD had provided information about its gross sales, the salary of its Chief Executive Officer, or the profits realized by its owners. Instead, LTD refused to provide the Board with this information and offers up the self-serving (and rejected) stipulation that a \$623,350 noise wall would be a "significant expense." The term "significant expense" is a term without meaning when the Board is unable to compare it to other expenses incurred and profits made by LTD.

The information before the Board suggests that a \$623,350 noise wall is not a significant expense for LTD and that even a \$3 million noise wall would not be a significant expense. LTD may not be a "cash cow" but it is hardly a pauper. LTD operates an almost 400,000 square foot

¹ The wall would consist of seven segments if extended to the southeast as suggested by Dr. Schomer in Figure 3. of his Report.

facility in Bannockburn, employing over 1,000 people, has recently opened a 400,000 square foot facility in Naperville, and employs 350 people at this facility, opened a 260,000 square foot facility in Aurora, and employs 600 people, and is looking to buy or lease an additional facility in northern Indiana. LTD spends several hundred thousands of dollars shuttling workers to and from a nearby parking lot. LTD paid approximately \$6.6 million for the Bannockburn facility in the mid-1980's and approximately \$6 million to expand the Bannockburn facility in 1994. In light of this information, the Board can reasonably conclude that LTD can afford to build even a \$3 million noise wall.

D. A noise wall in the middle of LTD's northern parking lot is impracticable.

In a further effort to do nothing, LTD argues that a noise wall built in the center of its parking lot is not technically practicable. The Complainants agree. A noise wall in the middle of LTD's northern parking lot is a bad idea. Dr. Schomer and Thomas Thunder agree: a noise wall is most effective when located either close to the noise source or noise receiver. A wall in the middle of LTD's north parking lot is neither close to the noise source nor the noise receiver. A wall in the middle of LTD's north parking lot, unless enormously tall, would be of limited value.

E. LTD failed to build an administrative record in support of a property-line noise wall.

LTD argues that the Board can only order it to build a noise wall on the property line because the noise it generates is not a nuisance until it travels off-site. The Complainants agree that the noise is not a nuisance until it travels off-site. It does not follow, however, that Board can only order LTD to build a noise wall at the property line.

If LTD wanted to argue that a property-line noise wall was a technically practicable remedy, then LTD had the burden of building a record to support that remedy. In its order of February 15, 2001, the Board invited the parties to “further address appropriate remedies.” (Decision at page 33). The Roti, Weber and Rosenstock families took that charge seriously and retained the internationally respected professor from the University of Illinois, Dr. Paul Schomer. Dr. Schomer developed a three dimensional model of the LTD dock area and surrounding property, analyzed the sources of the noise, and designed a noise wall to substantially reduce off-site migration of noise.

In contrast, LTD has yet to propose a detailed noise wall design. LTD failed to (1) submit into evidence a sketch of the property-line noise wall; (2) tell the Board the height of the property-line noise wall; (3) tell the Board what material it would use to build the property-line noise wall; (4) tell the Board how much the property-line noise wall would cost; (5) tell the Board where it would build a property-line noise wall to protect the Weber family that doesn't share a common property line with LTD; or (6) tell the Board how effective the property-line noise wall would be in reducing noise to the Rosenstock home which Dr. Schomer described as being set back a moderate distance from the property line. LTD failed to build a record in support of a Board order requiring construction of a property-line, noise wall.

Having provided only the most vague description of the eleventh hour remedy, a property-line, noise wall, LTD then suggests that if the Roti, Weber and Rosenstock families do not rush to embrace the idea of a property-line noise wall then, “They're in [this administrative hearing] just to try to hurt LTD.” (December 9, 2002, p. 160). This statement is offensive to the Complainants.

It is offensive for LTD - the generator of noise for over six years that was so loud it shook lighting fixtures in Paul Rosenstock's home, the generator of noise so unsettling that it kept the Roti children from studying or falling asleep, the generator of noise so persistent that Leslie Weber came to dread Sunday nights because it meant the weekly assault of dock noise was about to begin again - to now argue to the Board that it is the victim in these proceedings and that the Roti, Weber and Rosenstock families are now spending their time and hard earned dollars not to find a way to reduce their own very real suffering but simply to hurt LTD.

F. Dr. Schomer considered in his noise wall design the distance of the Weber home from LTD's dock area.

LTD tries to justify its inaction by arguing that Dr. Schomer "did not consider that the Weber home is significantly farther away from LTD than the Roti and Rosenstock homes (Closing Brief, page 9.).

Dr. Schomer did consider the distance between the Weber home and LTD's dock area. Annex A of Dr. Schomer's April 26, 2002, Report contains Sample Calculation Outputs. Page 12. of Dr. Schomer's report contains a small portion of the "output" spreadsheet for one calculation for the Rosenstock residence. In the middle of the page, Dr. Schomer defines "ds" as closest source distance to barrier along ground and "dr" as closest receiver distance to barrier along ground. Dr. Schomer estimated that the closest source distance to the barrier along the ground was 87 feet and that the closest receiver distance was 254 feet. That is to say, on average the sources of dock noise are 87 feet from the south face of the noise wall and Paul Rosenstock's home is 254 feet from the north face of the noise wall.

Dr. Schomer testified that he used the method outlined in the internationally accepted ISO 9613-2-1996 standard to calculate the attenuation of sound for the Roti, Weber and Rosenstock homes. Tom Thunder agreed that the ISO standard was an appropriate standard. As set forth above, the ISO standard requires that values be assigned for the distance between the source and the barrier, and between the barrier and the receiver. Dr. Schomer assigned values for "ds" and "dr" for the Roti, Weber and Rosenstock homes. LTD is either trying to mislead the Board or didn't understand Dr. Schomer's testimony when it suggests that Dr. Schomer failed to consider in his noise wall design the fact that the Weber home is significantly farther away from LTD than the Roti and Rosenstock homes.

G. Dr. Schomer designed the noise wall to reduce the migration of noise that creates the nuisance.

Again, LTD is either trying to mislead the Board or didn't understand Dr. Schomer's testimony when it suggests that Dr. Schomer's wall was not designed to mitigate the noise at issue in this case. It is true that (1) certain noise - like the exhaust from the trucks - originates at the 12-foot height; (2) that noise from the air brakes and fifth wheels originate at a four-foot height; and, (3) that Dr. Schomer testified that "a 25-foot high wall was needed because the "critical path is sound from the 12-ft high source that reflects off the hard LTD wall, over the noise barrier, to the second floor of the indicated [Weber] residence." (Complainants' Ex. A, p.4.)

LTD's \$300.00 per hour hired gun, Tom Thunder, apparently wasn't able to explain to counsel for LTD how noise originating at a four-foot height becomes a noise source at 12-feet above grade. This may not be surprising because Mr. Thunder testified that he had spent less

than an hour observing dock operations at LTD. This is the same Mr. Thunder who admitted that the noise wall he originally designed would not have reduced in the least noise traveling to the second story of the Roti, Weber and Rosenstock homes.

Dr. Schomer testified that sound is energy that radiates from its source in the pattern of a wave. He explained that the energy generated when the fifth wheel engages with the pin on the trailer is transmitted mechanically from the point of impact downward along the base of the trailer and upward along the walls and roof of the trailer. Dr. Schomer likened the semi-trailer to the body of a violin and explained how the connection between the fifth wheel and pin was akin to the connection between the bridge of a violin and the body of the violin. While a violin's bridge transmits the vibration from the strings into the body of the violin where it resonates producing the musical tone, the pin and the fifth wheel transmit the vibration from the impact into the body of the semi-trailer where it resonates producing noise.

If the noise from the fifth wheel stayed at the four-foot level, then the ten foot high retaining wall might be an adequate noise wall. Instead, the noise from the fifth wheel travel up through the body and sound energy is released at a height of 12-feet above grade. This sound energy (in the form of waves) then moves outward and is reflected by the hard surface on the north side of LTD's facility back towards the Roti, Weber and Rosenstock homes.

Dr. Schomer emphasized that the manner in which noise is generated within the LTD dock area and moves upward and out of the LTD dock area is highly complex. He sought through intensive computer modeling to understand this phenomenon and design a method for reducing the migration of noise. Perhaps if LTD acknowledged the complexity of the problem it has created it might be more willing to spend the resources necessary to develop a solution.

Instead, it seeks to mislead the Board by suggesting that noise that originates at the four-foot level never rises above the four-foot level and Dr. Schomer grossly miscalculated the necessary height of a noise wall. The Complainants are grateful that the Board sent its technical representative to the remedy phase of the hearing and are confident that the Board will not be misled by LTD's sophistry.

H. The noise wall must provide protection for noise generated on Lakeside Drive.

LTD argues that the 150-foot extension of the wall (or relocating LTD's exit ramp) because of noise problems on Lakeside Drive is not necessary. The record shows that LTD is wrong.

Leslie Weber complained about the noise from the accelerating and idling of diesel engines, including the yard tractor. She claimed that these noise come from the staging area and Lakeside Drive. Tr. at 450, 473, 493, 513. February 15, 2001, Order, page 6. Dr. Schomer testified that he observed semi-trailers parked on the ramp and on Lakeside Drive. Tr. 10/15/02 at page 61-66.

Dr. Schomer calculated the impact of noise from LTD dock activities on the ramp and Lakeside Drive. He compared the effectiveness of a 25-foot high noise wall with and without the 150-foot extension. The results of his analysis are set forth in Table 3. of his April 26, 2002, Report. Complainants' Exhibit A. Dr. Schomer concluded that if LTD continues to stage semi-trailers on the ramp and Lakeside drive and builds a noise wall without the 150-foot extension, noise as measured in the 1000 kHz octave band at the second story of the Weber home will only be reduced by 7.3 dB. If LTD built the wall and included the 150-foot extension, the noise at the

Weber home in the 1000 kHz octave band would be reduced by 11.5 dB.

Section 901.107(f) exempts noise from trucks as they enter or leave Lakeside Drive. This Section, however, does not exempt noise generated when LTD stages semi-trailers on the ramp and Lakeside Drive.

It is critical that LTD either refrain from staging semi-trailers on the ramp and Lakeside Drive, or build the 150-foot extension. The Village of Bannockburn already prohibits LTD from parking semi-trailers on Lakeside Drive. The record demonstrates that this prohibition has not deterred LTD from staging semi-tractors on Lakeside Drive. Again, LTD cannot solve the noise problem solely through operational changes. The Board must order LTD to build a noise wall.

I. LTD lost the benefit of priority of location when it expanded operations in 1996.

LTD points out that the Board stated in its February 15, 2001, decision at page 27. that, "LTD clearly has the priority of location." LTD fails to note, however, that the Board has already found as follows,

"LTD substantially increased its activities after complainants had moved into their nearby homes. LTD cannot rely on priority of location as a mitigating factor. The Board finds that LTD's facility, as it is currently operated, is unsuitable to the area involved and weighs this factor against LTD." (Order of the Board, February 15, 2001.)

LTD now argues that, "[it] should not be punished for decisions beyond its control." The decisions to which it refers are the decisions of the Roti, Weber and Rosenstock families to build two-story homes! This argument borders on the ridiculous.

First, the Board has already found that noise from LTD's dock area disrupted the Webers when they were in their first floor living room playing games and doing other quiet activities around the house. Tr. at 534, 888, 894, 989. In the late summer and early fall, the noise made it

difficult for the Webers to enjoy the use of their outdoor decks. Tr. at 457-58, 533, 891, 898 (Webers). The noise from LTD made the Rotis' youngest daughter afraid to go outside, and it also startled her inside the residence. Tr. 696.

The nuisance is not limited to the second floors of the Roti, Weber and Rosenstock residences. The nuisance also extends to the first floors of the Complainants' homes. The Board must order LTD to implement a solution that eliminates the nuisance in the Complainants' back yards, first floors, and second floors.

Furthermore, the Board will not be punishing LTD for decisions beyond its control if it orders LTD to build a noise wall. LTD decided to operate a second shift at Bannockburn without giving any consideration to its impact on LTD's neighbors. The Board will not be punishing LTD, it will merely be holding LTD accountable for the consequences of its own decisions.

VIII The Board should punish LTD for its decision to forego proposing a meaningful remedy.

LTD argues that the Board should not impose a civil penalty because there has been no alleged nuisance since October 18, 2002. First, the Board continued this matter for hearing concerning an appropriate remedy. The Complainants did not put on testimony concerning the on-going nature of the nuisance because it was beyond the announced scope of the hearing. Second, implicit in LTD's statement that there has been no alleged nuisance since October 18, 2002, is the fact that between the issuance of the Board's order on February 15, 2001, declaring LTD's dock operations to be a nuisance, and October 18, 2002, LTD continued to be a nuisance. LTD's dock operations were a nuisance throughout the Summer, Fall and early Winter of 2001, and throughout the late Summer and early Fall of 2002.

More significantly, LTD did virtually nothing to provide the Board and the Roti, Weber and Rosenstock families with information about an appropriate remedy. Between February 15, 2001, and the hearing in October 2002, Jack Voit asked for, received, and reviewed one bid from The Huff Company. LTD's so-called noise expert, Tom Thunder, did nothing other than critic (unsuccessfully) Dr. Schomer's report. LTD's engineer, Ted Anderson, said a wall couldn't be built immediately above the existing retaining wall. He didn't provide the Board with any drawings or written cost estimates for building a unified retaining wall and noise wall where proposed by Thunder and Dr. Schomer.

In light of the fact that the Board had found LTD in violation of the nuisance noise prohibitions, it is shocking that LTD did so little to fashion a remedy to eliminate the nuisance. The Board should impose a substantial civil penalty.

IX Conclusion.

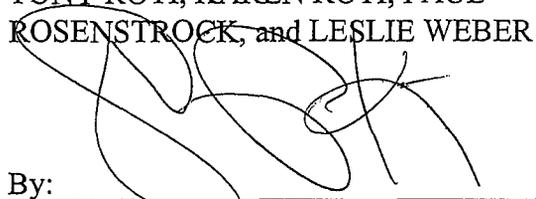
Leslie Weber, Paul Rosenstock, Tony Roti and Karen Roti have demonstrated that the noise from LTD's dock operations frequently and substantially interferes with their use and enjoyment of their homes. They have also demonstrated that construction of a 520 foot noise barrier wall with an average height of 25 feet above grade located immediately to the north of LTD's dock area will cut in one-half the noise as measured at the second story of the Weber residence and by more than one-half as measured at the second story of the Roti and Rosenstock homes.

LTD has shown that the existing retaining area at the north end of LTD's dock area would have to be removed and rebuilt in order to support a noise wall in the area immediately north of LTD's dock area. LTD has not demonstrated, however, that construction of a wall -

even a wall costing between \$1.5 - \$3 million - is economically unreasonable in light of the value of the LTD property and revenues generated by LTD's operations.

Ms. Weber, Ms. Roti, Mr. Roti and Mr. Rosenstock respectfully request the Board to order LTD to (1) turn off the backup warning beeper on the yard tractors during both day time and night time operations; (2) employ a guard to ensure that tractors and trailers do not stop, stand or park on the ramp connecting the dock area with Lakeside Drive or on Lakeside Drive; (3) construct the noise wall of the height and length recommended by Dr. Schomer and in the location first proposed by LTD and now recommended by Dr. Schomer.²

Respectfully submitted,
TONY ROTI, KAREN ROTI, PAUL
ROSENSTOCK, and LESLIE WEBER

By: 

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Dated: May 23, 2003

Submitted on Recycled Paper

² See Figure 3. Schomer Report, April 26, 2002.