

ILLINOIS POLLUTION CONTROL BOARD
April 7, 2022

MAREK KRUK,)	
)	
Complainant,)	
)	
v.)	PCB 20-10
)	(Citizens Enforcement - Noise)
NEW TRIER HIGH SCHOOL DISTRICT)	
NO. 203,)	
)	
Respondent.)	

OPINION AND ORDER OF THE BOARD (by J. Van Wie)

On August 23, 2019, Marek Kruk (Kruk) filed a *pro se* citizens complaint against New Trier High School District No. 203 (New Trier or the District), located at 385 Winnetka Avenue in Winnetka, Cook County (New Trier Site). The complaint alleges that New Trier violated the Board’s numeric noise regulations by emitting excessive sounds—from a dust collector used for its wood shop and other equipment—to Kruk’s home located at 124 Woodland Avenue, Winnetka, Cook County.

On October 12, 2021, New Trier filed a motion for summary judgment.

Also on October 12, 2021, Kruk filed a one-page document seeking to amend the complaint by adding two complainants and specifying additional sources of noise emissions at the New Trier Site.

On February 16, 2022, Kruk filed a motion for leave to file a sur-reply and for oral argument.

In this opinion and order, the Board denies New Trier’s motion for summary judgment as genuine issues of material fact remain concerning the noise emissions alleged in Kruk’s complaint. Construing Kruk’s sur-reply and oral argument motion as a request to establish a discovery schedule, the Board grants it. Lastly, the Board denies Kruk’s motion to amend the complaint but grants Kruk—as well as his two neighbors if they seek to be added as co-complainants—until May 23, 2022, to file an amended complaint.

The opinion first provides the procedural history of this case. The Board then sets forth the uncontested facts of the case. Next, the Board provides the relevant legal background and the standards for considering motions for summary judgment. That is followed by the Board’s analysis and order.

PROCEDURAL HISTORY

Kruk's Complaint and New Trier's Answer

On August 23, 2019, Kruk filed a *pro se* citizens complaint (Compl.) against New Trier. The complaint alleges that New Trier violated the Board's noise regulations at Section 901.102(a) and (b) (35 Ill. Adm. Code 901.102(a), (b)) by emitting excessive sounds from the dust collector and other equipment at the New Trier Site, which is located near a residential area. Compl. at ¶¶ 4, 5.

On October 18, 2019, New Trier filed its answer to the complaint, including three affirmative defenses asserting governmental immunity under the Local Governmental and Governmental Employees Tort Immunity Act, 745 ILCS 10/1 et seq. (Resp.) and "den[ying] any violations of any standards set by the Pollution Control Board, the Illinois Administrative Code, or any other Illinois or Federal law or regulation." Resp. at ¶ 5.

Kruk's Motion to Amend Complaint

On October 12, 2021, Kruk filed a one-page document seeking to amend his complaint to add two additional complainants – Heather Walsh and Cristian "Cris" Downey, both residents of Winnetka. The document also lists additional equipment as sources of noise from the New Trier Site. On October 19, 2021, Kruk filed the affidavits of Heather Walsh and Cristian Downey with the Board.

On November 18, 2021, New Trier filed its response in opposition to Kruk's motion to amend the complaint. New Trier stated that the motion to amend is both materially deficient on its face and makes no claim upon which relief may be granted.

New Trier's Motion for Summary Judgement

On October 12, 2021, New Trier filed a motion for summary judgment with supporting affidavits and exhibits (New Trier MSJ). New Trier argues that Kruk has not met his burden of proving a violation of Section 901.102(a) and (b), Kruk has not presented any evidence to support his allegations, and that New Trier's most recent testing indicates that the noise level of the dust collector was below Illinois numeric noise limits. New Trier MSJ at 5-6. One exhibit with several sub-exhibits was attached to New Trier's motion:

- 1) Affidavit of David Conway, Director of Physical Plant Services at New Trier, dated October 12, 2021 (Conway Affidavit), which included the following sub-exhibits:
 - a. Exhibit A – Affidavit of Brian Homans, previously employed by Shiner Acoustics, LLC (Shiner Acoustics) as a Managing Partner, dated September 14, 2021 (Homans Affidavit)
 - i. Exhibit 1 - a December 20, 2019 report from Shiner Acoustics (December 2019 report)

- b. Exhibit B - Affidavit of Cameron Baillie, Professional Engineer licensed in Alberta, Canada and employed by Shiner Acoustics, dated September 14, 2021 (Baillie Affidavit)
 - i. Exhibit 1 - a March 1, 2021 report from Shiner Acoustics (March 2021 report).

On December 9, 2021, Kruk filed his response to the New Trier's summary judgment motion (Kruk MSJ Response), arguing that "[i]t is the burden of the District to prove that the dust collector operates below allowable limits." The Kruk MSJ Response included nine exhibits:

- 1) August 15, 2018 report from Shiner Acoustics (Exhibit 1R);
- 2) December 20, 2019 report from Shiner Acoustics (Exhibit 2R);
- 3) June 24, 2020 report from Shiner Acoustics (Exhibit 3R);
- 4) Kruk's Motion to Amend Complaint in PCB 2020-10 (Exhibit 4R);
- 5) November 18, 2019 report from Shiner Acoustic (Exhibit 11R);
- 6) Video clip of trash compactors at New Trier (Exhibit V1)
- 7) Video clip of trash compactors at New Trier at 2:19 a.m. (Exhibit V2)
- 8) Video clip of back-up generator (Exhibit V3)
- 9) Video clip of ground-level grate basement fans at 5:20 a.m. (Exhibit V4)

On January 10, 2022, New Trier filed its reply in support of its motion for summary judgment (New Trier Reply), arguing that "it is Kruk's burden, as the Complainant alleging violation of a numeric noise standard, to prove by an accurate measurement of sound emissions pursuant to the procedures outlined in Section 910.105, that there has been a violation of noise limits." New Trier Reply at 4 (emphasis in original).

Kruk's Motion for Leave to File Sur-reply and for Oral Argument

Kruk filed this motion on February 16, 2022 (Kruk Sur-reply Request). New Trier did not file a response.

UNCONTESTED FACTS

In the Fall of 2017, the New Trier Site underwent a renovation including a newly built service dock. Compl. at ¶ 4; Resp. at ¶ 4. The service dock includes a dust collector used for the New Trier wood shop, which was installed and is operated by New Trier. Resp. at ¶ 4. The service dock also includes two trash compactors, an emergency generator, and a condenser/compressor. Compl. at ¶ 4; Resp. at ¶ 4. New Trier installed this equipment. Resp. at ¶ 4.

The dust collector emits a noise. . Resp. at ¶¶ 5, 6, 7.

Kruk resides at 124 Woodland Avenue in Winnetka. Comp. at ¶ 1; Resp. at ¶ 1; Conway Affidavit at ¶ 4. On behalf of New Trier, Shiner Acoustics took sound measurements at the west edge of the public sidewalk at the north property line of 124 Woodland Avenue on Friday, December 13, 2019, between 4:20 a.m. and 5:20 a.m. Homans Affidavit at ¶¶ 2, 3. And again, on behalf of New Trier, Shiner Acoustics took sound measurements on the public sidewalk at the northeast corner of the property line of 124 Woodland Avenue on Thursday, June 18, 2020, starting at approximately 4:00 p.m. Baillie Affidavit at ¶¶ 2, 3.

LEGAL BACKGROUND

Noise Regulations

Section 901.102(a) and (b) of the Board’s noise regulations, 35 Ill. Adm. Code 901.102(a) and (b), establish daytime and nighttime numeric sound limits:

- a) Except as elsewhere provided in this Part, a person must not cause or allow the emission of sound during daytime hours¹ from any property-line noise source located on any Class A, B or C land to any receiving Class A² land that exceeds any allowable octave band sound pressure level specified in the following table, when measured at any point within the receiving Class A land. Sound pressure levels must be measured at least 25 feet from the property-line noise source.

Octave Band Center Frequency (Hertz)	Allowable Octave Band Sound Pressure Levels (dB) of Sound Emitted to any Receiving Class A Land from		
	Class C Land	Class B Land	Class A Land
31.5	75	72	72
63	74	71	71
125	69	65	65
250	64	57	57
500	58	51	51
1000	52	45	45
2000	47	39	39
4000	43	34	34
8000	40	32	32

¹ “Daytime hours” mean “7:00 am to 10:00 pm, local time.” 35 Ill. Adm. Code 900.101.

² The land use classification system for applying the Board’s Part 901 numeric sound standards is based on the Land-Based Classification Standards. 35 Ill. Adm. Code 901.101(a). Class A land includes residences. 35 Ill. Adm. Code 901.101(b), 901.Appendix B.

b) Except as provided elsewhere in this Part, person must not cause or allow the emission of sound during nighttime hours³ from any property-line noise source located on any Class A, B or C land to any receiving Class A land that exceeds any allowable octave band sound pressure level specified in the following table, when measured at any point within the receiving Class A land. Sound pressure levels must be measured at least 25 feet from the property-line noise source.

Octave Band Center Frequency (Hertz)	Allowable Octave Band Sound Pressure Levels (dB) of Sound Emitted to any Receiving Class A Land from		
	Class C Land	Class B Land	Class A Land
31.5	69	63	63
63	67	61	61
125	62	55	55
250	54	47	47
500	47	40	40
1000	41	35	35
2000	36	30	30
4000	32	25	25
8000	32	25	25

Under the Board’s noise regulations, “sound measurement procedures for 35 Ill. Adm. Code . . . 901 must conform to 35 Ill. Adm. Code 910” and 35 Ill. Adm. Code 900.103(b). 35 Ill. Adm. Code 900.103(a), (b), 910.

Enforcement

The complainant in an enforcement action has the burden of proof. 415 ILCS 5/31(e) (2020). The Board “has held that with alleged violations of a *numeric* noise standard, sound measurements of the alleged property-line-noise-source are required and must be taken with ‘strict adherence to applicable measurement procedures.’” Matt Gill v. CHS Inc. – Carrollton Farmers Elevator, PCB 16-68, slip. op. at 4 (Jan. 21, 2016), *quoting* Kasella v. TNT Logistics N. Am., PCB 06-1, slip op. at 2 (Sept. 1, 2005) (emphasis in original), *quoting* Charter Hall Homeowner’s Ass’n. v. Overland Transp. Sys., PCB 98-81, slip op. at 19 (Oct. 1, 1998); *see also* 35 Ill. Adm. Code 900.103(b), 910.105. “It is therefore the complainant, or more typically its noise consultant, who must accurately measure sound emissions in a case of alleged numeric noise violations.” Kasella, PCB 06-1, slip op. at 3; *see also* Brill v. Latoria, PCB 00-219, slip op. at 26-28 (June 6, 2002) (complainant may use respondent’s sound measurements to prove numeric violation).

³ “Nighttime hours” mean “10:00 pm to 7:00 am, local time.” 35 Ill. Adm. Code 900.101.

Summary Judgment

Standards

“The purpose of summary judgment is not to try a question of fact, but rather to determine whether a genuine question of material fact exists.” Illinois Environmental Protection Agency v. Illinois Pollution Control Bd., 386 Ill. App. 3d 375, 391 (3rd Dist. 2008). Summary judgment is appropriate when the pleadings, depositions, admissions, affidavits, and other items in the record show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Adames v. Sheahan, 233 Ill. 2d 276, 295 (2009); Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483 (1998); 35 Ill. Adm. Code 101.516(b). When determining whether a genuine issue of material fact exists, the record “must be construed strictly against the movant and liberally in favor of the opponent.” Adames, 233 Ill. 2d at 295-96; Purtill v. Hess, 111 Ill. 2d 229, 240 (1986). Summary judgment “is a drastic means of disposing of litigation, and therefore, should be granted only when the right of the moving party is clear and free from doubt.” Adames, 233 Ill. 2d at 296.

Burdens of Proof and Production

In summary judgment proceedings, the burden of proof is “always on the moving party to establish that there are no genuine issues of material fact and that moving party is entitled to judgment as a matter of law.” Performance Food Group Co., LLC v. ARBA Care Center of Bloomington, LLC, 2017 IL App (3d) 160348, ¶ 18 (burden of “proof” or “persuasion”). “The burden of production, however, may shift during the course of the proceedings.” *Id.* “The burden of proof and the initial burden of production in a motion for summary judgment lie with the movant.” Pecora v. County of Cook, 323 Ill. App. 3d 917, 933 (1st Dist. 2001); Williams v. Covenant Medical Center, 316 Ill. App. 3d 682, 689 (4th Dist. 2000). A defendant (here, respondent) who moves for summary judgment “may meet its initial burden of production in at least two ways”:

(1) by affirmatively disproving the plaintiff’s case [here, complainant’s case] by introducing evidence that, if uncontroverted, would entitle the movant to judgment as a matter of law (traditional test) (*see* Purtill v. Hess, 111 Ill. 2d 229, 240-41, 489 N.E.2d 867, 871, 95 Ill. Dec. 305 (1986)); or (2) by establishing that the nonmovant lacks sufficient evidence to prove an essential element of the cause of action (Celotex test) (*see* Rice v. AAA Aerostar, Inc., 294 Ill. App. 3d 801, 805 ([4th Dist.] 1998), *citing* Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); *see also* Fooden v. Board of Governors of State Colleges & Universities, 48 Ill. 2d 580, 587 (1971) (summary judgment is appropriate if what is contained in the pleadings and affidavits would have constituted all of the evidence before the court and the trial court would have directed a verdict on that evidence)). Williams, 316 Ill. App. 3d at 688-89.

If the respondent-movant fails to meet its initial burden of production under either of these tests, the nonmovant-complainant may rely solely upon the pleadings to create a question of material fact defeating the summary judgment motion. Kleiss Produce Farms v. Bozdech, 349 Ill. App. 3d 336, 350 (4th Dist. 2004), *citing* Williams, 316 Ill. App. 3d at 689. “Only if the movant satisfies its initial burden of production does the burden shift” to the non-movant complainant and then not to “prove his

case” but rather to “present some factual basis that would arguably entitle him to a judgment under the applicable law.” *Id.*

PLEADINGS

Kruk’s Complaint

Kruk’s one-count complaint alleges that noise levels coming from New Trier’s equipment and reaching his residence are above allowable limits found in Section 901.102(a) and (b) of the Board’s noise regulations, 35 Ill. Adm. Code 901.102(a) and (b). Compl. at ¶ 5. Kruk does not allege any other violations. Kruk alleges that “[t]he dust collector emits a loud buzzing noise that creates strong vibrations felt in and around [his] home” and “... disturbs [his] family even when the windows and doors are closed.” Compl. at ¶ 6. New Trier added the dust collector to a new west service dock in the Fall of 2017. Compl. at ¶ 4. The complaint also alleges noise from other equipment located at the New Trier Site, including: a backup generator, two trash compactors, a condenser/compressor, electrical cabinets, rooftop units, ventilation fans, and O² tank overpressure discharges, stating “[t]he additional equipment adds banging, humming, and whirring noises to the already incessant buzzing from the dust collector.” Compl. at ¶¶ 4, 6.

Kruk states that the noise has negatively affected his family by leaving him “mentally and physically exhausted,” caused his wife “headaches, anxiety and chest pains,” and that “[t]he noise causes frustration, aggravation, and stress for [his] entire family.” Compl. at ¶ 8. Furthermore, Kruk alleges that his “enjoyment of life and property has diminished” and “[t]he value of [his] home has significantly diminished as well.” Compl. at ¶ 8.

Kruk alleges in the complaint that noise emissions measured by New Trier through its noise consultant, Shiner Acoustics, demonstrate that New Trier was in violation of the Section 901.102(a) and (b) noise limits in May and July 2018.⁴ Compl. at ¶ 4. Kruk attached a Shiner Acoustics report dated August 15, 2018 to the complaint.

In response to New Trier’s motion for summary judgement, Kruk cites the August 15, 2018 report as proof of the dust collector’s non-compliance with noise standards, and the December 20, 2019 report for continuing non-compliance. Kruk MSJ Response at ¶ 6; Exhibit 2R. Kruk also argues that the methodology that Shiner Acoustics used to collect data for the December 20, 2019 report was incorrect. Kruk MSJ Response at 5-9. Kruk concludes that “[i]t is the burden of [New Trier] to prove that the dust collector operates below allowable limits,” and requests the Board direct New Trier “to take whatever steps are necessary to bring the noise levels below the limits at relevant elevation and in front of all affected Woodland Avenue residents” and “be required to test noise levels periodically to ensure compliance moving forward.” Kruk MSJ Response at 9, 17.

New Trier’s Motion for Summary Judgment

New Trier argues that Kruk has not met his burden of proof, Kruk has not presented any evidence to support his allegations, and New Trier’s most recent testing indicates that the noise level of the dust collector is below Illinois numeric noise limits. New Trier MSJ at ¶ 8, pg. 5-6.

⁴ The Shiner Acoustics report dated August 15, 2018.

Specifically, New Trier states that it hired Shiner Acoustics to conduct environmental noise measurements beginning in May 2018. New Trier MSJ at ¶ 2; Conway Affidavit at ¶ 5. According to New Trier, Shiner Acoustics provided reports on December 20, 2019 and March 1, 2021 to demonstrate New Trier's compliance with the Board's noise regulations. New Trier MSJ at ¶¶ 2, 3 and 8; Conway Affidavit at ¶¶ 5, 6 and 14; Homans Affidavit at ¶ 4; Baillie Affidavit at ¶¶ 2 and 4. The December 20, 2019 Shiner Acoustics report "explained that the rooftop ventilation equipment does not exceed the nighttime or daytime Illinois standards," ... "[h]owever, the operation of the dust collector could exceed daytime Illinois standards in the 2000 and 4000 hertz (Hz) bands." New Trier MSJ at ¶ 3; Conway Affidavit at ¶ 6; Homans Affidavit at ¶ 4. New Trier states that it had already treated the dust collector motor with a one and one-half inch thick insulated sheet metal enclosure. New Trier MSJ at ¶ at 4; Conway Affidavit at ¶ 7.

New Trier notes that after Kruk filed his complaint, "the District moved the compressor indoors and installed noise deflectors," and ... "continued to treat the dust collector with noise reduction barriers and completed additional testing to ensure compliance." New Trier MSJ at ¶ 7; Conway Affidavit at ¶¶ 11, 14, and 15. New Trier also states, "the District has expended approximately \$200,000 on noise reduction measures." New Trier MSJ at ¶ 10.

New Trier asserts that additional testing on March 16, 2020 and June 18, 2020 "indicated that the noise level of the dust collector was acceptable and below Illinois standard limits." New Trier MSJ at ¶ 8; Conway Affidavit at ¶¶ 12 and 14; Baillie Affidavit, Exhibit 1. New Trier further claims that it "remains in compliance with Illinois law since at least June 18, 2020." New Trier MSJ at ¶ 11; Conway Affidavit at ¶¶ 14 and 15. Additionally, New Trier asserts that "Kruk has made various generalized claims regarding noise, including unspecified claims regarding the backup generator and trash compactors, but has presented no evidence in support of any of these allegations." New Trier MSJ at pg. 6.

However, New Trier notes that it is Kruk's burden "to prove, by an accurate measurement of sound emissions pursuant to the procedures outlined in Section 910.105, that there has been a violation of noise limits." New Trier Reply at 2 (emphasis in original). So, New Trier concludes "[w]ith no evidence of a current sound violation after the School District's mitigation efforts, the Complaint must fail; there is no question of material fact because the Complainant has presented no evidence compliant with the requirements of 415 ILCS 5/31 or 35 Ill. Adm. Code 910.105." New Trier Reply at 5. Additionally, New Trier states that Kruk's requests for "testing in front of 'all affected Woodland Avenue residents' and that the School District 'be required to test noise levels periodically to ensure compliance' ... would improperly shift the burden to the School District, requiring significant efforts to continually prove that it is not violating a law which it has not been shown to be violating." New Trier Reply at 5.

DISCUSSION

New Trier's Motion for Summary Judgment

To address this motion, the Board must determine whether there is a genuine issue of material fact, and if not, whether New Trier is entitled to judgment as a matter of law. Kruk asserts that the facts presented by the parties demonstrate non-compliance with the noise standards in Section 901.102(a) and (b). Kruk also argues that the burden is on New Trier to prove that its equipment complies with these noise standards. Kruk argues that the December 13, 2019 test did not use the correct protocol and so did not prove compliance. Kruk MSJ Resp. at 9.

New Trier argues that Kruk has the burden of proof, and that Kruk has not presented any accurate measurement of sound emissions to demonstrate a current violation of the Section 901.102(a) and (b) noise standards. New Trier asserts that, without evidence of a current violation, there is no issue of material fact and Kruk's complaint fails as a matter of law. Further, New Trier states that its most current noise reports do not show any potential violation of the Section 901.102(a) and (b) standards.

Burden of Proof and Initial Burden of Production at Summary Judgement

While Kruk has the ultimate burden of proving the alleged violations of Section 901.102(a) and (b) in this enforcement proceeding, New Trier, as the movant, has the burden of proof and initial burden of production at summary judgment. *See Williams*, 316 Ill. App. 3d at 689. As discussed above, New Trier may meet its initial burden of production: (1) by affirmatively disproving Kruk's case by introducing evidence that, if uncontroverted, would entitle New Trier to judgment as a matter of law under the traditional test, or (2) by establishing that Kruk lacks sufficient evidence to prove an essential element of the cause of action under the Celotex test. *See Williams*, 316 Ill. App. 3d at 688-89. New Trier's motion appears to make arguments that could fit into both tests. So, each is addressed below.

Traditional Test. If the respondent-movant elects to affirmatively show that some element of the complainant-nonmovant's case must be resolved in its favor, respondent is "required to prove something it would not be required to prove at trial; at [hearing] the burden would be on [complainant] to prove the element, not on [respondent] to disprove it." *Hutchcraft v. Independent Mechanical Industries, Inc.*, 312 Ill. App. 3d 351, 355 (XX Dist. 2000).

New Trier argues that "[t]he rooftop ventilation equipment components were never in violation of Illinois noise limits and [New Trier's] noise mitigation efforts with the dust collector have resulted in sound levels that are below the limits set by section 901.102." New Trier MSJ at 3. In support of this, New Trier attached affidavits and two reports by Shriner Acoustics dated December 20, 2019 and March 1, 2021.⁵ New Trier MSJ, Conway Affidavit, December 2019 report, Baillie Affidavit, March 2021 report.

⁵ Several reports dated August 15, 2018, November 18, 2019, December 20, 2019, June 24, 2020, and March 1, 2021 have been submitted with the pleadings.

The December 2019 report states that sound levels from the dust collector exceeded the Board's daytime limits in Section 901.102(a) at octave band frequencies of 2000 Hz and 4000 Hz even after correction for ambient sound. Conway Aff. at ¶4. The March 2021 report, which addresses noise emissions testing performed on June 18, 2020, evaluates the sound levels emanating from the same equipment assessed in the December 2019 report, but after the implementation of sound mitigation measures by New Trier. March 2021 report at 1. The report indicates that the noise level in all nine octave bands from equipment operating during daytime hours was below the Board's daytime standards under Section 901.102(a) before and after correction for the ambient sound and concludes that the "[p]roperty line sound levels complied with the Illinois daytime limits in all frequency bands." *Id.* at 2., 35 Ill. Adm. Code 901.102(a). Kruk alleges that the measurements described in the March 2021 report were incorrectly conducted. Kruk Resp. at 4-5, 8.

Sound measurements of the alleged property-line-noise-source must be taken with "strict adherence to applicable measurement procedures" pursuant to Sections 900.103(b) and 910.105 of the Board's rules. Charter Hall, PCB 98-81, slip op. at 19; 35 Ill. Adm. Code 900.103(b), 910.105. New Trier acknowledges that the procedures outlined in Section 910.105 must be followed to prove a violation of the Illinois noise limits. New Trier MSJ Rep. at 2. These requirements, however, also apply to New Trier's claims of compliance in its motion. 35 Ill. Adm. Code 910.100 (Part 910 provides the required specifications and techniques "to determine whether a noise source is compliant").

Neither the Shiner Acoustics' reports nor the corresponding affidavits of Homans or Baillie represent that Shiner Acoustics' sound measurements were conducted in strict adherence to Section 900.103(b) or 910.105. Nor do these materials describe the specifications and techniques used in sufficient detail for the Board to find that Shiner Acoustics met all the required sound measurement procedures. Moreover, the December 2019 report states that the microphone used to measure sound was 15 feet above ground level, but Board regulations require that the microphone be on top of tripod "extended to a height between 3 feet 8 inches (1.12 m) and 4 feet 10 inches (1.47 m) above ground." 35 Ill. Adm. Code 910.105(b)(1)-(2). Further, it is unclear whether Shiner Acoustics measured for all the noise sources alleged in Kruk's complaint. Therefore, New Trier has not met its burden of production under the traditional test.

Celotex Test. If the respondent-movant elects to establish that the complainant-nonmovant lacks sufficient evidence to prove an essential element of the cause of action, the movant does not meet its initial burden of production by "merely asserting that the [complainant] lacks evidence." Kleiss, 349 Ill. App. 3d at 350. Rather, the movant must show that the nonmovant cannot acquire sufficient evidence to make its case. Pecora, 323 Ill. App. 3d at 934. Accordingly, summary judgment should be granted on a Celotex-type motion "only when the record indicates that a [complainant] has had extensive opportunities to establish her case but has failed in any way to demonstrate that she could [do so]." Williams, 316 Ill. App. 3d at 694.

New Trier argues that "Kruk alleged that [New Trier] was in violation of Sections 901.102(a) and (b) but cannot meet his burden to prove the alleged violation of the noise regulations." New Trier MSJ at 3. New Trier further argues that Kruk "has provided no measurements of sound emissions whatsoever and has therefore failed to meet this burden" and his allegations regarding

sound levels at different locations are “unsupported by any facts in the record.” New Trier MSJ Rep. at 2-3.

New Trier cannot meet its burden of production under the Celotex test by merely asserting that Kruk lacks evidence. *See Kleiss*, 349 Ill. App. 3d at 350. Rather, the movant must show that the nonmovant cannot acquire sufficient evidence to make its case. *See Pecora*, 323 Ill. App. 3d at 934-35. “A Celotex-type motion is appropriate only when the nonmovant has had an adequate opportunity to conduct discovery.” *Willett v. Cessna Aircraft*, 366 Ill. App. 3d 360, 369 (1st Dist. 2006). No formal discovery has been conducted in this case. Further, Kruk has outstanding requests that New Trier disclose all sound measurements performed for it, as well as “all procedures and measurements of all equipment tested (including rooftop units/cafeteria fans).” Kruk Sur-Reply Request at 1. And as recently as June 2021, New Trier reported, during a telephonic status conference with the hearing officer and Kruk, that New Trier’s “noise consultant is still attempting to alleviate some of the base sound around the site.” PCB 20-10 Hearing Officer Order at 1 (June 4, 2021). Given the stage of the case, it is premature to find that Kruk cannot acquire sufficient evidence to make his case. Therefore, New Trier has not met its burden of production under the Celotex test.

Ruling on New Trier’s Motion

To prove a violation of Section 901.102(a) or (b), Kruk must provide evidence of a numeric noise exceedance through measurement procedures that strictly adhere to the applicable requirements of Section 900.103 and Part 910, whether Kruk uses sound measurements taken by a noise consultant on his behalf or New Trier’s behalf. At the summary judgment stage, however, New Trier has not met its burden of production under either the traditional or Celotex test. Therefore, the burden of production does not shift to Kruk to present some factual basis that would arguably entitle him to judgment under the applicable law. Instead, Kruk may rely upon the pleadings to create a question of material fact. Construing the record “strictly against the movant and liberally in favor of the opponent,” the Board finds that genuine issues of material fact preclude summary judgment. *See Adames*, 233 Ill. 2d at 295-96. Accordingly, the Board denies New Trier’s motion for summary judgment.

Kruk’s Motion for Leave to File Sur-reply and for Oral Argument

Nothing in Kruk’s motion identifies a novel legal question warranting oral argument. He also seeks to present facts to the Board, but that is not permissible through oral argument. *See* 35 Ill. Adm. Code 101.700(a), (b). And, as noted above, by sur-reply, Kruk asks that New Trier disclose additional information about sound measurements performed.

Despite the terminology (“oral argument” and “sur-reply”) used by Kruk, who is not an attorney, the substance of Kruk’s motion consists of a request for information from New Trier and an opportunity to be heard. The Board construes this motion as a request for discovery before proceeding to hearing. So construed, the Board grants the motion and directs the hearing officer to require the parties to participate in a discovery conference. *See* 35 Ill. Adm. Code 101.616.

Kruk’s Motion to Amend Complaint

Kruk's motion to amend his complaint seeks to add Heather Walsh and Cristian Downey as co-complainants in this proceeding. Any individual may file a complaint with the Board *pro se*—that is, representing represent himself or herself as complainant—regardless of whether he or she is a licensed attorney. 35 Ill. Adm. Code 101.400(a)(1)-(2). However, an individual who is not a licensed attorney is prohibited from representing another person in an adjudicatory proceeding before the Board, like this enforcement action. *Id.* Kruk is not an attorney but the motion to amend purports to be filed by him on behalf of his two neighbors. For this reason, the Board denies Kruk's motion to amend the complaint.

However, the Board may exercise its discretion to allow amendment and does so when it “furthers the ends of justice.” People v. Town of Cortland, PCB 11-67, slip op. at 7 (Nov. 3, 2011). Allegedly, Walsh and Downey live closer to the noise sources than does Kruk. If Walsh and Downey wish to be added as co-complainants in this proceeding and neither is a licensed attorney, then either all three neighbors will have to sign an amended complaint and represent himself or herself, or the neighbors will need to arrange for a licensed attorney to represent them and file an amended complaint on their behalf, along with an appearance. Of course, one or more of the neighbors may choose to retain legal counsel while one or more of them proceeds *pro se*. The Board grants the neighbors permission to file an amended complaint by May 23, 2022, which is the first business day following the 45th day after the date of this order.

Kruk's motion to amend also seeks to allege additional noise sources and require New Trier to take more sound measurements. Any amended complaint may include such allegations and requested relief. But to be clear, the Board lacks authority to require that New Trier conduct additional sound measurements absent a finding of violation.

CONCLUSION

The Board finds that New Trier has failed to meet its burden to obtain judgment as a matter of law and therefore denies New Trier's motion for summary judgment. The Board construes Kruk's motion for leave to file a sur-reply and for oral argument as a motion for discovery and, so construed, grants it. Finally, the Board denies Kruk's motion to amend the complaint but grants Kruk, Walsh, and Downey until May 23, 2022, to file an amended complaint.

This opinion constitutes the Board's findings of fact and conclusion of law.

ORDER

1. The Board denies New Trier's motion for summary judgment.
2. The Board construes Marek Kruk's motion for leave to file a sur-reply and for oral argument as a motion to establish a discovery schedule. So construed, the Board grants Marek Kruk's motion.
3. Consistent with paragraph 2 of this order, the Board directs the hearing officer to require the parties to participate in a discovery conference.

4. The Board denies Marek Kruk's motion to amend the complaint, but grants Marek Kruk, Heather Walsh, and Cristian Downey until May 23, 2022, to file an amended complaint.

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on April 7, 2022, by a vote of 5-0.

A handwritten signature in cursive script that reads "Don A. Brown". The signature is written in black ink and is positioned above a horizontal line.

Don A. Brown, Clerk
Illinois Pollution Control Board