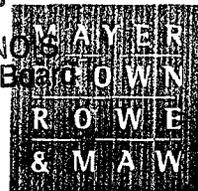


RECEIVED
CLERK'S OFFICE

ORIGINAL

JAN 25 2005

STATE OF ILLINOIS
Pollution Control BoardMayer, Brown, Rowe & Maw LLP
190 South La Salle Street
Chicago, Illinois 60603-3441Main Tel (312) 782-0600
Main Fax (312) 701-7711
www.mayerbrownrowe.comPatricia F. Sharkey
Direct Tel (312) 701-7952
Direct Fax (312) 706-9113
psharkey@mayerbrownrowe.com

January 24, 2005

VIA EMAIL AND FIRST CLASS U.S. MAILMichael Blazer
THE JEFF DIVER GROUP, L.L.C.
1749 South Naperville Road
Suite 102
Wheaton, Illinois 60187Re: Pattermann v. Boughton, PCB 99-187;
Courtesy Copy of Boughton's Response and
Updates to Respondent's Cost Statement

Dear Mike:

I am enclosing herewith a courtesy copy of Boughton's Response and Objection to Complainant's Motion for Voluntary Dismissal Without Prejudice which we will be filing with the Board tomorrow morning.

I am also attaching the invoices for Kip Smith's litigation support services as shown in Respondent's Statement of Costs and mentioned in my email last Friday.

Also, as mentioned in my second email last Friday, I realized I didn't include \$950.00 for McCann's January invoice in the totals in my letter, although the invoice itself was included in the backup materials sent to you in pdf form on Friday with my first email. Please add \$950.00 to the McCann costs. That brings the total to \$34,726.95.

Sincerely,

Patricia F. Sharkey

Enclosures

cc (w/enc): Bradley Halloran

ORIGINAL

RECEIVED
CLERK'S OFFICE

JAN 25 2005

STATE OF ILLINOIS
Pollution Control Board

BEFORE THE
ILLINOIS POLLUTION CONTROL BOARD

GINA PATTERMANN,)	
)	
Complainant,)	PCB 99-187
)	
v.)	(Citizen Enforcement -
)	Noise, Air)
BOUGHTON TRUCKING AND)	
MATERIALS, INC.,)	
)	
Respondent.)	

**BOUGHTON'S RESPONSE AND OBJECTION TO
COMPLAINANT'S MOTION FOR VOLUNTARY DISMISSAL
WITHOUT PREJUDICE**

NOW COMES Respondent, Boughton Trucking and Materials, Inc. ("Boughton"), by its attorneys, Mayer, Brown, Rowe & Maw LLP pursuant to 35 Ill. Admin. Code 101.500(d) and an oral agreement with the Hearing Officer made on January 20, 2005 to file an expedited response, and responds to Complainant's Motion for Voluntary Dismissal.

SUMMARY OF FACTS AND LAW

On January 20, 2005, eleven days before the hearing scheduled in this matter, Complainant filed a motion for voluntary dismissal under 735 ILCS 5/2-1009. That motion is not supported by an affidavit or other evidence of compliance with the prerequisites for a Section 5/2-1009 dismissal. Complainant did not file a motion for expedited Board ruling on this motion and did not file a motion to cancel the hearing.

As set forth below, Plaintiff's eleventh hour attempt to have this matter dismissed *without prejudice as of right* under Section 5/2-1009 is an abuse of the Board's procedures, is designed to avoid the consequences of adverse rulings in this case, and is highly prejudicial to Respondent. In addition, Complainant's motion is procedurally and substantively defective.

Complainant's motion states key facts that are not in the record, i.e. that Pattermann will pay Respondent's costs. It is also not accompanied by an affidavit supporting Ms. Pattermann's purported agreement to pay Respondent's costs, as required by 35 Ill. Admin. Code 101.504. In fact, Complainant's attorney has rejected Respondent's statement of costs, and there is no evidence in the record that the Complainant herself, who would be bound to pay, has actually agreed to pay whatever costs the Board awards.

Complainant is not entitled to dismissal without prejudice *unless and until* the substantive requirements of 735 ILCS 5/2-1009 have been met, i.e. *upon* the actual payment of Respondent's costs. Complainant's manipulative use of Section 5/2-1009 to avoid the consequences of adverse discovery rulings entitle the Respondent to its "reasonable expenses" as defined under Supreme Court Rule 219. In such cases, Rule 219 authorizes the Board to award a Respondent "reasonable expenses incurred in defending the action including but not limited to discovery expenses, expert witness fees, reproduction costs, travel expenses, postage and phone charges" as a precondition to the granting of a Section 5/2-1009 motion. A statement of all such costs incurred by Respondent in this case, including invoices, were tendered to Complainant on January 21, 2005. (See Attachment 1 hereto.) As of this date, Complainant has neither paid those costs nor agreed to pay those costs. In fact, Complainant apparently disputes these costs and the applicability of Section 219 in this case. (See Attachment 2 hereto.) Thus, the substantive precondition for granting a Section 5/2-1009 motion has not been met.

As noted above, the "costs" are in dispute. Furthermore, Complainant has not filed a motion for expedited Board consideration. Therefore, it is highly unlikely the Board will hear and rule on Complainant's motion before the hearing date which is now just one week away. If

the Board does not hear Complainant's motion before hearing, the Hearing Officer cannot rule on that motion because it is a dispositive motion.

Furthermore, the Hearing Officer cannot cancel the hearing because the Complainant failed to file a written motion to cancel the hearing at least 10 days before the hearing date. Section 101.510(b) of the Board's rules (35 Ill. Admin. Code 101.510(b)) requires that a motion to cancel a hearing demonstrate material prejudice and be attested to by an affidavit. That Complainant made a "last minute decision" to move for voluntary dismissal is a situation of her own making and she cannot use that decision as a "bootstrap" to now argue material prejudice requiring the canceling of the hearing. Indeed, it is the Respondent that will suffer material prejudice if the Hearing Officer or the Board ignores the rules and aids the Complainant in manipulating the hearing process.

To the extent the Board has the discretion to grant voluntary dismissal without prejudice apart from Section 5/2-1009, the equities demand that the Board *not* do so in this case. After five and a half years of litigation and a multitude of discovery abuses, the filing of this motion to dismiss without prejudice eleven days before the rescheduled hearing date is an abusive tactic in itself. Granting of this motion at this late hour would be highly prejudicial to Respondent. Rather than attempt to remedy Complainant's abusive, late, and defective motion by ignoring its own rules, the Board should follow its rules and the scheduled hearing should go forward. Complainant can either appear at that hearing or take a default judgment.

ARGUMENT

Complainant's Motion Does Not Demonstrate Compliance With the Prerequisite of Payment of Costs As Required by Section 5/2-1009

1. Section 5/2-1009(a) states:

“The plaintiff may, at any time before trial or hearing begins, upon notice to each party who has appeared or each such party’s attorney, *and upon payment of costs*, dismiss his or her action or any part thereof as to any defendant, without prejudice, by order filed in the cause.” (emphasis added)

Section 2-1009 has strict rules that govern the manner in which a plaintiff can successfully dismiss his or her suit without prejudice. Lewis v. Collinsville Unit #10 School District, 311 Ill.App.3d 1021, 1027 -28, 725 N.E.2d 801, 806 (5th Dist. 2000). Where those rules are not followed, the motion to dismiss must be denied. Id. The key prerequisite is that the moving party is entitled to dismissal only “upon payment of costs.” Payment of costs is a prerequisite to entitlement to a dismissal without prejudice, not a matter to be complied with subsequent to the issuance of the dismissal order. In this case, Complainant’s motion does not demonstrate that Complainant has made such payment and, indeed, Complainant has not made such payment. Therefore, Complainant’s motion is substantively defective.

Complainant's Motion Is Not Supported By An Affidavit As Required By Rule 101.501

2. Complainant’s states that “Pattermann shall pay such costs as are within the meaning of Section 2-1009 upon submission of a statement of the same from Respondent.” But the mere statement that a party will pay “costs” is not the same as the actual payment of such costs. Not only has Complainant not yet paid Respondent its costs, Pattermann’s agreement to make this payment is an asserted fact which is not of record in this proceeding and which is not supported by an oath, affidavit or certification. In fact, Complainant’s attorney’s email of

January 23, 2005 indicates that Complainant will *not* pay the costs Respondent is entitled to under Rule 219.(See Attachment 2.)

3. The Board's rules at 35 Ill. Adm. Code 101.504 plainly provide, "Facts asserted that are not of record in the proceeding must be supported by oath, affidavit or certification in accordance with Section 1-109 of the Code of Civil Procedure [735 ILCS 5/1-109]." Absent an affidavit from Ms. Pattermann supporting her agreement to pay Respondent's costs and in the face of her attorneys stated rejection of Respondent's costs, there is no evidence that this motion is made in good faith. Therefore this motion is defective on its face and should be rejected without further consideration.

If Voluntary Dismissal Without Prejudice Is Granted, Respondent is Entitled to Its Reasonable Expenses as Specified in Supreme Court Rule 219

4. The Illinois Appellate Court has held that, with regard to voluntary dismissals, the rules guiding the courts of Illinois "provide the outer bounds of what an administrative agency can do regarding motions for voluntary dismissal." Citizens of Burbank and People of the State of Illinois v. Claimant Transfer Co., PCB 84-125 (December 18, 1986), 1986 WL 27205, *citing Village of South Elgin v. Waste Management*, 64 Ill. App.3d 570, 881 N.E.2d 782, 782-783 (2d Dist. 1978). Supreme Court Rule 219(e) ("Voluntary Dismissals and Prior Litigation") is a companion Rule to Section 5/2-1009 designed to ensure voluntary dismissals are not used abusively to circumvent the consequences of discovery. *Morrison v. C.G. Wagner*, 191 Ill. 2d 162, 729 N.E. 2d 486 (2000) (Rule 219 prohibits a party from avoiding compliance with discovery deadlines, orders or applicable rules by voluntarily dismissing a lawsuit.) As Rule 219(e) is a companion to Section 5/2-1009, the Board cannot act on Complainant's Section 5/2-1009 motion without considering Rule 219(e) and whether the voluntary dismissal without

prejudice will allow the Complainant to circumvent the effect of discovery orders and sanctions entered in this case.

Illinois Supreme Court Rule 219(e)¹ states:

(e) Voluntary Dismissals and Prior Litigation

A party shall not be permitted to avoid compliance with discovery deadlines, orders or applicable rules by voluntarily dismissing a lawsuit. In establishing discovery deadlines and ruling on permissible discovery and testimony, the court shall consider discovery undertaken (or the absence of same), any misconduct, and orders entered in prior litigation involving a party. The court may, in addition to the assessment of costs, require the party voluntarily dismissing a claim to pay an opposing party or parties reasonable expenses incurred in defending the action including but not limited to discovery expenses, expert witness fees, reproduction costs, travel expenses, postage and phone charges.

The Committee Comments to this rule further clarify the purpose of this rule and its applicability to the case at hand:

Paragraph (e)

Paragraph (e) addresses *the use of voluntary dismissals to avoid compliance with discovery rules or deadlines, or to avoid the consequences of discovery failures, or orders barring witnesses or evidence*. This paragraph does not change existing law regarding the right of a party to seek or obtain a voluntary dismissal. However, this paragraph does clearly dictate that when a case is refiled, the court shall consider the prior litigation in determining what discovery will be permitted, and what witnesses and evidence may be barred. The consequences of noncompliance with discovery deadlines, rules or orders cannot be eliminated by taking a voluntary dismissal. Paragraph (e) further authorizes the court to require the party taking the dismissal to pay the out-of-pocket expenses actually incurred by the adverse party or parties. This rule reverses the holdings in *In re Air Crash Disaster at Sioux City, Iowa, on July 19, 1989*, 259 Ill. App. 3d 231, 631 N.E.2d 1302 (1st Dist. 1994), and *Galowich v. Beech Aircraft Corp.*, 209 Ill. App. 3d 128, 568 N.E.2d 46 (1st Dist. 1991). Paragraph (e) does not provide for the payment of attorney fees when an action is voluntarily dismissed.

¹ In addition, Illinois Supreme Court Rule 208 provides that court reporter's fees, transcription costs, witness fees and associated copying and filing fees may be taxed as "costs."

5. As stated by the Illinois Supreme Court in *Morrison v. C.G. Wagner*, 191 Ill.2d 162, 166, 729 N.E.2d 486, 488 (2000):

“Rule 219 prevents voluntary dismissals from being used as an artifice for evading discovery requirements through two entirely different mechanisms. First, the rule enhances the monetary burden associated with such dismissals. Under section 2-1009(a) of the Code of Civil Procedure, plaintiffs must pay costs as a condition of taking a voluntary dismissal without prejudice. Rule 219(e), however, provides that in addition to the assessment of costs, the court may require the party seeking dismissal to pay the opposing party or parties their reasonable expenses incurred in defending the action including but not limited to discovery expenses, opinion witness fees, reproduction costs, travel expenses, postage, and phone charges.” *Morrison, Id.* At pp. 166-167, 488 – 489.

In *Scattered Corporation v. Midwest Clearing Corporation*, 2299 Ill. App. 3d 653, 702 N.E. 2d 167 (1st Dist. 1998), the Illinois Appellate Court provided more insight into the scope and function of Rule 219(e) :

“ ... Rule 219(e) does not act as a bar to a plaintiff’s statutory right to a voluntary dismissal. 735 ILCS 5/2-1009(a)...Rule 219(e) does, however, curtail a plaintiff’s use of the voluntary dismissal as a dilatory tactic. We believe that Rule 219(e) targets those strategic and tactical litigation decisions which, having crossed the line of vigorous advocacy, become decisions aimed no longer at besting the opposing party but rather at undermining the integrity of the judicial system.” *Id.* at 660.

The Appellate Court went on to say:

“...expenses authorized under Rule 219(e) serve not as a sanction per se, but rather as a deterrent to the dilatory and manipulative use of plaintiff’s voluntary dismissal. This prophylactic intent is consistent with the purpose behind rule 219(c) in encouraging compliance with the entire discovery process...” *Id.* at 660.

6. Notably, the sanctions in Rule 219(c), are the same sanctions that are authorized under Board Rule 101.800 (35 Ill. Admin. Code 101.800) under which Complainant in this case was sanctioned with the barring of her expert witness. (See Attachment 3 hereto.) Thus, the type of behavior that Complainant in this case engaged in which has increased Respondent's costs and resulted in Board sanctions is precisely the type of "strategic and litigation decision" that Rule 219(e) "targets." The intent of Rule 219(e) is to deter plaintiffs from taking a voluntary dismissal without prejudice to avoid the sanctions imposed under Rule 219(c) or, in this case, Rule 101.800, and then simply refile the case. This is the avenue that Complainant in this case is clearly trying to preserve by filing this motion. Although the Board cannot prevent her from taking a voluntary dismissal under Section 5/2-1009, Rule 219(e) authorizes the Board to lessen the harm to the Respondent by ensuring that she bear the cost of Respondent's "reasonable expenses" before she avails herself of this tactic.²

7. Complainant's behavior in this case is precisely the type of manipulation of the system that Rule 219(e) was designed to curtail. Complainant filed this matter on June 15, 1999. Since that time, Complainant has engaged in a strategy of delay and discovery abuse designed to increase costs for the Respondent while minimizing costs for herself. Rather than diligently prosecute her alleged "nuisance" claims, she has taken an "on again/off-again" approach, only occasionally paying attention to orders and commitments made in this case, while keeping the Respondent "on the hook." Her approach to this case resulted in many discovery abuses and ultimately Board sanction.

² It should be noted that the "reasonable expenses" authorized under Rule 219(e) do not include attorneys fees, which the Appellate Court has held the Board cannot impose. *ESG Watts, Inc. v. PCB*, 286 Ill. App.3d 325, 337-338. Nor would the Board be imposing a penalty or damages by requiring that the requirements of Section 5/2-1009 and Rule 219(e) be met before a voluntary dismissal can be granted.

8. Complainant's current motion is a blatant effort to circumvent the consequence of her own discovery errors and the Board's discovery rulings and sanctions. Despite the fact that Complainant is herself an attorney, Complainant abused discovery procedures by refusing to provide certain subpoenaed documents and by filing a witness list that consisted of hundreds of names. She also purported to have hired an expert witness which she had, in fact, not hired, and then allowed Respondent to bear the cost of a deposition in which her purported expert witness did not appear. Based on this discovery abuse, along with her failure to attend many scheduled status conferences, the Board ultimately ordered that Complainant's fact witnesses were limited to the four identified witnesses, confirmed that discovery was closed and no further witnesses would be allowed, and granted a motion for sanctions which barred her purported expert witness.

(See Attachment 3.) The Board's August 7, 2003 order stated:

"The Board finds Ms. Pattermann's conduct has amounted to an abuse of discovery and grants Boughton's motion for discovery sanctions in part. Under Section 101.616(f), failure to comply with any order regarding discovery may subject the offending persons to sanctions. 35 Ill. Adm. Code 101.616(f). Here, Mr. Zak did not appear at this scheduled deposition because Ms. Pattermann had not retained him. Ms. Pattermann does not dispute these facts. In addition, the hearing officer ordered that the parties complete all depositions by May 2, 2003. By not making Mr. Zak available at this scheduled deposition or any other time before May 2, 2003, Ms. Pattermann did not comply with the hearing officer's order to complete all depositions by a time certain. In addition, Ms. Pattermann prevented Boughton from completing any discovery deposition of her expert noise witness. Ms. Pattermann has violated several hearing officer orders in the past by not appearing at status meetings and by not producing a document subpoenaed by Boughton. The Board finds that Ms. Pattermann's conduct amounts to an abuse of the discovery process."

9. Apparently Complainant has now finally focused on the facts in this case and realizes that as a result of the Board's sanction order she doesn't have an expert witness. Perhaps

her fact witnesses have also disappeared or become disaffected with her case. While we are not privy to her reasoning --- because she hasn't filed a proper, documented request to cancel the hearing -- it is clear that she would like to avoid the consequences of her past actions and the Board's sanction order by dismissing this case with the option of refile and starting anew. This effort at circumvention falls squarely within the type of abuse Supreme Court Rule 219(e) was designed to prevent.

10. In Valdovinos v. Luna-Manalac Medical Center, Ltd., 328 Ill.App.3d 255, 764 N.E.2d 1264 (1st Dist. 2002), the Appellate Court affirmed an award of \$79,173.14 in costs under S. Ct. Rule 219(e), holding:

"There is no question that the assessment of expenses pursuant to Rule 219(e) [is] proper in the instant case where the plaintiffs exercised their right to voluntarily dismiss the action without prejudice in order to avoid the effects of pre-trial evidentiary rulings based on their own failure to comply with discovery deadlines."

As in Valdovinos, there should be no question in this case that Respondent is minimally entitled to its expenses, as specified in Rule 219 and demonstrated in Attachment 1, if and when the Board rules on Complainant's Section 5/2-1009 motion.

**The Board Should Not Exercise Its Discretionary Authority
to Dismiss This Case Without Prejudice.**

11. Until Respondent's "reasonable expenses," as shown in Attachment 1 hereto, have been paid, Complainant is not entitled to a voluntary dismissal without prejudice under Section 5/2-1009. Furthermore, a dismissal without prejudice is not warranted under the Board's discretionary powers. Dismissal without prejudice would be highly prejudicial to Respondent who has not only incurred extensive "costs" as defined under Supreme Court Rule 219, but has also incurred extensive attorneys fees to defend itself in the face of Complainant's nuisance

allegations. Although attorneys fees cannot be recovered in this forum, the Board can and should consider the fact that Complainant's dilatory and abusive prosecution of this case has resulted in extra costs and fees to Respondent. Respondent has been forced to have its attorneys request withheld documents repeatedly, attend numerous scheduled status conferences over the last 5 ½ years where Complainant and her counsel failed to appear, move to strike a spurious purported witness list of over 100 witnesses, attend and pay for a properly noticed deposition in which neither Complainant, her counsel nor her purported expert witness appeared, finally move to bar Complainant's purported expert witness, and file motions to remind Complainant's to file late responsive briefs.

12. All of Complainant's abuses of discovery requirements and the Board's orders and rules have been expensive for the Respondent. It would be manifestly unjust for the Board to dismiss without prejudice and thereby allow Complainant to potentially re-file her claims at a later date, thus keeping Respondent in jeopardy. Respondent has not only been forced to bear the extra costs and fees associated with Complainant's procedural abuses, it has also at this point borne extensive costs and attorneys fees, as well as the time and effort of its own employee witnesses, to fully prepare for a hearing on nuisance claims which Complainant has apparently now decided she doesn't want to pursue *at this time*. After 5 ½ years of litigation, if Complainant is not ready and able to support her allegations at this point, justice requires that her allegations be dismissed with prejudice.

**Filing an abusive, unsupported and incomplete motion
does not automatically stay or cancel a hearing.**

13. Complainant's Motion was not filed until January 20th, and the next Board meeting will not take place until after the January 31, 2005 scheduled hearing date. The Hearing Officer cannot act on a dispositive motion (35 Ill. Admin. Code 101.502(a)), and Complainant

has not filed a motion for expedited Board review under 35 Ill. Admin. Code 101.512. Thus, even though Respondent agreed to file this response on an expedited basis, it is highly unlikely that Complainant's Motion will be acted upon prior to the hearing date. This is a problem of Complainant's own making.

14. The filing of a Motion for Voluntary Dismissal does not automatically cancel a scheduled hearing. The Board's rules make it very clear that the filing of a motion, in and of itself, does not stay a proceeding or extend the time for the performance of any act. 35 Ill. Admin. Code 101.502. Motions to stay a proceeding must be directed to the Board and must be accompanied by sufficient information detailing why a stay is needed. 35 Ill. Admin. Code 101.514.

15. Furthermore, the Hearing Officer has no authority to cancel the hearing in this case because Complainant did not file a motion to cancel the hearing more than ten days before the scheduled hearing date, nor has she provided an affidavit demonstrating that she will suffer material prejudice if the hearing is not canceled and that any request to cancel the hearing is not the result of her own lack of diligence, all as required under 35 Ill. Admin. Code 101.510.

16. That Complainant made a last minute tactical decision to move for voluntary dismissal is a situation of her own making and she cannot use that decision as a "bootstrap" to now argue material prejudice requiring the canceling of the hearing which was rescheduled at her request less than 45 days ago. Indeed, it is the Respondent that will suffer material prejudice if the Hearing Officer or the Board ignore the rules and aid the Complainant in manipulating the judicial process. Respondent has now been required to prepare for hearing twice to accommodate Complainant. Furthermore, there is no guarantee that the Board will grant Complainant's motion or that Complainant won't withdraw this motion when faced with actually paying Respondent's

expenses as required by Rule 219. If this hearing is cancelled, Respondent may very well have to prepare for trial a third time as a result of Complainant's maneuvers.

17. All of these procedural problems are a result of Complainant's own very late decision to file this motion. The lateness of this filing does not excuse compliance with the Board's regulations or allow the abandoning of those rules to the prejudice of the Respondent. Respondent very much wants this hearing to go forward, to have its day in court and to finally get a Board ruling that its operations do not constitute a nuisance. The Complainant's motion is simply too late to be heard before hearing and the hearing must go forward.

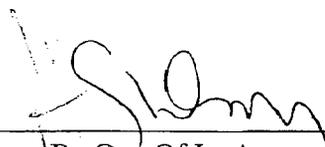
CONCLUSION

If the Board chooses to rule on Complainant's motion under Rule 5/2-1009, it cannot apply only part of that rule or apply it in a fashion that is inconsistent with Supreme Court Rule 219 and the Supreme Court's stated intent. Thus, unless and until Complainant has paid Respondent's discovery expenses, expert witness fees, reproduction costs, travel expenses, postage, phone charges, court reporter and transcription charges and related costs as required under Rule 219 and Rule 208, all of which are listed in Attachment 1 hereto, Complainant's motion cannot be granted.

Furthermore, there is no automatic stay of the hearing and no proper motion and basis has been filed which would allow the Hearing Officer or the Board to cancel the hearing at this late date. Complainant has created this problem, just as she created the other problems in this case she now seeks to avoid. She should live with the consequences. She has a choice – she can go to hearing on the scheduled date or take a default judgment.

BOUGHTON TRUCKING AND MATERIALS, INC.

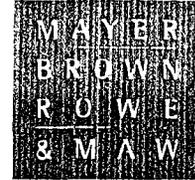
January 25, 2005



By One Of Its Attorneys

Mark R. Ter Molen
Patricia F. Sharkey
Kevin Desharnais
Michelle A. Gale
Jaimy L. Hamburg
MAYER, BROWN, ROWE & MAW LLP
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

ATTACHMENT 1



January 21, 2005

VIA EMAIL AND FIRST CLASS U.S. MAIL

Michael Blazer
 THE JEFF DIVER GROUP, L.L.C.
 1749 South Naperville Road
 Suite 102
 Wheaton, Illinois 60187

Mayer, Brown, Rowe & Maw LLP
 190 South La Salle Street
 Chicago, Illinois 60603-3441

Main Tel (312) 782-0600
 Main Fax (312) 701-7711
 www.mayerbrownrowe.com

Patricia F. Sharkey
 Direct Tel (312) 701-7952
 Direct Fax (312) 706-9113
 psharkey@mayerbrownrowe.com

Re: Pattermann v. Boughton, PCB 99-187;
 Respondent's Costs Within the Meaning of
 Illinois Code of Civil Procedure Section 5/2-1009

Dear Mr. Blazer:

We received Complainant's Motion for Voluntary Dismissal by facsimile yesterday, January 20, 2005. We are preparing a response to that motion which we will email to you and file with Mr. Halloran and the Board on Monday in advance of our scheduled Status Conference with Mr. Halloran.

In response to Paragraph 3 of Complainant's Motion, we are hereby tendering a preliminary statement of Respondent's costs, within the meaning of Section 2 -1009, as we have been able to gather in this short time interval.

RESPONDENT'S COSTS

Expert witnesses	
Michael S. McCann, William A Mcann & Associates, Inc.	\$23,293.35
Kip Smith, MacTec, Inc. (previously Harding-Lawson)	\$ 3,423.49
Court Reporter and Transcripts	
George E. Rydman & Assoc., Ltd.	\$ 1,361.40
Trial Exhibits	
Document Technologies, inc.	\$ 591.63
Reproduction Costs	\$ 3,714.15
Travel Expenses	\$ 142.07
Postage (incl. mail, document delivery, preparation and fax)	\$ 1,242.17
Phone (Long Distance)	\$ <u>8.69</u>

Total \$ 33,776.95

Brussels Charlotte Chicago Cologne Frankfurt Houston London Los Angeles Manchester New York Palo Alto Paris Washington, D.C.
 Independent Mexico City Correspondent: Jauregui, Navarrete, Nader y Rojas, S.C.

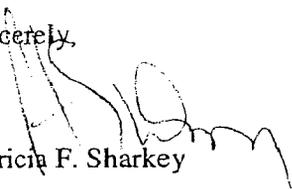
Mayer, Brown, Rowe & Maw LLP operates in combination with our associated English limited liability partnership in the offices listed above.

Mayer, Brown, Rowe & Maw LLP

Michael Blazer
January 21, 2005
Page 2

Notwithstanding our tender of this information, we reserve our objections to the Motion and we will be prepared to discuss those objections in our conference on Monday.

Sincerely,



Patricia F. Sharkey

Enclosures

cc (w/enc): Bradley Halloran

DETAIL REPORT BY MATTER

From Date:01 Jan 1999 To Date:21 Jan 2005

Cost Summary

Amount

Cost Desc	Cost Type	Amount		
		Base	Total	Bill
Document Delivery	94	122.40	122.40	122.40
Document Delivery - Chicago Messenger	60	11.50	11.50	11.50

From Date:01 Jan 1999 To Date:21 Jan 2005

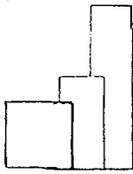
Time WIP Status Included: Billed

Cost WIP Status Included: Billed

Cost Summary		Amount		
Cost Desc	Cost Type	Base	Totl Billed	Billed
Document Delivery - Office	93	346.72	346.72	346.72
Document Preparation	29	727.50	727.50	727.50
Document Reproduction	42	3,364.65	3,354.00	3,352.35
Document Reproduction - Outside	41	361.80	361.80	361.80
Facsimile Transmission - Local	82	378.57	378.57	378.57
Facsimile Transmission - Long Distance	83	264.00	264.00	264.00
Local Transportation	09	142.07	142.07	142.07
Long Distance Telephone	72	8.69	8.69	8.69
Mailing Charges - Office	92	101.58	101.58	101.58
Mailing Charges - Outside	91	18.76	17.40	17.40
Transcripts	08	1,361.40	1,361.40	1,361.40
		\$7,195.98	\$7,195.98	

Jan. 21. 2005 3:18PM

No. 1703 P. 2



William A.
McCann &
Associates, Inc.
Since 1962

Real Estate Appraisers & Consultants

Michael S. McCann
Brian P. McCann
Kevin A. Byrnes
Michael F. Walsh

FILE COPY

James P. Foley III
Laura M. Foran
Martin L. Houlahan
William A. McCann III
John T. Setina III

Boughton Trucking & Materials, Inc.
c/o Frank Maly
Secretary
11746 S. Naperville-Plainfield Road
Plainfield IL 60544

April 07, 2003

William A. McCann, MAI
Litigation Consultant

Invoice No. 13794

PLEASE RETURN ONE COPY WITH PAYMENT

RE: 111th Street - Boughton Quarry
Naperville, IL.
McCann File No. 030304

For services rendered to assist client in preparing defense for PCB hearing, including exhibits, all supporting data and basis for opinions, time detailed as follows:

	<u>HOURS</u>	<u>AMOUNT</u>
<u>Michael S. McCann</u>		
04/04/2003 Telephone conference with Pat Sharky re: relocation cost issues, etc.	0.45	
04/03/2003 Executive summary - writing; refinement of analysis and conclusions; supervise production; edit tables, etc.	7.50	
04/02/2003 Analysis of resale data, Naperville trends/ River Run/ White Eagle data overall, specific near-far data; scope with John T. Setina, III and Laura Foran re: exhibits, maps, aerials; report writing re: findings, conclusions, support for opinions; lunch meeting with John T. Setina, III refine analysis, table and exhibit requirements; aerial presentation scope with Melissa M.; etc.	7.75	
Executive summary - writing; refinement of analysis and conclusions; supervise production	1.50	
03/31/2003 Meeting/ analysis with John T. Setina, III; review selections for data analysis	2.50	
Teleconference with Pat Sharkey, Esq. re: photos, preliminary data results, berm photo	0.25	
03/28/2003 Analysis with John T. Setina, III re: target and control areas, compare average prices and sf of house, marketing times, type of doc, locations of house, scope of exhibits	3.75	
03/26/2003 Conference with John T. Setina, III re: job and research	0.20	
03/24/2003 Review NIPC photos with John T. Setina, III and report exhibits	0.90	
03/21/2003 Review sequenced aerials with John T. Setina, III re: history of development trends; possible exhibits	0.50	
03/20/2003 Field inspect subject with John T. Setina, III, Frank M. at quarry; tour site, River Run subdivision, subdivision to north, White Eagle at west Rte. 59 to select control area; review MLS preliminary data; to/from Naperville	7.00	

414 North Orleans Street, Suite 601 Chicago, Illinois 60610
PHONE: (312) 644-0621 FAX: (312) 644-9244
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Jan. 21. 2005 3:19PM

No. 1708 P. 3

Boughton Trucking & Materials, Inc.

Page 2

Invoice No. 13794

		<u>HOURS</u>	<u>AMOUNT</u>
03/19/2003	Conference with John T. Setina, III re: job and research status	0.25	
03/18/2003	Analysis of location, info available with John T. Setina, III ; review subdivision histories & Naperville plan districts; teleconf w/ Frank M. re: general volume histories at subject and other area quarries; refine scope of target/control research; etc. Follow up review- township assessors lists, excel analysis, etc.	1.25	
		0.35	
03/17/2003	Conference with John T. Setina, III re: job and research parameters	0.35	
03/13/2003	Meeting with John T. Setina, III re: aerials needed, target area sale data, control parameters, etc.	0.75	
03/11/2003	Teleconference with Pat Sharky at Mayer Brown Review scope of research for property value impact study with John T. Setina, III	0.35	1.00
03/10/2003	Teleconference with Pat Sharky and Kevin Desharnais	0.25	
	SUBTOTAL:	36.85	6,817.25
	<u>Laura Foran</u>		
04/02/2003	Analysis and research - map out subdivision re-sales for each lot in River Run and White Eagle subdivisions	2.25	
	SUBTOTAL:	2.25	225.00
	<u>John T. Setina, III</u>		
04/04/2003	Process balance of reports and messenger to clients office	0.75	
04/03/2003	Edit tables chart for report; process reports; messenger (1) copy to clients office; conference with Michael S. McCann re: data tables, exhibits and report writing; print out photos to label for report exhibits	8.30	
04/02/2003	Conference with Michael S. McCann re: data tables, exhibits and report writing; Make River Run and White Eagle report exhibits of subdivision plat map with sales/ resales mapped out; Review River Run and White Eagle sales and resales data; NIPC photo to be copied; data tables for residential subdivisions, exhibits for reports and photos; report writing.	10.25	
04/01/2003	CMA for Clow Creek farm, Whispering Lakes, Saddle Creek, High Meadows, Crestview Knolls, Wheatland South, Breckenridge Estates residential; Research Naperville det-sfr sales 2001, 2002, 2003, Naperville overall and Naperville Will County only; MLS research CMA on subdivisions: Ashbury, Rosehill, Brook Crossing Estates, and Knoch Knolls	7.85	
03/31/2003	Make map exhibits for report re: River Run and White Eagle residential subdivision; MLS research CMA on subdivisions: Ashbury, Rosehill, Brook Crossing Estates, and Knoch Knolls; Field inspection photo - email to Pat Sharkey for review; 360 day comparative market analysis of River Run and White Eagle residential subdivision for active, expired, cancelled	7.55	

Jan. 21. 2005 3:19PM

No. 1708 P. 4

Boughton Trucking & Materials, Inc.

Page 3

Invoice No. 13794

HOURS AMOUNT

listings; Conference call with Michael S. McCann and Pat Sharkey, Esq. re: job status and preliminary data results; . Analysis with Michael S. McCann re: preliminary research data results, exhibits, new research and data array and prepared in tables

03/31/2003	Report writing	0.50
03/30/2003	Review and analyze White Eagle residential sale data, put in excel spread sheet form	2.00
03/29/2003	Research all sales in the Shite Eagle residential subdivision for sale and resale - 430 properties; River run and White eagle residential subdivision sales spread sheet , input data, sort data tables and calculate averages, input in spreadsheet form;	10.60
03/28/2003	Analysis with Michael S. McCann re: target and control areas, compare average prices and sf of house, marketing times, type of doc, locations of house, scope of exhibits	3.75
	Review and analyze White Eagle residential sale data, input excel	4.25
03/27/2003	Sidwell maps of entire White Eagle residential subdivision for research; revlew and analyze White Eagle residential sala data, excel input; conference with Michael S. McCann re: job and research	7.95
03/26/2003	Calculate marketing times for all sales each year 2003-01 for River Run and White Eagle; River Run and White Eagle residential sale data input	7.70
03/25/2003	Review NIPC photos with Michael S. McCann and discuss exhibits	0.30
03/24/2003	River Run and White Eagle residential sale data input; research White Eagle residential subdivision; review NIPC photos with Michael S. McCann and report exhibits; review and organize field inspection note and file; rview and organize (download) digital photos from field inspection	8.15
03/21/2003	Review and analyze River Run residential data, input excel spread sheet form, all properties (430) in subdivision; research maps for control area for sales study research, area maps, sidwell maps; aerials with Michael S. McCann; review and compare all sales in the River Run residential subdivision for sale and resale extraction	7.15
03/20/2003	Field inspection with Michael S. McCann, Frank M. at quarry; tour site, River Run subdivision	7.00
03/19/2003	Research all sale in the River Run residential subdivision for sale and resale analysis; conference with Michael S. McCann re: job and research status; research River Run residential subdivision, MLS 2003, 2002, 2001 sales in each year for average sale price and marketing times	7.20
03/18/2003	MLS - property report research sale and resale data in the River Run subdivision; review single family developments; conference with Michael S. McCann re: field inspection, research, target and control area	6.80

Jan. 21. 2005 3:20PM

No. 1708 P. 5

Boughton Trucking & Materials, Inc.

Page 4

Invoice No. 13794

	<u>HOURS</u>	<u>AMOUNT</u>
03/17/2003 Conference with Michael S. McCann re: job and research parameters; maps of subject site and area to be researched; research all sales in the River Run residential subdivision for sale and resale; order NIPC arials and airpix photos; research aerial photos for subject area, research (map quest) and sidwell maps	6.25	
03/14/2003 Research River Run PIN number and sales data on township web site; maps of the subject site and subject area to be researched	3.00	
03/13/2003 Conference with Michael S. McCann re: subject location and research of SFR in the area and research of target and control area; NIPC and airpix photos to order	0.75	
Call Kevin Desharnais re: any data relating to the subject property - not in office - left a voice mail message 3:14pm	0.05	
03/11/2003 Conference with Michael S. McCann re: job and research	1.00	
SUBTOTAL:	[119.10	14,887.50]
<u>Bill McCann, III</u>		
04/03/2003 Prepare photo exhibit (Figure #5)	1.25	
SUBTOTAL:	[1.25	156.25]
FEE AMOUNT:	159.45	\$22,086.00
ADDITIONAL CHARGES:		
<u>Expenses</u>		
04/03/2003 Mosner Company - exhibit and map charges		58.65
04/01/2003 Mossner Company - exhibit and map charges		30.90
03/20/2003 Aerial photographs		108.50
SUBTOTAL:		[198.05]
TOTAL COSTS		\$198.05
TOTAL AMOUNT OF THIS BILL		\$22,284.05
03/14/2003 Retainer Payment - thank you Check No. 50475		(\$5,000.00)
Total payments and adjustments		(\$5,000.00)
BALANCE DUE:		<u>\$17,284.05</u>

Jan. 21. 2005 3:20PM

No. 1708 P. 6

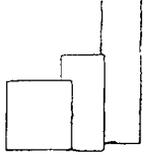
Boughton Trucking & Materials, Inc.

Page 5
Invoice No. 13794

This invoice is for services rendered for the dates listed above and is due and payable within 20 days. If you have any questions, please call our accounting department and you will be assisted in processing this invoice for a timely payment. Amounts unpaid after 30 DAYS are subject to a charge of 1.50% per month on the unpaid balance.

We appreciate the opportunity to be of service to you in this assignment.

Jan. 21. 2005 3:29PM



William A.
McCann &
Associates, Inc.
Since 1962

No. 1798 P. 7
Real Estate Appraisers & Consultants

Michael S. McCann
Brian P. McCann
Kevin A. Byrnes
Michael F. Walsh

James P. Foley III
Martin L. Houlihan
William A. McCann III
John T. Selina III

William A. McCann, MAJ
Litigation Consultant

FILE COPY

November 6, 2003

Boughton Trucking & Materials, Inc.
C/o Frank Maly, Secretary
11746 S. Naperville-Plainfield Road
Plainfield, Illinois 60544

RE: 111th Street - Boughton Quarry
Naperville, Illinois
McCann File No. 030304

Dear Frank:

Our current invoice includes exhibit charges that were not included in prior invoices.
Please call if you have any questions.

Respectfully,

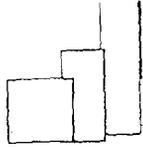
WILLIAM A. McCANN & ASSOCIATES, INC.

Michael S. McCann
President

Encl.

414 North Orleans Street, Suite 601 Chicago, Illinois 60610
PHONE: (312) 644-0621 FAX: (312) 644-9244
www.mccannappraisal.com

Jan. 21. 2005 3:21PM



William A.
McCann &
Associates, Inc.
Since 1962

No. 1703 P. 8
Real Estate Appraisers & Consultants

Michael S. McCann
Brian P. McCann
Kevin A. Bymes
Michael F. Walsh

James P. Foley III
Martin L. Houllhan
William A. McCann III
John T. Setina III

FILE COPY

Boughton Trucking & Materials, Inc.
c/o Frank Maly
Secretary
11748 S. Naperville-Plainfield Road
Plainfield IL 60544

November 08, 2003

William A. McCann, MAI
Litigation Consultant

Invoice No. 13957

PLEASE RETURN ONE COPY WITH PAYMENT

RE: 111th Street - Boughton Quarry
Naperville, IL
McCann File No. 030304

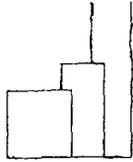
FOR PROFESSIONAL SERVICES RENDERED:

	<u>HOURS</u>	<u>AMOUNT</u>
<u>Michael S. McCann</u>		
11/6/2003 Final review of affidavit; forward to attorney Matt S.	0.25	
11/2/2003 Review and edit draft affidavit prepared by client's attorney re: summary of McCann property value study; forward to attorney (email)	2.00	
10/28/2003 Teleconference w/Pat Sharkey re: motion, affidavit to be prepared	0.25	
SUBTOTAL:	[2.50	462.50]
FEE AMOUNT:	2.50	\$462.50
ADDITIONAL CHARGES:		
<u>Expenses</u>		
4/3/2003 Mossner Company - exhibit and map charges		515.90
4/2/2003 Moasner Company - exhibit and map charges		30.90
SUBTOTAL:		[546.80]
TOTAL COSTS		\$546.80
TOTAL AMOUNT OF THIS BILL		<u>\$1,009.30</u>

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Jan. 21, 2005 3:21PM

No. 1706 P. 10
Real Estate Appraisers & Consultants



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Celebrating 42 Years of Service

Boughton Trucking & Materials, Inc.
c/o Frank Maly
Secretary
11746 S. Naperville-Plainfield Road
Plainfield IL 60544

January 21, 2005
Invoice No. 14198

PLEASE RETURN ONE COPY WITH PAYMENT

RE: 111th Street - Boughton Quarry
Naperville, IL.
McCann File No. 030304

For Professional Services Rendered:

	<u>Hours</u>	<u>Amount</u>
<u>Michael S. McCann</u>		
1/11/2005 Review of Boughton files for meeting with Kevin Desharnais	1.00	200.00
1/12/2005 Hearing prep with Kevin Deshanais.	3.75	750.00
Subtotal:	[4.75	950.00]
Total Appraiser Fees:	4.75	\$950.00

Appraiser Summary

<u>Name</u>	<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
Michael S. McCann	4.75	200.00	\$950.00

This invoice is for services rendered for the dates listed above and is due and payable within 20 days. If you have any questions, please call our accounting department and you will be assisted in processing this invoice for a timely payment. Amounts unpaid after 30 DAYS are subject to a charge of 1.5% per month on the unpaid balance.

We appreciate the opportunity to be of service to you in this assignment.

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PHONE: (312) 644-0621 FAX: (312) 644-9244

George E. Rydman & Assoc. Ltd.

Court Reporters and Video
 15 W. Jefferson St.
 Joliet, Illinois 60432

815-727-4363

800-608-5523

Fax 815-727-7186

Fed ID. 36-3303806

PATRICIA F. SHARKEY
 MAYER, BROWN, ROWE & MAW
 190 SOUTH LASALLE STREET
 CHICAGO, IL 60603

Invoice Date
4/18/2003
Invoice Number
15891

4/18/2003

Page
 1 of 1

Please reference this number
 when remitting

Date Taken	Reference	Charges
	RE: GINA PATTERMANN VS. BOUGHTON TRUCKING AND MATERIAL, INC. PCB 99-187 / BEE / 10518	
	DEPOSITION OF GINA PATTERMANN 115 pages	
4/8/2003	ORIGINAL TRANSCRIPT	\$362.25
	REPORTER ATTENDANCE FEE	\$87.00
	DEPOSITION OF WILLIAM B. JENE, JR. AND CARLENE C. JENKINS 87 pages	
4/10/2003	ORIGINAL TRANSCRIPT	\$274.05
	REPORTER ATTENDANCE FEE	\$87.00
4/10/2003	OVERNITE DELIVERY	\$18.00

Total Balance Due \$828.30

George E. Rydman & Assoc. Ltd.

Court Reporters and Video
15 W. Jefferson St.
Joliet, Illinois 60432

815-727-4363

800-608-5523

Fax 815-727-7186

Fed ID. 36-3303806

PATRICIA F. SHARKEY
MAYER, BROWN, ROWE & MAW
190 SOUTH LASALLE STREET
CHICAGO, IL 60603

Invoice Date
5/8/2003
Invoice Number
16102

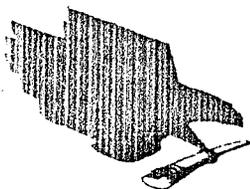
10/2/2003

Page
1 of 1

Please reference this number
when remitting

Date Taken	Reference	Charges
	RE: GINA PATTERMANN VS. BOUGHTON TRUCKING AND MATERIAL, INC. PCB 99-187 / KRN / 10632 <p style="text-align: center;">*** 120 days past due ***</p> DISCOVERY DEPOSITION OF GREG ZAK (Did not appear) LISA COLLINS, 46 Pgs. DONALD A. BOUDREAU, 65 Pgs.	
4/23/2003	REPORTER ATTENDANCE FEE ORIGINAL TRANSCRIPT ASCII DISKETTE(S)	\$174.00 \$344.10 \$15.00
	<p><i>10/9/03</i> <i>Per Verneille -</i> <i>check sent out</i> <i>yesterday</i></p>	

Total Balance Due	\$533.10
--------------------------	-----------------



Document Technologies, Inc.

105 W. Adams St., Ste. 1100
 Chicago, IL 60603
 Phone : 312-739-9999
 Fax : 312-739-0899
 Fed. ID No. : 58-2413793

INVOICE

Invoice Number: 164310

Invoice Date: 01/20/05

COPY

Bill To:
 Mayer, Brown, Rowe & Maw LLP
 190 S. LaSalle Street
 Suite 1900
 Chicago, IL 60603-3441
 Tom Kuslik

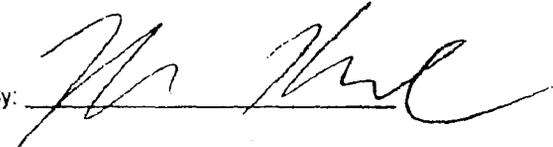
Ship To:
 Mayer, Brown, Rowe & Maw LLP
 190 S. LaSalle Street
 Suite 1900
 Chicago, IL 60603-3441

Customer ID 12861
 Terms Net 15 Days
 SalesPerson CHI CDA
 P.O. Number

Client / Matter No. 99556862
 Job No. CB36292
 Nat'l Acct Name
 Nat'l Acct Ref. No.

Quantity	Description	Unit Price	Total Price
6	35" x 36" B/W Oversize & Mount	65.00	390.00
1	24" x 36" Color Oversize & Mount	84.50	84.50
1	2 Sets - Color Photos & CD's w/Color Photos	117.13	117.13

Thank you for choosing Document Technologies, Inc.

Accepted By: 

Subtotal: 591.63

Total Sales Tax: 0.00

Total: 591.63

Remit To: Document Technologies, Inc.
 105 W. Adams St., Ste. 1100
 Chicago, IL 60603

Jan 24 05 09:48a

BOUGHTON TRUCKING

16309041436

p. 1

B O U G H T O N
TRUCKING & MATERIALS, INC.
 11746 S. NAPERVILLE-PLAINFIELD ROAD, PLAINFIELD, IL 60544

OUR TEL. NOS. 815-436-4555 and 630-759-4096
 OUR FAX NO. 630-904-1436

FACSIMILE TRANSMITTAL

DATE: 1-24-05
 TO: PAT / KEVIN
 FROM: FRANK
 NO. OF PAGES INCLUDING COVER: 10

MESSAGE: _____



INVOICE

Remit to: MACTEC Engineering & Consulting, Inc.
 Federal ID 68-0146861
 7477 Collection Center Drive
 Chicago, IL 60693-0076

To: BOUGHT TRUCKING AND MATERIALS
 11746 S. NAPERVILLE ROAD
 PLAINFIELD, IL 60544

Attn: Mr. WAYNE SZEPLAK

Project Name : BOUGHTON LITIGATION

Invoice Date : 11/26/2003

Jan 24 05 09:48a

BOUGHTON TRUCKING

16309041436

p-2

BOUGHTON TRUCKING & MATERIALS, INC.

MACTEC

Date	Type	Reference
11/26/2003	Bill	8060774

Original Amt.
179.13

	12/10/2003	
Balance Due	Discount	
179.13		
Check Amount		

52017

Payment
179.13
179.13

Cash - Checking

PCB Issues

179.13

120021 (2-03)

Jan 24 05 09:48a

BOUGHTON TRUCKING

16309041436

P. 3



INVOICE

Remit to: MACTEC Engineering & Consulting, Inc.
 Federal ID 68-0146861
 7477 Collection Center Drive
 Chicago, IL 60693-0076

To: BOUGHTON TRUCKING AND MATERIALS
 11746 S. NAPERVILLE ROAD
 PLAINFIELD, IL 60544

Attn: Mr. WAYNE SZEPLAK

Project Name : BOUGHTON LITIGATION
 Project Number: 3205030049
 Invoice Date : 16-APR-03
 Invoice Number: 6017046

For Professional Services through: 04-APR-03
 ASSIST BOUGHT TRUCKING WITH IPCB LITIGATION

Task Number 01 - LITIGATION SUPPORT
 LITIGATION SUPPORT

Title	Name	Date	Qty	UOM	Rate	Amount
Associate Engineer/Scientist	Smith, Kip J.	04/04/03	6.00	Hours	130.43	782.58
Clerical	Kohs, Theresa A	04/04/03	.25	Hours	43.48	10.87
Professional Services Subtotal						793.45
Reimbursable Expenses	Qty	UOM	Rate	Cost	Markup	Amount
3% Communication Fee						23.80
Reimbursable Expenses Subtotal						23.80
Task 01 Subtotal						817.25
Invoice Total						817.25

Project Summary

Previously Billed	0.00
Current Invoice	817.25
Total Billed To Date	817.25
Authorized Budget	2,813.00
Total Billed To Date	817.25
Remaining Authorized Budget	1,995.75

MACTEC Engineering and Consulting, Inc.
 5440 N. Cumberland Ave., Suite 250 - Chicago, IL 60656
 773-693-6030 • Fax: 773-693-6039

Jan 24 05 09:49a

BOUGHTON TRUCKING

16309041436

P. 4

BOUGHTON TRUCKING & MATERIALS, INC.

MACTEC

Date	Type	Reference
04/16/2003	Bill	8017046

Original Amt.
817.25

5/16/2003	Discount
817.25	
	Check Amount

50830

Payment
817.25
817.25

Cash - Checking

PCB Issues

817.25

176901 (5/02)



Jan 24 05 09:49a

BOUGHTON TRUCKING

16309041436

p.5



INVOICE

Remit to: MACTEC Engineering & Consulting, Inc.
 Federal ID 68-0146861
 7477 Collection Center Drive
 Chicago, IL 60693-0076

To: BOUGHT TRUCKING AND MATERIALS
 11746 S. NAPERVILLE ROAD
 PLAINFIELD, IL 60544

Attn: MR. WAYNE SZEPLAK

Project Name : BOUGHTON LITIGATION
 Project Number: 3205030049
 Invoice Date : 14-MAY-03
 Invoice Number: 8022742

For Professional Services through: 02-MAY-03
 ASSIST BOUGHT TRUCKING WITH IPCB LITIGATION

Task Number 01 - LITIGATION SUPPORT
 LITIGATION SUPPORT

Title	Name	Date	Qty	UOM	Rate	Amount
Clerical	Hill, Stephanie Lynne	04/18/03	1.00	Hours	43.48	43.48
Associate Engineer/Scientist	Smith, Kip J.	04/25/03	1.50	Hours	130.43	195.65
Professional Services Subtotal						239.13

Reimbursable Expenses	Qty	UOM	Rate	Cost	Markup	Amount
34 Communication Fee						7.17
FEDERAL EXPRESS	38101			10.11	15.0000%	11.63
Reimbursable Expenses Subtotal						18.80
Task 01 Subtotal						257.93
Invoice Total						257.93

Project Summary

Previously Billed
 Current Invoice
 Total Billed To Date

817.25 - PO # 50830
 257.93
 Bal Due

Jan 24 05 09:49a

BOUGHTON TRUCKING

16309041436

P.6

Project Name : BOUGHTON LITIGATION
Project Number: 3205030049
Invoice Date : 14-MAY-03
Invoice Number: 8022742

Authorized Budget	2,813.00
Total Billed To Date	1,075.18
Remaining Authorized Budget	<u>1,737.82</u>

Jan 24 05 09:49a

BOUGHTON TRUCKING

16309041436

p.7

BOUGHTON TRUCKING & MATERIALS, INC.

MACTEC

6/4/2003

50937

Date	Type	Reference	Original Amt.	Balance Due	Discount	Payment
05/14/200	Bill	8022742	257.93	257.93		257.93
				Check Amount		257.93



Cash - Checking

PCB Issues

257.93

176901 (5/02)

Jan 24 05 09:50a

BOUGHTON TRUCKING

16309041436

p.8

Harding Lawson Associates



Remit to: Harding Lawson Associates
 Federal ID 68-0146861
 P.O. Box 44329
 San Francisco, CA 94144

Project Name: TJBW-Boughton Trucking
 Project No. : 47668
 Invoice Date: 21-JUL-99
 Invoice No. : 193696

To: Tracy, Johnson, Bertani & Wilson
 116 North Chicago Street
 Suite 600, Two Rialto Square
 Joliet, IL

Attn: Mr. Roger Rickmon

For Professional Services through: 09-JUL-99

Professional Services						Amount
Principal Engineer						
Head, Mr. H. John	8.00 hrs @	150.00/hour	\$		1,200.00	
Senior Engineer						
Smith, Mr. Kip J.	8.00 hrs @	110.00/hour			880.00	
Accounting Technician I						
Nielsen, Ms. Jacqueline	.50 hrs @	52.00/hour			26.00	
Professional Services Total						2,106.00
Reimbursable Expenses						Amount
Communication Charge						63.18
Total Reimbursable Expenses						63.18
Total Invoice						\$ 2,169.18

Jan 24 05 09:50a

BOUGHTON TRUCKING

16309041436

P. 9

BOUGHTON TRUCKING & MATERIALS, INC.

4345

Harding Lawson Associates
09/16/99

Bill #193696

9/17/99

2,169.18

Cash - Checking Environmental Engineering Services

2,169.18

Message

ATTACHMENT 2

Page 1 of 2

Sharkey, Patricia F.

From: Michael S. Blazer [mblazer@enviroatty.com]
Sent: Sunday, January 23, 2005 1:48 PM
To: Sharkey, Patricia F.
Subject: RE: Pattermann v. Boughton; Respondent's Costs

Pat:

I have had a chance to review your list of "costs". In the context of a Voluntary Dismissal, I am unable to find any support for the award of the items you seek in either Section 2-1009 or Supreme Court Rules 208 and 219. First, the case law is clear that attorneys' fees and expenses, including travel expenses and the like, are not recoverable. See *Gilbert-Hodgman, Inc. v. Chicago Thoroughbred Enterprises, Inc.*, 17 Ill.App.3d 460 (1st Dist. 1974). Likewise, in this context, expert witness and deposition fees and expenses are not recoverable. See *Vicencio v. Lincoln-Way Builders, Inc.*, 204 Ill.2d 295 (2003); *Galowich v. Beech Aircraft Corporation*, 92 Ill.2d 157 (1982). Any reliance you may be placing on Supreme Court Rule 219(e) in this regard is misplaced, as that provision applies only to circumstances evidencing sanctionable conduct. See *Morrison v. Wagner*, 191 Ill.2d 162 (2000); *Scattered Corp. v. Midwest Clearing Corp.*, 299 Ill.App.3d 653 (1st Dist. 1998).

I note that the costs that are allowed in this context, filing fees and the like, are absent from your correspondence. In any event, as set forth in our Motion, we remain ready to pay appropriate costs upon presentation of the same. I do not, however, wish to foreclose you from substantiating your position, and I would welcome citations to any authorities that are contrary to or have overruled that set forth above.

Mike

Michael S. Blazer
Principal
The Jeff Diver Group, L.L.C.
1749 S. Naperville Road
Suite 102
Wheaton, IL 60187
(630) 681-2530
Fax: (630) 690-2812
Mobil: (708) 404-9091
mblazer@enviroatty.com

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-----Original Message-----

From: Sharkey, Patricia F. [mailto:PSharkey@mayerbrownrowe.com]
Sent: Friday, January 21, 2005 5:30 PM
To: Michael S. Blazer
Cc: Desharnais, Kevin; Gale, Michelle A.; Ter Molen, Mark R.
Subject: Pattermann v. Boughton; Respondent's Costs

1/24/2005

ILLINOIS POLLUTION CONTROL BOARD

August 7, 2003

GINA PATTERMANN,)	
)	
Complainant,)	
)	
v.)	
)	PCB 99-187
BOUGHTON TRUCKING AND)	(Citizens Enforcement - Noise, Air)
MATERIALS, INC.,)	
)	
Respondent.)	

ORDER OF THE BOARD (by N. J. Melas):

On May 23, 2003, respondent Boughton Trucking and Materials, Inc., (Boughton) filed a motion for discovery sanctions against the complainant in this proceeding, Ms. Gina Patterman (Mot.). Ms. Patterman filed this citizens' enforcement complaint against Boughton on June 17, 1999, alleging noise and air pollution violations. On June 10, 2003, Ms. Patterman filed a response to the motion for discovery sanctions (Resp.). Boughton replied to Ms. Patterman's response on June 20, 2003 (Reply). The Boughton facility is a stone quarry that produces crushed stone, located at 11746 South Naperville Plainfield Road in Plainfield, Will County.

For the following reasons, the Board grants Boughton's motion for discovery sanctions in part and denies the motion in part. The Board bars Mr. Zak from testifying at hearing regarding Boughton's noncompliance with Illinois Environmental Protection Agency (Agency) regulations and possible modifications to Boughton's facility. However, the Board does not bar any other witnesses, pleadings, or documents pertaining to the subject matter of Mr. Zak's proposed testimony, nor does the Board award Boughton attorney fees.

BACKGROUND

Boughton alleges that Ms. Patterman represented she had retained Mr. Greg Zak as an expert witness to testify at hearing. Mot. at 2. Boughton issued Mr. Zak a subpoena and sent him a notice of deposition for April 23, 2003. *Id.* In response, Mr. Zak sent Boughton a contract stating the fee for his services. Boughton informed Ms. Patterman and Board hearing officer Brad Halloran of the alleged erroneous billing. Mot. at 2. Boughton alleges that in a telephonic status conference with all three parties on March 27, 2003, Ms. Patterman stated she understood her responsibility to retain her expert witness. *Id.*

Boughton deposed Ms. Patterman on April 8, 2003. Mot. at 2. At the deposition, Boughton claims that its attorney asked Ms. Patterman to confirm that Mr. Zak would attend his deposition and Ms. Patterman stated she thought Mr. Zak would be there. *Id.*

On April 23, 2003, Mr. Zak did not appear at his scheduled deposition with Boughton. Mot. at 3. Boughton contacted Mr. Zak by telephone who responded that he had not been retained by Ms. Patterman. Boughton and Mr. Zak left a voice mail message to this effect for hearing officer Halloran. *Id.*

Ms. Patterman claims that she has retained Mr. Zak as a noise expert witness and that she is prepared to compensate him for his services. Resp. at 2. However, Ms. Patterman did not support these facts with a signed affidavit.

APPLICABLE REGULATIONS

Under Section 101.800(b), the Board will order sanctions when a party fails to comply with procedural rules, board orders or hearing officer orders. 35 Ill. Adm. Code 101.800(b). Sanctions can include barring the offender from filing pleadings or documents related to any issue to which the refusal or failure relates. 35 Ill. Adm. Code 101.800(b)(2). The Board may also bar a witness from testifying concerning that issue. 35 Ill. Adm. Code 101.800(b)(6).

In deciding what sanction to impose, the Board must consider four factors:

The relative severity of the refusal or failure to comply; the past history of the proceeding; the degree to which the proceeding has been delayed or prejudiced; and the existence or absence of bad faith on the part of the offending party or person. 35 Ill. Adm. Code 101.800(c).

BOUGHTON'S ARGUMENTS

Boughton requests the Board to bar Mr. Zak as a witness and bar any additional witnesses, pleadings, or documents pertaining to the subject matter of his testimony. Mot. at 5, 9. Boughton also asks the Board to award Boughton attorney fees attributable to Ms. Patterman's abuse of discovery process in the amount of \$19,520.25. Mot. Exh. 4.

Boughton argues that Ms. Patterman's assertion that she has retained Mr. Zak was unsupported by an affidavit as required by Section 101.504 of the Board rules, and therefore, insufficient as a matter of law. Reply at 1; citing 35 Ill. Adm. Code 101.504.

Boughton further argues that Ms. Patterman's alleged retention is late. Reply at 2. Board hearing officer Brad Halloran ordered the parties to complete all depositions by May 2, 2003. Mr. Zak's deposition was scheduled for April 23, 2003. Ms. Patterman did not seek to remedy her failure to provide Mr. Zak for deposition until she filed the response on June 10, 2003. Reply at 5.

Boughton argues that in this instance sanctions are warranted due to Ms. Patterman's negligence and abuse of Board procedural rules. Boughton contends that Ms. Patterman's history of abuse of the discovery process in this proceeding warrants sanctions. Mot. at 5-6. Boughton argues that Ms. Patterman refused to produce a document identified in her interrogatory responses pertaining to property values in the subdivision allegedly impacted by Boughton's operations. Mot. at 6. Boughton filed a motion to compel production of the document and Ms.

Patterman claimed her husband from whom she had recently separated possessed the document. Boughton subpoenaed Mr. Patterman for the document and he failed to appear at the deposition and failed to provide the subpoenaed document. Boughton argues that Ms. Patterman has failed to appear at least six status conferences set by hearing officer order. Boughton further argues that Ms. Patterman failed to provide addresses or phone numbers for two of her four witnesses that has caused Boughton significant delay in proceeding with discovery.

Boughton argues that Ms. Patterman also exhibited bad faith. Mot. at 10. Boughton opines that Ms. Patterman knew she had not retained Mr. Zak at the time she identified him as her witness. If not intentional, Boughton argues that causing Boughton to incur the expenses associated with preparing for and traveling to a deposition where the deponent did not appear was clearly negligent. Mot. at 11. Boughton contends that Ms. Patterman knew she did not retain Mr. Zak and neglected to inform Boughton.

Boughton argues that for all of these reasons, sanctions against Ms. Patterman are warranted.

PATTERMAN'S RESPONSE

Ms. Patterman's responds that Boughton has not established prejudice resulting from the delay in discovery, has not shown any bad faith on the part of Ms. Patterman. Resp. at 3-4. Ms. Patterman admits that there was a lack of clarity surrounding Mr. Zak's attendance at the deposition scheduled for April 23, 2003. Ms. Patterman states she merely *thought* that Mr. Zak would attend the deposition and that Boughton should have confirmed Mr. Zak's attendance before preparing for a deposition that was not certain to occur. *Id.*

Ms. Patterman also contends that she has officially retained Mr. Zak. Resp. at 3. Ms. Patterman argues that Boughton's contentions of bad faith are merely "unsubstantiated speculation." Resp. at 4. Ms. Patterman argues the solution is to take Mr. Zak's deposition, not bar his testimony. *Id.*

Ms. Patterman also contends that the attorney fees Boughton seeks for the cancelled deposition are unreasonable. Resp. at 4. Ms. Patterman argues the Board procedural rules do not allow the Board to monetarily sanction the offending party. Resp. at 5; citing Revision of the Board's Procedural Rules: 35 Ill. Adm Code 101-130, R00-20, slip op. at 7 (Dec. 21, 2000). Ms. Patterman further asserts that Boughton provided no breakdown of costs or other method for determining the reasonableness of the amounts sought. Ms. Patterman does concede, however, that Boughton may be arguably entitled to costs for travel to and attendance at the cancelled deposition.

DISCUSSION

In assessing whether sanctions are warranted, the Board must determine if Ms. Patterman violated a hearing officer order, board order, or procedural rule, including any subpoena issued by the Board. 35 Ill. Adm. Code 101.800(a). The Board must also consider the relative severity of the refusal or failure to comply, the past history of the proceeding, the degree to which the

proceeding has been delayed or prejudiced, and the existence or absence of bad faith on the part of the offending party. The goal of imposing discovery sanctions is to promote discovery, not necessarily to punish. IEPA v. Celotex Corp., 168 Ill. App. 3d 592, 522 N.E.2d 888 (3rd Dist. 1988).

The Board finds Ms. Patterman's conduct has amounted to an abuse of discovery and grants Boughton's motion for discovery sanctions in part. Under Section 101.616(f), failure to comply with any order regarding discovery may subject the offending persons to sanctions. 35 Ill. Adm. Code 101.616(f). Here, Mr. Zak did not appear at his scheduled deposition because Ms. Patterman had not retained him. Ms. Patterman does not dispute these facts. In addition, the hearing officer ordered that the parties complete all depositions by May 2, 2003. By not making Mr. Zak available at his scheduled deposition or any other time before May 2, 2003, Ms. Patterman did not comply with the hearing officer's order to complete all depositions by a time certain. In addition, Ms. Patterman prevented Boughton from completing any discovery deposition of her expert noise witness. Ms. Patterman has violated several hearing officer orders in the past by not appearing at status meetings and by not producing a document subpoenaed by Boughton. The Board finds that Ms. Patterman's conduct amounts to an abuse of the discovery process.

The Board will not grant Boughton's motion to bar the testimony of any other witnesses, pleadings, or documents pertaining to the subject matter of Mr. Zak's proposed testimony. However, the Board notes that the current discovery schedule set by the parties together with the hearing officer ordered all depositions completed by May 2, 2003, and all dispositive motions filed on or before May 30, 2003.

Regarding attorney fees, the appellate court has held that the Board has no authority to award attorney fees as a sanction. ESG Watts, Inc. v. PCB, 286 Ill. App. 3d 325, 337-338, 676 N.E.2d 299, 307-08 (3d Dist. 1997); see Revision of the Board's Procedural Rules: 35 Ill. Adm. Code 101-130, R00-20, slip op. at 7 (Dec. 21, 2000). Accordingly, the Board denies Boughton's motion for attorney fees.

CONCLUSION

The Board grants Boughton's motion for discovery sanctions in part and denies the motion in part. The Board bars Mr. Greg Zak's testimony at hearing, but denies Boughton's motion to bar any other witnesses, pleadings, or documents pertaining to the subject matter of Mr. Zak's proposed testimony. The Board also denies Boughton's motion for attorney fees. The Board finds the sanction it imposes today is appropriate to remedy the abuse of the discovery process the Board finds today and to promote timely discovery in the future.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on August 7, 2003, by a vote of 7-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board

Mayer, Brown, Rowe & Maw LLP

190 South La Salle Street
Chicago, Illinois 60603-3444

Main phone: (312) 782-0600
Main fax: (312) 701-7711

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Pollution Control Board

FACSIMILE COVER SHEET

FROM:	Patricia F. Sharkey	Date/time:	Tuesday, January 25, 2005 8:53:06 AM
Direct Tel:	(312) 701-7952	Pages:	46
Direct Fax:	(312)706-9113		ALL PAGES MUST BE NUMBERED

TO THE FOLLOWING:

Name	Company	Fax #	Telephone #
Bradley L. Halloran	IPCB	814-3669	814-8917

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