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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

JAN 25 2005

GINA PATTERMANN

Complainant,

v.

BOUGHTON TRUCKING AND MATERIALS,
INC.

Respondent.

PCB 99-187

(Citizen Enforcement,
Noise & Air)

STATE OF ILLINOIS
Pollution Control Board

NOTICE OF FILING

To: See Attached Certificate of Service

PLEASE TAKE NOTICE that on the 25th day of January, 2005, the undersigned caused to be filed with the Illinois Pollution Control Board COMPLAINANT'S MOTION FOR EXPEDITED REVIEW AND FOR LEAVE TO FILE REPLY MEMORANDUM, a copy of which is herewith served upon you.

THE JEFF DIVER GROUP, L.L.C.



By: _____

Michael S. Blazer
THE JEFF DIVER GROUP, L.L.C.
1749 S. Naperville Road, Suite #102
Wheaton, IL 60187
(630) 681-2530

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**COMPLAINANT'S MOTION FOR EXPEDITED REVIEW
AND FOR LEAVE TO FILE REPLY MEMORANDUM**

Now comes Complainant, Gina Pattermann ("Pattermann"), by her attorneys, and for her Motion pursuant to 35 IAC 101.512 for Expedited Review of her previously filed Motion for Voluntary Dismissal and pursuant to 35 IAC 101.500 for Leave to File a Reply Memorandum, states:

1. This matter is currently scheduled to proceed to hearing on January 31, 2005. On January 20, 2005, Pattermann filed her Motion for Voluntary Dismissal pursuant to 35 IAC 101.500(a) and 735 ILCS 5/2-1009. Unfortunately, this Board is not scheduled to meet to rule on the Dismissal Motion before the hearing is scheduled to commence.¹

2. Absent limited circumstances not present in this case, §2-1009 provides a plaintiff or complainant with an unfettered right to dismissal without prejudice. See *Morrison v. C.G. Wagner*, 191 Ill.2d 162, 165 (2000).

3. Under the circumstances, Pattermann would be materially prejudiced by being forced to proceed to hearing while her Motion is awaiting ruling by this Board, including being faced with the choice of either accepting a default or the wholly unnecessary expenditure of resources that proceeding to hearing would entail.

4. In addition, as a result of the filing of the pending Motion, Pattermann ceased

¹ Pattermann has concurrently herewith, and for the same reasons set forth herein, filed a Motion to Cancel the pending hearing dates with Hearing Officer Halloran.

preparation for hearing and, among other things, both parties failed to exchange trial exhibits as required by the Joint Pre-Trial Memorandum previously filed in this matter. Pattermann's counsel has thus not had an adequate opportunity to prepare for either segment of the hearing.

5. These draconian consequences would be obviated if this Board could consider the pending Motion before January 31.

6. In addition, Pattermann was served with Respondent's Response and Objection to the pending Motion on January 24, 2005. Said Response is rife with misstatements of law and fact regarding both the prior history of this case and the principles applicable to a Motion for Voluntary Dismissal. This includes misrepresentations regarding the "costs" that may be awarded in the context of a Motion for Voluntary Dismissal and when that determination must be made. This was the subject of an e-mail transmitted to Respondent's Counsel by Pattermann's counsel on January 23, 2005. A copy of this e-mail is attached to the Certification of Counsel which follows this Motion.

7. Under the circumstances, Pattermann requests leave to file a short Reply Memorandum. Said Memorandum could be filed within one day of leave being granted

Based on the foregoing, Pattermann requests that this Board grant her leave to file a Reply Memorandum and that it rule on the Motion for Voluntary Dismissal prior to January 31.

Respectfully submitted,
Gina Pattermann



By: _____
One of her attorneys

Michael S. Blazer
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Wheaton, IL 60187
630-681-2530

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CERTIFICATION

Under penalties as provided by §1-109 of the Illinois Code of Civil Procedure,
Michael S. Blazer hereby certifies as follows:

1. I am lead counsel for Gina Pattermann ("Pattermann"), the Complainant herein, and am the attorney responsible for conducting the public hearing in this matter.
2. On the morning of January 20, 2005, in advance of the telephonic status conference scheduled for that day, I called counsel for Respondent to advise them that Pattermann had that morning elected to exercise her right under §2-1009 of the Illinois Code of Civil Procedure and that I had been directed to move for Voluntary Dismissal of this matter. I confirmed this during the status conference later that day and also served and filed the subject Motion that day.
3. As a result of the decision to seek Voluntary Dismissal, no further hearing preparation was conducted by Pattermann and no exhibits were exchanged by either of the parties, as otherwise provided by the Joint Pre-Trial Memorandum filed in this matter.
4. At this juncture, I have no ability to proceed forward with the hearing in this

matter, nor have I had the opportunity to properly prepare witnesses or hearing exhibits, or identify and review Respondent's proposed exhibits.

5. Pattermann would be materially prejudiced if she were required to proceed to hearing under these circumstances and in light of the pending Motion to Dismiss.

6. In addition, Pattermann was served with Respondent's Response and Objection to the pending Motion for Voluntary Dismissal on January 24, 2005. Among other things, said Response contains misrepresentations regarding the "costs" that may be awarded in the context of a Motion for Voluntary Dismissal and when that determination must be made. This was the subject of an e-mail transmitted to Respondent's Counsel by me on January 23, 2005. A copy of this e-mail is attached as Exhibit A.

Further affiant sayeth not.



Michael S. Blazer

EXHIBIT A**Michael S. Blazer**

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

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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

1/25/2005

Mike - As discussed on the phone this afternoon, I am attaching a letter with a preliminary statement of Boughton's "costs" within the meaning of Section 5/2-1009 and invoices. We have limited this to costs which are expressly authorized under the Code and Supreme Court Rule 208 and 219. I don't have the Kip Smith invoice in hand right now, but can obtain it Monday. Have a good weekend. -Pat

<<Boughton.PDF>> <<Letter.PDF>>

Patricia F. Sharkey
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused the above and foregoing Notice of Filing and COMPLAINANT'S MOTION FOR EXPEDITED REVIEW AND FOR LEAVE TO FILE REPLY MEMORANDUM, to be served via facsimile transmission upon the following:

Bradley P. Halloran
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601
Fax No. (312) 814-3669

Patricia F. Sharkey
Kevin G. Deshamais
Mayer, Brown, Rowe & Maw
190 S. LaSalle Street
Chicago, IL 60603
Fax No. (312) 706-9113

on this 25th day of January, 2005.



Michael S. Blazer