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FEB 14 2005

STATE OF ILLINOIS  
Pollution Control Board

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

GINA PATTERMANN

Complainant,

v.

BOUGHTON TRUCKING AND MATERIALS,  
INC.

Respondent.

PCB 99-187

(Citizen Enforcement,  
Noise & Air)

**NOTICE OF FILING**

To: See Attached Certificate of Service

PLEASE TAKE NOTICE that on the 11<sup>th</sup> day of February, 2005, the undersigned caused to be filed with the Office of the Clerk of the Pollution Control Board the COMPLAINANT'S RESPONSE TO RESPONDENT'S MOTION FOR LEAVE TO FILE INSTANTER, 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  
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(630) 681-2530

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**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

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	)	Noise & Air)
BOUGHTON TRUCKING AND MATERIALS,	)	
INC.	)	
	)	
Respondent.	)	

STATE OF ILLINOIS  
Pollution Control Board

**COMPLAINANT'S RESPONSE TO  
RESPONDENT'S MOTION FOR LEAVE TO FILE  
SUPPLEMENTAL RESPONSE TO MOTION FOR VOLUNTARY DISMISSAL**

Now comes Complainant, Gina Pattermann ("Pattermann"), by her attorneys, and for her Response to the Motion of Respondent, Boughton Trucking and Materials, Inc. ("Boughton") for Leave to File a Supplemental Response Instantly, states:

1. Had Boughton truly wished to merely add one invoice to its prior Response, the simple expedient of tendering an additional exhibit would have sufficed. Boughton's current filing goes much farther and reflects a transparent attempt to further assert its improper effort to recover "costs" to which Boughton is not entitled.

2. As things now stand, there is pending before this Board Pattermann's Motion for Leave to file a Reply Memorandum, in large part to fully address Boughton's improper claims for "costs".<sup>1</sup> As indicated in that pending Motion, Pattermann's counsel provided Boughton's counsel with the case citations that identify the costs to which Boughton would be entitled in the context of Pattermann's Motion for Voluntary Dismissal. A copy of counsel's e-mail of January 23, 2005 is attached hereto as Exhibit

<sup>1</sup> As originally filed, the subject Motion also sought an expedited ruling by this Board regarding the pending Motion for Voluntary Dismissal, because of the pendency of the scheduled hearing in this matter. The Hearing Officer has since cancelled that hearing, leaving the request to file a Reply Memorandum as the primary object of the Motion.

A. More important, the subject e-mail pointed out cases confirming the costs to which Boughton is not entitled.

3. Despite the foregoing, Boughton persists in its pursuit of its excessive costs. Its effort is wholly inappropriate and finds no support in the Board's rules. Under the circumstances, Boughton's Motion for Leave to File Instanter should be denied.

Respectfully submitted,

Gina Pattermann



By: \_\_\_\_\_  
One of her attorneys

Michael S. Blazer  
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## EXHIBIT A

**Michael S. Blazer**

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**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 MEMORANDUM IN RESPONSE TO RESPONDENT'S MOTION FOR LEAVE TO FILE INSTANTER, all on behalf of the Complainant, 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 11<sup>th</sup> day of February, 2005.

THE JEFF DIVER GROUP, L.L.C.



By: \_\_\_\_\_

Michael S. Blazer