

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD **RECEIVED**
CLERK'S OFFICE

CITY OF CHICAGO DEPARTMENT)
OF ENVIRONMENT,)

Complainant,)

v.)

SPEEDY GONZALEZ LANDSCAPING,)
INC.,)

Respondents.)

Site Code:0316485103
AC: 2006-039
(CDOE No. 06-02-AC)

JUN 30 2008
STATE OF ILLINOIS
Pollution Control Board

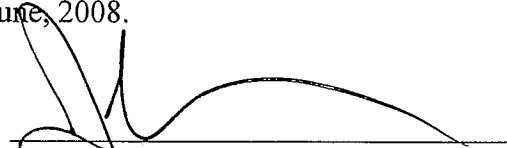
NOTICE OF FILING

TO: Mr. Bradley P. Halloran
Illinois Pollution Control Board
100 West Randolph Street, Suite 11-500
Chicago, Illinois 60601

Ms. Jennifer A. Burke
City of Chicago, Dept. of Law
30 North La Salle Street, Suite 900
Chicago, Illinois 60602

PLEASE TAKE NOTICE that we have this day filed with the Clerk of the Illinois Pollution Control Board, Respondent's **Sur-Reply Brief**.

Dated at Chicago, Illinois, this 30th day of June, 2008.



JEFFREY J. LEVINE, P.C.
Attorney for Respondent
SPEEDY GONZALEZ LANDSCAPING, INC.

Jeffrey J. Levine, P.C. #17295
20 North Clark Street, Suite 800
Chicago, Illinois 60602
(312) 372-4600

PROOF OF SERVICE

The undersigned, being first duly sworn on oath, deposes and says that he served a copy of the Notice together with the above mentioned documents to the person to whom said Notice is directed, this 30th day of June, 2008.



JEFFREY J. LEVINE, P.C.

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SPEEDY GONZALEZ LANDSCAPING, INC.'S SUR-REPLY

Now comes the Respondent, SPEEDY GONZALEZ LANDSCAPING, INC., by and through it's counsel Jeffrey J. Levine, P.C., and for its Sur-Reply, states and asserts as follows:

1. Confronted with allegations substantiated by no evidence and a likelihood that its witness, Rafael Maciel, the senior environmental inspector, withheld discovery, sought bribes and committed perjury at the hearing of the matter, the City of Chicago in its May 13, 2008, Reply Brief, seeks to ignore its witnesses' testimony, amend the charges and change the law.

2. The City argues that Respondent is Liable for violations as it was the source of waste and litter on the site. The investigation conducted by City personnel, revealed from the truck manifests, that it was the CTA which was the actual source of waste and litter on the site. May 9. 2007, Tr. 32, 49-51, 87.

Tanker Truck

3. The City devotes two pages to its argument that a tanker truck, being stored on the site, formerly owned by Respondent, was a "significant piece of waste and litter." The city concedes in its Reply that there was no evidence presented that Respondent SPEEDY GONZALEZ LANDSCAPING, INC., presently owns the tanker truck. In fact, the only connection to Respondent

to the site is Respondent's name on the side of the tanker. The City had argued that the tanker and a flatbed truck demonstrated this Respondents access and control over the site. See: Complainant's Post Hearing Brief at p. 4.

4. The argument made by the City is in direct contrast to the city's main witness, investigator Rafael Maciel. That witness specifically testified under oath at his deposition that the tanker truck on the site was not a violation. See: Macial's 12/06/06 Deposition at p. 148, attached hereto as Exhibit A. Under any minimal due process requirements, a defendant is allowed to know the claim made against him so that he may defend against said claim.

5. The tanker truck is not a violation. The Complainant's witness testified under oath that the truck was not a violation. The City's argument that the truck constitutes a violation is contrary to it's own witness and the evidence it presented throughout the discovery process as well as at hearing.

6. While Mr. Gonzalez expresses his intentions as to the tanker, the City attributes these intentions to the Respondent SPEEDY GONZALEZ LANDSCAPING, INC., the entity that use to own the tanker. Further, during his testimony Mr. Macial referred to the Respondent as "he" and mistook the corporate entity as Mr. Gonzalez. May 9. 2007, Tr. 68 (line 6) 130 (line 7). Macial agreed that, other than the tanker, the only connection that the Respondent landscape company had to the property was the presence of Mr. Gonzalez. May 9. 2007, Tr. 99, 153

7. The alleged violations against Respondent SPEEDY GONZALEZ LANDSCAPING, INC., also contained baseless allegations regarding securing the property, salt unloading operations, ACM or asbestos, waste next to residential homes and oil flowing into the sewer. May 9. 2007, Tr. 68, 129-32. Macial, a senior environmental inspector (May 9. 2007, Tr. 7), contended that these charges were put into his investigative report because Respondent Speedy Gonzalez Landscaping, Inc., committed the additional offenses (May 9. 2007, Tr. 130). Macial however had no evidence that the

offenses occurred. May 9, 2007, Tr. 68, 129-32. Mr. Maciel concluded that he had “no idea” why the violations were charged when there was no basis for them. May 9, 2007, Tr. 132.

8. Maciel concluded that he had no knowledge or information whether Respondent Speedy Gonzalez Landscaping, Inc., caused or allowed any of the alleged violations. May 9, 2007, Tr. 41-2, 152-55. Respondent contends that these baseless charges were a result of Respondents refusal to “work out” the violations.

9. Unlike the authority offered by the City, the truck cannot be considered an abandoned vehicle which has been discarded improperly which would categorize it as litter or waste. In *County of Sangamon v. Daily*, AC 01-16 (IPCB Jan. 10, 2002), respondent argued that he had expressed an intention to use every single discarded item on his property. The evidence revealed however, that “the items were clearly not stored in such a way as to protect their future use.” The vehicle was not surrounded by high vegetation. See: *IEPA v. Gruen*, AC 06-49, (IPCB Jan. 24, 2008). Gruen also admitted that the truck beds and debris therein and a boat were ‘unuseable’ therefore constituting waste. No evidence was presented regarding the storage of the tanker. The City’s authority holds that for items to be waste they must be stored in such a way as to protect any future use. Finally, the City concedes that there is no evidence that Respondent (“the former owner of the tanker”) is the current owner of the tanker.

10. The City also has failed to demonstrate that Respondent had the capability of control of the premises or was in control of the premises where the pollution occurred. *IEPA v. Cadwallar*, AC 03-13 (IPCB May 20, 2004), quoting *People v. A. J. Davinroy Contractors*, 249 Ill.App.3d 788, 793-96, 618 N.E. 2d 1282, 1286-88 (5th Dist. 1993). The City’s Reply brief implies that access to a property equates to control over said property. Such a result would hold all citizens responsible for any garbage dumped in City parks.

Landscape Waste

11. The Complainant's witness denied that Respondent caused or allowed any of the alleged violations. Mr. Macial testified that the waste material originated from the CTA. May 9, 2007, Tr. 25. With this solid foundation, the City now argues that Respondent's access to the site qualifies as control and that Respondent was the likely source or generator of materials as they are "commonly used in the landscaping industry." The City concludes that this "supports a conclusion that waste and litter on the site were discarded there by Respondent."

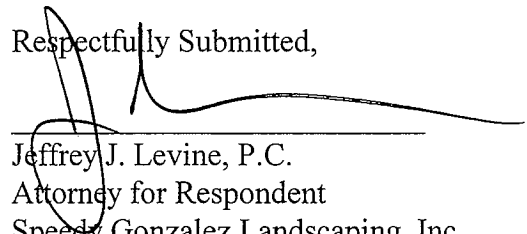
12. The City's witness withheld information such as business cards and field notes. May 9, 2007, Tr. 53, 59. He testified that he only provided selective information at his deposition. May 9, 2007, Tr.118. He determined that the waste and litter was from the CTA. May 9, 2007, Tr. 25. Absent any evidence, the City, rather than gracefully dismissing the charges, seeks to hold Respondent responsible for what is literally its own mess.

13. No waste or litter is directly attributable to the Respondent. Mr. Macial determined that other uncharged entities were responsible for the waste and litter. Rather than causing or allowing the litter, the City found that the CTA's mess was being cleaned and removed from the site, yet Macial lied under oath as to the actions of the trucks. May 9, 2007, Tr. 160. This cleanup was not presented as a defense but rather evidence that the waste was neither caused or allowed by the owner of the land. Macial testified that in other cases he allows time to clean the waste. May 9, 2007, Tr. 159-60, 168.

14. The City is seeking to justify the actions of Mr. Macial who offered to "work out" the alleged violations and threatened a loss of future City contracts. May 9, 2007, Tr. 126-27, 204. The City has the burden of proof in these hearings. 415 ILCS 5/31.1(d)(2)(2004); 35 Ill. Admn. Code 108.400. With a witness such as Macial, it cannot meet its burden.

Wherefore, for the above and forgoing reasons, Respondent Speedy Gonzalez Landscaping, Inc., prays that the Illinois Pollution Control Board dismiss Complainant's Administrative Citation and for such further relief as it deems just and equitable.

Respectfully Submitted,



Jeffrey J. Levine, P.C.
Attorney for Respondent
Speedy Gonzalez Landscaping, Inc.

Dated: June 30, 2008

Jeffrey J. Levine, P.C. #17295
20 North Clark Street, Suite 800
Chicago, Illinois 60602
(312) 372-4600

DEPOSITION OF RAFAEL MACIEL

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

CITY OF CHICAGO DEPARTMENT OF ENVIRONMENT, Complainant, vs. AC 06-39 (CDOE No. 06-02--AC)
 SPEEDY GONZALEZ LANDSCAPING, INC., Respondent.

CITY OF CHICAGO DEPARTMENT OF ENVIRONMENT, Complainant, vs. AC 06-40 (CDOE No. 06-03--AC)
 JOSE R. GONZALEZ, Respondent.

CITY OF CHICAGO DEPARTMENT OF ENVIRONMENT, Complainant, vs. AC 06-41 (CDOE No. 06-01--AC)
 1601-1759 EAST 130th STREET, L.L.C., Respondent.

The deposition of RAFAEL MACIEL, taken before Sharon Valli, Certified Shorthand Reporter and Notary Public, taken pursuant to the rules governing the Illinois Pollution Control Board pertaining to the taking of depositions for the purpose of discovery at 20 North Clark Street, Suite 800, Chicago, Illinois, commencing at 2:14 p.m. on the 6th of December, A.D., 2006.

ORIGINAL

1		<u>I N D E X</u>	
2	<u>WITNESS</u>		<u>PAGE</u>
3	RAFAEL MACIEL		
4	Examination by Mr. Levine	4
5			
6			
7		<u>E X H I B I T S</u>	
8	<u>DEPOSITION EXHIBIT</u>		<u>PAGE</u>
9	Exhibit A	32
10	Exhibit B	24
11	Exhibit C	88
12	Exhibit D	142
13	(Exhibits retained by Mr. Levine by agreement of counsel.)		
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1 APPEARANCES:

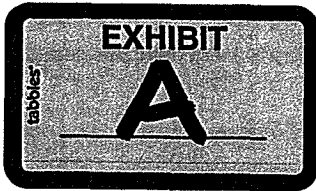
2 CITY OF CHICAGO, DEPARTMENT OF LAW
 3 MS. JENNIFER BURKE
 4 MR. GRAHAM G. McCAHAN
 5 30 North LaSalle Street
 6 Room 900
 7 Chicago, Illinois 60602
 8 Phone: (312) 742-3990; (312) 744-1438

9 On behalf of the Complainant;

10 JEFFREY J. LEVINE, P.C.
 11 MR. JEFFREY J. LEVINE
 12 20 North Clark Street
 13 Suite 800
 14 Chicago, Illinois 60602
 15 Phone: (312) 372-4600

16 On behalf of the Respondent.

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1 MR. LEVINE: Let the record reflect that this is the
 2 discovery deposition of -- Could you please state your
 3 name?

4 THE WITNESS: Rafael Maciel.

5 MR. LEVINE: Maciel?

6 THE WITNESS: Yes.

7 MR. LEVINE: (Continuing.) -- Maciel taken pursuant
 8 to a notice out -- because I will send a notice out --
 9 pursuant to a notice that will be sent out at some point
 10 in three different cases. And the cases are: City of
 11 Chicago Department of Environment vs. Jose Gonzalez --
 12 Which number do you go by, the top one?

13 MS. BURKE: Mm-hmm.

14 MR. LEVINE: (Continuing.) -- AC 06-40; City of
 15 Chicago Department of Environment vs. Speedy Gonzalez
 16 Landscaping, Incorporated, Case No. AC 06-39; and City of
 17 Chicago Department of Environment vs. 1601-1759 East
 18 130th Street, L.L.C., Case No. AC 06-41.

19 Will you please swear the witness?
 20 (Witness sworn.)

21 WHEREUPON:
 22 RAFAEL MACIEL,
 23 called as a witness herein, having been first duly sworn,
 24 was examined and testified as follows:

1 handwriting on it. Is that part of your --
 2 MS. BURKE: I think it's on there.
 3 THE WITNESS: It's on there.
 4 MR. LEVINE: Is it?
 5 MS. BURKE: Exhibit B.
 6 THE WITNESS: Right.
 7 BY MR. LEVINE:
 8 Q. Oh, I'm sorry. Yeah. Directing your attention
 9 to Exhibit B, page 2, marked as 7 at the bottom, is that
 10 your signature on the bottom?
 11 A. It is, correct.
 12 Q. And did you complete the report?
 13 A. The report was completed by -- with myself and
 14 Christopher Antonopoulos.
 15 Q. And was the investigation ever completed?
 16 A. The investigation was completed? No.
 17 Q. Okay. What needed to be done with the
 18 investigation as far as you know?
 19 A. Well, we had to find out exactly where the
 20 material -- who was going to dispose of the material, how
 21 it was going to be disposed of, who were the responsible
 22 parties for the material being there. I mean, there was
 23 so many different angles before we could finish off the
 24 investigation, subsequently, close it out.

1 Q. Was that completed at some time?
 2 A. To my knowledge, no. I have no idea.
 3 Q. Who would have been responsible for completing
 4 the investigation?
 5 A. My supervisor, Stanley Kaehler. You have John
 6 Kryl, who is director of inspection.
 7 Q. How about Chris?
 8 A. Well, Chris was just an investigator just like
 9 me. So ...
 10 Q. With regard to the site conditions, I'm going
 11 to go through a couple of things. The stone piles, that
 12 was the clean stone?
 13 A. I have no idea.
 14 Q. Those were the piles listed in --
 15 A. Yeah. I would say yes, it is.
 16 Q. Okay. And do you know whether those were
 17 pollution or waste?
 18 A. I wouldn't say that they were.
 19 Q. With regard to the debris piles, the debris
 20 piles, I'm assuming, are the small piles all around the
 21 edges of the berm, correct?
 22 A. Correct.
 23 Q. And you stated you had no information whether
 24 any defendant caused or allowed those piles to be placed

1 there, correct?
 2 A. Correct.
 3 Q. With regard to the suspected CTA material which
 4 you later learned to be the CTA material ...
 5 A. Yeah. We still haven't -- To my knowledge, I
 6 have no idea if it was still CTA material.
 7 Q. Well, you previously testified that it was from
 8 the CTA, correct?
 9 MS. BURKE: No, he did not. That is
 10 mischaracterizing his testimony. I object.
 11 BY MR. LEVINE:
 12 Q. Did you subsequently learn from talking to
 13 people and checking manifests that this material came
 14 from the CTA Brown Line?
 15 A. Like I said, during the process of my
 16 investigation, there was so many clashing stories. The
 17 people, as far as the drivers and operators there, they
 18 told me the material was coming from a CTA project.
 19 Chuck Webber had stated at first that it was from a CTA
 20 project. And then you had Paschen who rebutted that and
 21 said that material was not from the CTA project.
 22 Q. Does anyone know at the City of Chicago where
 23 the material is from?
 24 A. To my knowledge, I have no idea.

1 Q. Okay. The compost pile, do you know whether --
 2 do you have any information whether any defendant caused
 3 or allowed the placement of that compost pile on the
 4 yard?
 5 A. To my knowledge, no.
 6 Q. With regard to the timber with possible
 7 arsenic -- not arsenic. Is it creosote?
 8 A. Yes.
 9 Q. Do you have any knowledge whether or not any
 10 defendant caused or allowed the material to be placed in
 11 the yard?
 12 A. To my knowledge, no.
 13 Q. You list 50 waste tires. Do you have any
 14 knowledge whether any defendant caused or allowed the
 15 material to be placed in the yard?
 16 A. To my knowledge, no.
 17 Q. Now, there's a dump truck, a tanker truck, and
 18 a flatbed parked and labeled on-site. Is that a
 19 violation?
 20 A. Is that a violation?
 21 Q. Yeah.
 22 A. No.
 23 Q. No. Okay. That's just parked trucks?
 24 A. Yes.