

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

STEPHEN AND KATHY DARNEY,  
Personally and on behalf of K. AND S. D.

Plaintiffs,

v.

DRAGON PRODUCTS COMPANY,  
LLC,

Defendant.

CIVIL ACTION

DOCKET No.: 2:08-cv-47

**DEFENDANT’S POST-TRIAL MEMORANDUM OF LAW**

This Court conducted a bench trial on October 26, 27 and 28, 2010 and on November 1 and 2, 2010 of the Plaintiffs’ (“Plaintiffs” or the “Darneys”) claims against the Defendant (“Dragon”) for nuisance, common law trespass, statutory trespass, negligence, strict liability, and for injunctive relief. The parties stipulated that the Darneys’ claims are limited to the period from November 12, 2004 to April 17, 2009. *See* Joint Stipulations (Oct. 20, 2010) at 1; *see also* Transcript of Proceedings (hereinafter “Tr.”) at 164:13-165:5. The Darneys failed to prove any of their claims at trial.

At the conclusion of the trial, the Court requested the parties to submit Proposed Findings of Fact and Conclusions of Law, and a memorandum of law in support of those submissions. This is Dragon’s memorandum of law.

**EVIDENCE ADDUCED AT TRIAL**

**A. Dragon Products Company, LLC.**

Dragon manufactures cement and operates a cement-manufacturing facility in Thomaston, Maine, east of town, along United States Route One. Tr. at 896:10-21. Dragon’s plant is located on one side of Route One, while its quarry is located on the opposite side of

Route One. Tr. at 896:10-21. Cement manufacturing has been taking place at Dragon's facility since 1928. Tr. at 896:22-24. Quarrying operations have been taking place in the Thomaston/Rockland/Rockport/Camden area since the 1800s, and have likely been taking place in Dragon's quarries since prior to 1928. Tr. at 896:25-897:6. Dragon is New England's only cement manufacturer. Tr. at 897:7-10.

Dragon currently employs 97 employees at its Thomaston facility, paying payroll and benefits to them of approximately \$5 million. Tr. at 898:6-9. Prior to the current recession, during its peak employment numbers, Dragon paid out about \$8.2 million in wages and benefits a year. Tr. at 898:25-899:4.

Dragon currently pays about \$1.2 million in annual property taxes to the Town of Thomaston. Tr. at 899:5-12.

In 2004, Dragon completed a \$50 million modernization project to convert its plant in Thomaston to the modern "dry" process of manufacturing cement, which is more energy efficient than the "wet" process previously employed. Tr. at 899:13-900:9.

**B. The Darneys.**

The Darneys purchased their residence, located at 24 Old County Road, Thomaston, Maine, on February 8, 2002 for \$80,500. Tr. at 431: 4-5, 519: 19-4, 1010:6-11; Trial Exhibit (hereinafter "Ex.") 6. The house, which was built in 1844, is located near Route One. Tr. at 519:22-24, 521:7-11. Both Old County Road and Route One are busy roads with traffic noise that can be quite loud. Tr. at 521:-18-20. Both Old County Road and Route One are sanded and salted in the winter. Tr. at 521:15-17.

The Darneys were assisted by a real estate broker, Monroe Hall, in the purchase of their house. Tr. at 673:9-9, 1010:2-14. When the Darneys viewed the house before purchasing it,

they saw a Dragon sign on Old County Road which indicated that Dragon conducted blasting operations. Tr. at 435:18-436:2, 441:15-23. The Darneys also saw the plant on Route One. Tr. at 437:1-6. After the Darneys looked at their house, they drove with Monroe Hall from 24 Old County Road to Route One and turned onto Route One heading towards Rockland. Tr. at 1011:13-1012:13. As they drove on Route One, they drove directly in front of Dragon's plant. *Id.* Mr. Hall testified that the Darneys asked him what the plant was; he told them it was Dragon Cement and explained that Dragon ground up limestone and manufactured cement with the limestone. *Id.* He also testified that he told the Darneys that Dragon's plant was responsible for the real estate prices in the area being "reasonable." *Id.*

Notwithstanding the hellish conditions allegedly caused by Dragon, The Darneys believe that their house is currently worth \$140,000. Tr. at 522:11-15.

### **C. Evidence Relating to Blasting.**

The Darneys assert claims against Dragon for common law trespass, statutory trespass, nuisance, negligence and strict liability on the basis of vibrations from blasting. *See* Complaint at ¶¶ 35, 40, 46, 52; First Amended Complaint at ¶ 62. They allege their property has suffered the following damage from Dragon's blasting operations:

- A retaining wall next to their barn has shifted, Tr. at 445:2-5. The Darneys presented no evidence as to when such damage occurred.
- A cement step has separated from their deck, Tr. at 445:10-13. The Darneys presented no evidence as to when such damage occurred.
- A small border of railroad ties now slants down the hill, Tr. at 445:13-17. The Darneys presented no evidence as to when such damage occurred.
- Their chimney shifted and cracked which has caused water leaks, water stains, cracks and mold in the ceiling of the master bedroom; peeling paint, rusty-colored spots and water stains on the master bedroom ceiling; and water to come down flashing and wash down chimney into beams and rot their ceiling. Tr. at 389:12-14, 393:4-8, 444:22-445:5, 445:24-446:9; 508:1-4, 686:20-23, 695:17-24. The leaks

associated with the chimney began on February 3, 2004. The only evidence presented by the Darneys is their own testimony. Tr. at 688:2-689:11, 691:4-14. The ceiling in the master bedroom still looks like it did in February 2004. Tr. at 717:13-718:18, Exs. 102A, 102B.

- Cracks have appeared in the mortar inside of their chimney and that mortar has fallen out of their chimney, Tr. at 508:12-509:9. The Darneys presented no evidence as to when such damage occurred.
- Cracks have appeared in their son's room, Tr. at 444:22-445:5, 694:5-695:16, 696:8-23. The cracks in their son's room first appeared around February 2004 and since then the cracks remain pretty much the same today or have possibly grown no more than six inches in either direction. Tr. at 717:18-718:3, 719:12-720:22, Exs. 102C, 102D. The only evidence presented is the Darneys' own testimony.
- Cracks have appeared in their stairway, 697:3-12, 720:8-721:5. The cracks first appeared in February 2004, and since then have gotten a little bit longer and opened up a little more. Tr. at 721:1-5. The only evidence presented is their own testimony.
- Window sills separated from vertical molding, Tr. at 703:7-18. The only evidence presented is their own testimony.
- Cracks have appeared in some of their barn windows, 447:3-8, 709:4-7. However, the Darneys presented no evidence as to when such damage occurred.
- Their barn is settling, Tr. at 709:24-710:6. However, the Darneys presented no evidence as to when such damage occurred.
- Their side garden has shifted, Tr. at 444:22-445:5. However, the Darneys presented no evidence as to when such damage occurred.

When blasting occurs, the Darneys allege that they feel vibrations from the blasts, that they hear windows rattling, that they hear dishes and glasses rattle, that their chandelier shakes, and that the blasts frighten their children. Tr. at 446:12-16, 507:23-25, 510:10-511:22. The Darneys offered no expert testimony in support of their allegations, and they have not allowed a seismograph to be placed on their property to measure the vibration created by Dragon's blasting. Exs. 51, 81. The Darneys offered no admissible expert testimony as to the source or cost of repair of the damages they have attributed to Dragon's blasting.

It is possible for blasting to cause damage to buildings from fly rock, ground vibration, and air blast. Tr. at 842:12-18. The United States Bureau of Mines has determined that ground vibrations of 0.5 inches per second or more can cause cosmetic damage to plaster walls in houses, and that ground vibrations of 0.75 inches per second or more can cause cosmetic damage to drywall. Tr. at 844:12-846:13, Ex. 117 at 4. The United States Bureau of Mines has also determined that normal, everyday environmental changes, such as weather changes or changes in humidity or temperature can result in strains to residential structures equivalent to ground vibrations of 1.2 inches per second. Tr. at 847:12-21. Further, the United States Bureau of Mines determined that human activity, such as slamming doors or jumping, can produce vibrations equal to between 0.2 and 0.4 inches per second of ground vibrations. Tr. at 848:10-13.

There is no evidence of any incident in which Dragon's blasting has generated fly rock. Tr. at 505:9-10, 889:12-22, 723:4-11.

At trial, Dragon presented the testimony of Andrew McKown, Dragon's retained blasting expert. Mr. McKown's area of expertise is drilling and blasting. Tr. at 839:12-15. Mr. McKown also has extensive experience with quarries and is familiar with quarries in New England, in particular. Tr. at 840:1-14, 841:7-9. In preparation for his testimony Mr. McKown reviewed Dragon's blasting records for all blasts which occurred between November 12, 2004 and April 17, 2009. Tr. at 849:20-24. *See e.g.*, Tr. at 929:21-930:11; Ex. 41, 43, 45, 47, 49 (examples of blasting records). This included seismographic records taken at the Darney residence for two blast events. Tr. at 849:25-853:10; Exs. 30, 31. Mr. McKown also reviewed a significant number of videos of blasts conducted by Dragon. Tr. 882:7-9. *See e.g.*, Tr. at 930:12-24; Exs. 40, 42, 44, 46, 48 (examples of videos of blasts). Finally, Mr. McKown

observed Dragon's blasting techniques for the loading and firing of a typical blast. Tr. at 854:24-855:24, 923:17-924:11.

Mr. McKown testified that in his expert opinion, no ground vibrations occurred at the Darney residence during the relevant period as a result of Dragon's blasting which exceeded 0.1 inch per second. Tr. at 849:13-853:20. In his opinion, Dragon did not generate any vibration which caused damage to the Darney residence during the relevant period. Tr. at 849:13-853:26.

To prevent damage, the United States Bureau of Mines established a safe limit for air blast of 133 decibels, which was designed to prevent rattling of windows. Tr. at 853:21-854:23. Damage to windows from air blast does not occur until 170 decibels, and structural damage can occur at 180 decibels. Tr. at 807:4-7. Mr. McKown testified that at all times at the Darney residence, air blasts were below 133 decibels; no air blasts generated by Dragon's blasting operations have caused any damage to the Darneys' windows or home. Tr. at 854:4-23.

The Darneys were previously on a list to be called by Dragon before blasts occurred and given advance notice of blasts. Tr. at 521:21-24, 723:13-724:13; Ex. 50. However, the Darneys no longer receive such calls because they disconnected their land-line telephone and decided not to give Dragon any other number to call. Tr. at 522:2-10, 724:16-725:6.

Dragon takes the following steps to minimize ground vibrations from its blasting operations:

- Proper burden and spacing are designed into the shot and the shot is measured in the field using a laser measurement device to measure from the front row of holes to the free face. Tr. at 931:3-8.
- Dragon uses a 14 foot burden by 14 foot of spacing, as provided for in its Blasting Plan. Tr. at 931:12-13; Ex. 112.1.
- Dragon verifies the depth of the blasting holes and measures the holes as they are being loaded to ensure there are no voids in the holes and are not being over-loaded. Tr. at 931:21-932:13.

- Dragon uses delays in its explosives to reduce the pounds per delay in a given shot, so as to reduce ground vibrations from the explosion. Tr. at 932:17-933:14.
- Dragon has videotaped shots of explosives in its quarry for the purpose of reviewing them for quality-control purposes. Ex. 79 at 9; *see e.g.*, Exs. 40, 42, 44, 46, 48.
- Dragon has identified sensitive areas in the quarry and takes appropriate measures to minimize vibrations from blasts in those areas. Ex. 79 at 10. For example, Dragon reduces the hole diameter, which has the effect of reducing vibrations. Tr. at 933:18-24.
- Dragon has had an explosives contractor review its blasting policies and provide specific training to quarry employees regarding shot layout and timing, and in some instances has had the explosives contractor conduct the shots. Ex. 79 at 10.
- Dragon has adjusted its blasting by decking holes in which shots are placed so as to reduce the charge weight in the shot design. Ex. 79 at 10. Tr. at 934:17-935:9.
- Dragon designs its shot patterns in order to minimize vibrations. Ex. 79 at 10.

As part of its blasting operations, Dragon also engages in the following best management practices:

- Dragon's blaster designs and implements all blasts to comply with the U.S. Bureau of Mines guidelines;
- Dragon's blaster lays out each blast, insuring appropriate burden is maintained to properly confine the explosive column;
- Dragon profiles the face to aid in determining the front row burden to the blaster's discretion;
- Dragon's blaster specifies each drill hole's location, size and depth;
- Dragon's driller keeps a log describing any unusual conditions found in the drill holes;
- Dragon's blaster reviews the drill logs to make any adjustments needed to account for the condition of the holes;
- Dragon's blaster insures the holes are drilled as specified;
- the blast holes are bored, tracked or the equivalent;
- blast holes contained in voids are abandoned or encased to avoid overloading;
- blasting is scheduled to avoid adverse weather conditions;
- blast holes are loaded and implemented under the direct supervision of Dragon's blaster;
- all blasts are designed to assure proper confinement of the explosives column;

- Dragon uses the appropriate type of stemming for the size of the hole, but does not use drill cuttings as stemming;
- the blast area is secured prior to each blast;
- neighbors who desire it are called the morning of each blast;
- Dragon typically blasts between 9:00 am and 2:00 pm;
- Dragon does not blast on holidays or weekends;
- all blasts are monitored with two properly calibrated seismographs;
- Dragon's blaster checks the shot before sounding the all clear;
- Dragon's blaster reviews the seismograph results to determine compliance with the U.S. Bureau of Mine guidelines and adjusts the blast designs as needed;
- Dragon keeps records of all blasts;
- Dragon promptly and professionally responds to and investigates all complaints; and
- Dragon offered to conduct a pre-blast survey for the Darneys.

Tr. at 924:20-929:20, 801:1-8; Ex. 117 at 8-10.

Mr. McKown testified that Dragon takes the necessary precautions to minimize any risk of harm to persons or property. Tr. at 856:24-857:7. Based on the precautions taken by Dragon, Dragon's blasting operations pose a low degree of risk of harm to other persons or property. Tr. at 857:3-9. Further, Mr. McKown testified there is a low likelihood that harm will result from Dragon's blasting operations, based on the procedures utilized by Dragon, the monitoring undertaken by Dragon, and the care taken by Dragon in conducting its blasting. Tr. at 857:10-23. Mr. McKown also testified that Dragon has taken precautions which have eliminated the risks of blasting. Tr. at 857:24-858:5. Mr. McKown testified that blasting of the type conducted by Dragon is very common, particularly in New England. Tr. at 858:6-20. Mr. McKown also testified it is common for residential structures to be near quarries in New England and that Dragon's blasting operations are appropriate to the location in which they are carried out. Tr. at 858:21-7.

**D. Evidence Relating to Dust.**

The Darneys assert claims against Dragon for common law trespass, statutory trespass, nuisance, and negligence on the basis of dust from Dragon's operations. *See* Complaint at ¶¶ 35, 40, 46, 52. As the result of Dragon's operations, the Darneys allege there is dust in their home, on vegetation in their yard, on their patio table, and on their children's toys and swing set. Tr. at 498:19-22, 504:17-19, 708:15-22. They allege that such dust gets on their cars and scratches the finish of their cars. Tr. at 499:21-500:9. They also allege dust has gotten in their computer, electronics and other belongings in their house. Tr. at 708:15-22. They contend that as a result of dust they had to replace the fan on their computer. Tr. at 711:2-10. The basis for the Darneys' contention that the dust comes from Dragon is because it "couldn't be coming from anywhere else" and because "[t]he proximity to our home to their plant is too close for it not to travel when the wind blows on our home." Tr. at 498:23-499:5. They also contend that the dust affects them every day. Tr. at 490:2-13. However, Dragon's plant is frequently shut down and the Darney house is generally not downwind of Dragon's operations. Tr. at 577:2-4; Ex. 123.4, Ex. 120 at FedDrag018038.

Dragon takes numerous steps to control dust at its facility, including the following:

- In the quarry, Dragon waters haul-roads on a daily basis to suppress dust. Tr. at 902:2-11.
- At essentially every step of the cement manufacturing process where dust can escape, Dragon has installed dust collectors, which are "oversized vacuum cleaners" with fabric filter bags that are designed to capture dust particles from the cement-manufacturing process and reintroduce it to the process. Tr. at 902:20-911:1; Exs. 57, 79 at 9. In total, Dragon has over 75 dust collectors and spends hundreds of thousands of dollars on dust collectors on an annual basis. Tr. at 910:9-10, 911:24-912:5. Dragon goes to such great lengths to capture dust, because it is the product it manufactures and could damage the equipment at the plant if it escapes. Tr. at 910:11-911:9.
- Dragon has installed additional dust collectors on storage buildings to further minimize dust. Tr. at 997:22-998:3.

- Dragon purchased a sweeper vacuum truck to sweep the paved portions of the plant to collect fugitive dust. Tr. at 915:12-23, 998:1-3.
- Dragon paved 35,000 square feet of gravel roadways in order to permit its sweeper vacuum truck to sweep the area and to control fugitive roadway emissions. Tr. at 998:7-10.
- Dragon sealed up cracks and crevices in the clinker storage building, to prevent fugitive dust. Tr. at 915:25-916:4.
- In September 2005, at a cost of \$300,000, Dragon put a cover system in place for its CKD pile, with the objective of, among other things, reducing fugitive dust. Following installation of the cover, Dragon vegetated the cover system to further reduce fugitive dust. Dragon also installed ambient air monitors and video monitors to monitor the pile. Tr. at 916:19-920:11, 997:17-998:1; Ex. 79 at 9; Exs. 85-89.

The Maine Department of Environmental Protection (“DEP”) conducted a study of total suspended particulate in the Thomaston area. Ex. 123.1 As part of that study, the DEP installed an air sampler at the Darney residence to collect data regarding total suspended particulate at that location. Ex. 123.1 at 2. The air sampler collected data until November 2007, at which time the Darneys requested it be discontinued because Mrs. Darney was “tired of hearing it run” and it was “getting on her nerves.” Tr. at 617:1-11, 727:12-19. Up to that time, the sampler provided 41 valid samples for analysis. Ex. 123.1 at 7. Of those 41 samples, only one, from July 19, 2007, suggested that Maine’s nuisance standard had been exceeded at the Darney residence. Ex. 123.1 at 8, Tr. at 622:9-12. On that particular date, the detected concentration was 250 micrograms per cubic meter, which is five times the average concentration in samples obtained at the Darney residence. Ex. 123.1 at 9, 12. Such an extreme variation can indicate a problem with the sample and the DEP considered the July 19 result to be an anomaly. Ex. 123.1 at 9, 12. Unless there were validating reasons, the DEP concluded that there was a 100% chance that this result was due to some kind of error. Ex. 123.1 at 12. The DEP was ultimately unable to explain the anomaly. Tr. at 622:16-623:9.

No evidence presented at trial demonstrated that the spike on July 19, 2007 was due to Dragon. On that day, Dragon's kiln was neither in production nor generating any particulate emissions. Tr. at 938:15-940:4. Further, no rock crushing operations occurred on that date at Dragon. Tr. at 938:15-940:4. However, there were other potential causes for a spike in particulate levels in the area. On July 18, 2007, construction on the nearby Lowe's project in Thomaston had reached the stage where a bypass lane at the nearby intersection of Old County Road and Dexter Street was started and on July 19, 2007, construction crews began tearing up the intersection. Ex. 123.1 at 12; Tr. at 625:6-626:14. Richard Marriner, a DEP employee, testified at trial that such extensive road work could have led to excessive dust in the area on July 19, 2007. Tr. at 625:6-626:14. The DEP's report, authored by Mr. Marriner, determined that construction activities in the area could have led to excessive dust in the area. Ex. 123.1 at 12. Although Mr. Marriner's report could not determine the cause of the July 19, 2007 spike in the Darney sample, it stated that dust in the sample (together with the other analyzed samples) could have resulted from a number of sources, including road repairs in the area, construction of a large commercial center nearby, the operations of Chemrock (a nearby manufacturer), Dragon's operations, usual summer traffic, lawn maintenance, backyard grills, or a "myriad of other human activities, and natural events." Ex. 123.1 at 2.

Historical data obtained from three other monitoring stations in close proximity to Dragon demonstrate there have been no exceedances of the nuisance standard of 150 micrograms per cubic meter in the area since 1982. Ex. 123.1 at 15, Tr. at 612:7-616:25. No evidence exists that the dust of which the Darneys complain is, in fact, dust generated by Dragon. *See e.g.*, Tr. at 701:8-10. However, Dragon introduced evidence showing that it is unlikely Dragon is the source of the dust.

Dragon's expert, Patrick Gwinn, performed a fingerprinting analysis of six Dragon samples, from Dragon's cement kiln dust pile, Dragon's quarry dust, Dragon's clinker pile, and two samples taken from the Darneys' property. Ex. 13 at 3 and Table 1; Tr. at 1031:22-1032:8, 1034:19-1035:21, 1036:10-1037:14, 1038:18-1039:10. The purpose of the fingerprinting analysis was to compare potential emissions sources from Dragon to off-site sources, including the Darneys, and determine their similarities and differences. Tr. at 1031:22-1032:8. The fingerprinting analysis demonstrated that the six Dragon samples were very similar to each other, had similar profiles, and contained similar percentages of sodium, magnesium, iron, calcium, and aluminum. Ex. 13, at 4-5 and Figure 1; Tr. at 1046:4-1047:3; Ex. 91; Tr. at 1047:5-1050:6, 1050:24-1052:2; Ex. 92. The Darney samples, DH1 and DH2, on the other hand, were very different from the Dragon samples and from each other. Ex. 13, at 4-5 and Figure 1; Tr. at 1046:4-1047:3; Ex. 91; Tr. at 1050:7-13, 1050:24-1052:2; Ex. 92; Tr. at 1052:3-24. Mr. Gwinn also compared the relative percentages of elements within samples and to other samples. Tr. at 1052:25-1053:22. For example, in the case of the DH1 sample from the Darney residence, the ratio of aluminum to calcium is about 2 to 1. Tr. at 1053:8-13. On the other hand, the ratio of aluminum to calcium in the CKD1 sample from Dragon is about 20 to 1. Tr. at 1053:14-17. As a result of the fingerprinting analysis, Mr. Gwinn concluded that the Darney samples were not likely the result of emissions from Dragon. Tr. at 1050:14-20; Ex. 13 at 13-14. To verify the results of the fingerprinting analysis, Mr. Gwinn performed a principal components analysis. Tr. at 1054:19-22.

A principal components analysis tries to compute the inter-element variability of samples, then ranks them by importance of the variability, and then visually plots the results. Tr. at 1054:24-1055:5. The more similar samples are to each other, the closer they will plot to

one another. Tr. at 1055:13-16. In the case of the Dragon samples, they all plotted in the same location. Tr. at 1055:11-1056:15; Ex. 13 at Figures 2 and 3. The Darney samples plotted in different locations from each other and different from the Dragon samples. Tr. at 1055:11-1056:15; Ex. 13 at Figures 2 and 3. This confirmed the conclusions of the fingerprinting analysis, as illustrated in Figure 1. Tr. at 1055:11-1056:16.

Mr. Gwinn concluded from the fingerprinting analysis and the principal components analyses that the Dragon samples differ significantly from the Darney samples. Tr. at 1056:17-1057:2. He also concluded that the Darney samples differed from each other, which suggested that they were receiving contributions of materials from different sources. Tr. at 1056:17-1057:2. Had Dragon been the primary source of the Darney samples, he would have expected a similar fingerprint in those two samples. Tr. at 1057:5-12. Because that is not the case, Mr. Gwinn concluded that sources other than Dragon were contributing to the Darney samples and not likely the result of emissions from Dragon. Tr. at 1050:14-20, 1057:5-12; Ex. 13 at 13-14.

#### **E. Evidence Relating to Noise.**

The Darneys assert claims against Dragon for nuisance and negligence on the basis of noise from Dragon's operations. *See* Complaint at ¶¶ 46, 52. They allege that they hear trucks early in the morning and a "constant humming" at night from the plant. Tr. at 503:25-504:5. The Darneys presented no evidence relating to how the noise damaged them; only that it existed. Tr. at 503:25-504:5.

At trial the only evidence relating to sound measurements was admitted into evidence as part of Exhibit 4. That study measured sound from Dragon's operations at the west end of the quarry, near where the Darneys live, for eight hours and measured a time-weighted average of 61 decibels. Ex. 4 at FedDrag 20172, 20185, 20186. The relevant ordinance, Thomaston's

Land Use and Development Ordinance, § 716.9, provides that noise may be equal to but not exceed 75 decibels during any consecutive eight-hour period. Ex. 5.

Dragon takes numerous steps to reduce noise from its facility:

- It uses stemming in its blasting operations to reduce noise while blasting. Tr. at 936:20-937:5.
- It designs its shot patterns in order to minimize noise and does not conduct blasting operations on days in which atmospheric conditions make excessive overblast more likely, thus reducing excess noise. Ex. 70 at 10.
- It uses equipment in the plant that has been supplied with acoustic designs built into the equipment, and Dragon has added acoustic designs to equipment to reduce noise. Tr. at 937:6-12.
- It has soundproofed equipment and rooms at the plant in an effort to further reduce noise levels. Ex. 79 at 10; Tr. at 995:11-18.

### **ARGUMENT**

#### **I. THE DARNEYS CONSISTENTLY TOOK STEPS TO PREVENT THE COLLECTION OF EVIDENCE TO SUPPORT THEIR CLAIMS AGAINST DRAGON.**

The first event that occurred that caused the Darneys to have concerns about Dragon's operations was a blast that occurred on February 3, 2004. Tr. at 688:5-689:10. Mr. Darney brought their concerns to Dragon's attention. Ex. 50. In response, Dragon placed the Darneys on a pre-blast call list, agreed to place a seismograph on the Darney property to monitor ground vibrations from blasts, and agreed to get information from the Darneys for a pre-blast baseline survey. Ex. 50. Dragon followed through on all of its promises until the Darneys prevented them from doing so.

First, Dragon placed the Darneys on the pre-blast call list, so that the Darneys would receive advance notice of blasts before they occurred. Ex. 50; Tr. at 521:21-24, 723:13-724:13. In fact, the Darneys received such advance notice until they disconnected their land-line

telephone and decided not to give Dragon any other number to call. Tr. at 522:2-10, 724:16-725:6.

Second, Dragon placed a seismograph on the Darneys' property which monitored blasts on February 18, 2004 and February 24, 2004. Exs. 30 and 31. At trial, Mr. McKown testified that based on the seismographic record from the Darney residence for the blast of February 18, 2004, the ground vibration on that date measured at the Darney residence was less than 0.04 inches per second. Tr. at 850:3-853:20. In the case of the blast of February 24, 2004, the blasting record demonstrates that the ground vibration at the Darney residence was 0.034 inches per second. Tr. at 852:1-853:1. Both sets of ground vibrations were well below the level which could cause cosmetic damage. Tr. at 844:12-846:13, 850:3-853:20, Ex. 117 at 4. After the seismographic monitoring of February 18 and February 24, 2004, which showed very low ground vibrations, Mr. Darney ordered Dragon to stop conducting any seismographic testing on the Darneys' property and threatened to contact the police if any Dragon employees came onto their property. Ex. 51; 81. By this point – less than a month after the event that first piqued his concern – Mr. Darney had decided to pursue a litigation approach against Dragon. Tr. at 730:14-19; Ex. 81.

Third, Dragon offered to conduct a pre-blast survey and initiated the necessary steps to perform a pre-blast survey, but the Darneys refused to permit access to Dragon so that the pre-blast survey could be completed. Tr. at 801:1-8; Ex. 53 at P069. The purpose of the survey was to establish a baseline of the condition of the Darney residence and would be important to have in order to determine whether blasting was impacting the Darney residence. Ex. 53 at P069.

Finally, as part of its study investigating total suspected particulate in the Thomaston area, on June 19, 2007, the DEP installed an air sampler at the Darney residence to collect data

regarding total suspended particulate. Ex. 123.1 at 2. The sampler collected data until November 2007, when the Darneys requested it be discontinued because Mrs. Darney was “tired of hearing it run” and it was “getting on her nerves.” Tr. at 617:1-12, 727:12-19.

Each of the instances illustrates how whenever steps were taken to gather information about the Darneys’ claims against Dragon, the Darneys took steps to prevent such information from being gathered. In the case of the seismograph, the Darneys’ decision to stop information from being gathered was made after seismographic readings demonstrated that Dragon’s operations were not, in fact, creating issues for the Darneys. Despite the Darneys’ actions preventing the gathering of information relevant to their claims against Dragon, as described below, the evidence that does exist demonstrates that none of the Darneys’ complaints about Dragon are warranted and that there is no basis on which to sustain the Darneys’ claims against Dragon.

## **II. THE DARNEYS DID NOT MEET THEIR BURDEN OF PROOF WITH REGARD TO THEIR NUISANCE CLAIM.**

The essence of a private nuisance is an interference with the use and enjoyment of land. *Town of Stonington v. Galilean Gospel Temple*, 1999 ME 2, ¶ 15, 722 A.2d 1269, 1272 (quoting W. Page Keeton, *et al.*, *Prosser and Keeton on the Law of Torts* § 87, at 619 (5<sup>th</sup> ed. 1984) (“*Prosser and Keeton*”). In Maine, the following elements are necessary to establish a cause of action for common law nuisance:

- 1) “[t]he defendant acted with the intent of interfering with the use and enjoyment of the land by those entitled to that use;”
- 2) “there was some interference of the kind intended;”
- 3) “the interference was substantial such that it caused a reduction in the value of the land;” and
- 4) the interference “was of such a nature, duration or amount as to constitute unreasonable interference with the use and enjoyment of the land.”

*Johnston v. Maine Energy Recovery Co., L.P.*, 2010 ME 52, ¶ 15, 997 A.2d 741, 745; *see also Charlton v. Town of Oxford*, 2001 ME 104, ¶ 36, 774 A.2d 366, 377 (citing *Prosser and Keeton*, § 87 at 622-23) (footnote omitted).

The Darneys failed to prove the essential elements of their nuisance claim. First, they failed to prove that Dragon intended to interfere with their use of their land. Assuming Dragon did something to interfere with the Darneys' use and enjoyment of their land, the Darneys failed to prove that such interference was either substantial or unreasonable.

**A. Dragon Did Not Act With the Intention of Interfering With the Darneys' Use and Enjoyment of Their Property.**

The first element of common law nuisance requires the plaintiff to prove that the "defendant acted with the intent of interfering with the use and enjoyment of the land by those entitled to that use." *Charlton*, 2001 ME 104, ¶ 36, 774 A.2d at 377. "Intent" means that "the defendant has created or continued the condition causing the interference with full knowledge that the harm to the plaintiff's interests are occurring or are substantially certain to follow." *Johnston*, 2010 ME 52, ¶ 15, 997 A.2d at 745.

There is no evidence that Dragon conducted any of its operations with "full knowledge" that they harm the Darneys' interests or are substantially certain to follow as a result of Dragon's operations. Without that evidence, the Darneys are unable to prove their nuisance claim.

**B. Dragon Did Not Substantially Interfere With the Darneys' Use and Enjoyment of Their Land.**

As this Court held on Dragon's motion for partial summary judgment, a substantial harm is one of "importance, involving more than slight inconvenience or petty annoyance." Restatement (Second) of Torts, § 821F, cmt. c; *see also Charlton*, 2001 ME 104, ¶ 36 fn 10, 774

A.2d at 377 (“[s]ubstantial simply means a *significant harm* to the plaintiff”) (emphasis added); *Prosser and Keeton* § 88 at 628 (defining substantial and unreasonable interference as “definitely offensive, seriously annoying, or intolerable”). This is because the law “does not concern itself with trifles, and therefore there must be a real and appreciable invasion of the plaintiff’s interests before he can have an action for ... private nuisance.” Restatement (Second) of Torts, § 821F, cmt. c.

As described above, the Darneys’ nuisance claim against Dragon is based on allegations that vibrations, dust, and noise from Dragon’s operations are interfering with the use and enjoyment of their property. The trial record unequivocally demonstrates that the Darneys failed to prove that vibrations, dust or noise from Dragon were responsible for interfering with the use and enjoyment of their property during the relevant time period.

1. There Is No Evidence That Vibrations From Dragon’s Blasting Have Substantially Interfered With the Darneys’ Use and Enjoyment of Their Property.

The trial record is devoid of any evidence that Dragon’s blasting generated vibrations or air blast that even approach the levels which cause damage.

The only claims at issue are those claims which are based upon events occurring between November 12, 2004 and April 17, 2009. The Darneys have the burden of proving that Dragon’s blasting created nuisance conditions during that period. As described above, the Darneys allege that their property has suffered damage from Dragon’s blasting operations, consisting predominantly of cracks in their chimney, walls, ceilings, and windows; and that their property has shifted. However, at trial the Darneys presented no expert testimony as to the causation of any of the alleged damage to their house. On the other hand, Dragon presented expert testimony by Andrew McKown that there is were no ground vibrations at the Darney

residence as a result of Dragon's blasting during the relevant period which were even close to those levels which would be necessary to cause cosmetic damage. Similarly, Mr. McKown also testified that no airblasts generated by Dragon's blasting operations have caused any damage to the Darneys' windows or home. Mr. McKown's testimony was uncontradicted by the Darneys. There is simply no evidence that vibrations interfered with the Darneys' use and enjoyment of their property, other than their unsupported testimony. Further, the Darneys did not allow the collection of evidence in the form of pre-blast surveys and seismograph readings that could have proven or disproven the damages they allege.

As described above, *see supra* at 3-4, the Darneys identified damage which they allege occurred to their house as a result of Dragon's blasting operations, including cracks, structural settling, etc. However, for almost all of the alleged damage, the Darneys presented no evidence as to when such damage occurred. For other items of damage, including damage to their chimney which has allegedly caused damage to their master bedroom and cracks in their son's room and the stairway, the Darneys testified that the damage occurred in February 2004. Tr. at 688:2-689:11, 691:4-14, 695:24-696:2, 717:13-718:18, 719:12-720:22, 721:1-5, Ex. 102A, Ex. 102B, Ex. 102C, Ex. 102D. The damage to their master bedroom has remained unchanged since February 2004. Tr. at 717:13-718:18, Ex. 102A, Ex. 102B. The cracks in their son's room remain pretty much the same today as compared to February 2004, but may have possibly grown no more than six inches in either direction. Tr. at 695:24-696:2, 717:18-718:3, 719:12-720:22, Ex. 102C, Ex. 102D. The cracks in their stairway have gotten a little longer since February 2004 and have opened up a little more, but are otherwise the same. Tr. at 721:1-5. Because these items of damage either occurred before November 12, 2004 or because the

Darneys presented no evidence as to when they occurred, the Darneys failed to prove that they were caused by Dragon during the relevant time period.

The only items of damage which the Darneys testified occurred during the relevant time period consist of cracks getting longer in their son's room and in the stairway, and window sills separating from vertical molding. Tr. at 695:24-696:2, 703:7-18, 717:18-718:3, 719:12-720:22, 721:1-5; Ex. 102C, Ex. 102D. These are hardly "significant harms" which are "definitely offensive, seriously annoying, or intolerable." *Charlton*, 2001 ME 104, ¶ 36 fn 10, 774 A.2d at 377 ("[s]ubstantial simply means a *significant harm* to the plaintiff"); *Prosser and Keeton* § 88 at 628. These damages, which have not been shown to be the result of Dragon's blasting, are nothing more than a slight inconvenience or petty annoyance. Restatement (Second) of Torts, § 821F, cmt. c. Without more, they cannot provide the basis for a nuisance action.

2. There Is No Evidence That Dust From Dragon's Operations Has Interfered With the Darneys' Use and Enjoyment of Their Property.

The Darneys allege that dust from Dragon's operations is interfering with the use and enjoyment of their property. However, based on analyses of dust samples from both the Darney residence and from Dragon, the dust on the Darney property is likely from a source other than Dragon.

At trial, Dragon presented the expert testimony of Patrick Gwinn regarding the origin of dust appearing on the Darneys' property. As described above, Mr. Gwinn testified that he performed a fingerprinting analysis of six samples of dust taken from Dragon sources (from Dragon's cement kiln dust pile, Dragon's quarry dust, and Dragon's clinker pile) and two dust samples taken from the Darneys' property. The fingerprinting analysis demonstrated that the Dragon samples were very similar to each other, had the same profile, and contained very similar percentages of sodium, magnesium, iron, calcium, and aluminum. On the other hand,

the two Darney samples were very different from the Dragon samples and from one another. As a result of the fingerprinting analysis, Mr. Gwinn concluded that the samples from the Darney residence were not likely the result of emissions from Dragon. This conclusion was confirmed by a principal components analysis.

A principal components analysis computes the inter-element variability of samples, ranks them by importance of the variability, and then visually plots the results. The more similar samples are to each other, the closer they plot to one another. All of the Dragon samples plotted in the same location. The Darney samples, on the other hand, plotted in different locations than each other and different locations than the Dragon samples. This confirmed the conclusions of the fingerprinting analysis, as illustrated in Figure 1. Mr. Gwinn concluded from the fingerprinting analysis and the principal components analyses that the Dragon samples differ significantly from the Darney samples. He also concluded that the Darney samples differed from each other, which suggested that they were receiving contributions of materials from different sources. Had Dragon been the primary source for the Darney samples, he would have expected to see a similar fingerprint in those two samples. Because that is not the case, Mr. Gwinn concluded that sources other than Dragon contributed to the Darney samples. Gwinn testified that it is more likely than not that the Darney dust samples are not from Dragon. There is no evidence that the dust at the Darney residence is from Dragon's operations.

3. The Darneys Presented No Evidence of Noise Substantially Interfering with the Use and Enjoyment of Their Property.

The Darneys also contend that noise from Dragon's operations interferes with the use and enjoyment of their property. The only evidence presented at trial by the Darneys relating to this allegation consisted of their testimony that they hear trucks early in the morning and hear a "constant humming" at night from the plant. Tr. at 503:25-504:5. However, the Darneys

presented no evidence as to how such noise interferes with the use and enjoyment of their property.

One of the essential elements of establishing a nuisance claim under Maine law is that the plaintiff must prove that the defendant caused substantial interference to the plaintiff's use and enjoyment of their property. *Charlton*, 2001 ME 104, ¶ 36, 774 A.2d at 377. The interference must be more than "slight inconvenience or petty annoyance" and must be "significant." *Id.* at fn 10; Restatement (Second) of Torts, § 821F, cmt. c.; *see also Prosser and Keeton* § 88 at 628 (defining substantial and unreasonable interference as "definitely offensive, seriously annoying, or intolerable").

First, although the Darneys testified they have heard trucks in the morning and humming from the plant at night, it is not clear that the noise was caused by Dragon. As the Darneys testified at trial, their house is located on Old County Road and near Route One, both of which are busy roads with loud road noise. Tr. at 521:7-20. That being the case, the truck noise they complain of could have come from traffic on Old County Road or Route One, and not from Dragon. Even assuming that a "constant humming" came from Dragon, they still did not meet their burden of proof because they presented no evidence that the noise is significant or is more than a "slight inconvenience or petty annoyance." Because the Darneys failed to prove the essential elements of their claim, Dragon is entitled to judgment on the Darneys' claim that noise from Dragon is creating a nuisance.

4. The Darneys Presented No Evidence That the Value of Their Property Has Been Diminished by the Alleged Nuisance Conditions.

The Maine Law Court has held that to recover for nuisance a plaintiff must prove "the interference was substantial such that it caused a reduction in the value of the land." *Johnston*, 2010 ME 52, ¶ 15, 997 A.2d at 745; *see also Charlton*, 2001 ME 104, ¶ 36, 774 A.2d at 377.

The Maine Law Court has held that a “good working rule” for proving when an interference is substantial and unreasonable enough to justify a recovery for damages, is when the interference “results in a depreciation in the market or rental value of the land.” *Charlton*, 2001 ME 104, ¶ 36 at n.10, 774 A.2d at 377 n. 10. Further, unless a plaintiff makes the essential showing that a property’s market or rental value has been diminished, a plaintiff cannot satisfy the “substantial interference” requirement for nuisance. *Id.* at ¶ 38, 774 A.2d at 378. *See also Prosser and Keeton*, § 88 at 627; Dan B. Dobbs, *The Law of Torts*, vol. 2, § 466 at 1334 (2001) (“Reduced market value is an objective measure of loss in the quality of life for those in possession of their property.”).

As is clear from the trial record, no evidence was offered that the Darneys’ property has been reduced in value by Dragon’s activities since they purchased it. They purchased their property in 2002 for \$80,500. Tr. at 431:4-5, 519:19-21, 1010:6-11. They consider it to be worth \$140,000, both currently and as of April 17, 2009, an increase of 75% in only seven years. Tr. at 522:11-15. Further, no evidence was presented that the magnitude of their property’s appreciation was less than it would otherwise have been but for Dragon’s conduct. Thus, the Darneys failed to demonstrate, as they must, that their property has suffered a reduction in its value and for that reason alone cannot sustain their nuisance claim. *See Johnston*, 2010 ME 52, ¶ 15, 997 A.2d at 745; *Charlton*, 2001 ME 104, ¶¶ 36, 38, 774 A.2d at 377, 378. *See also Darney v. Dragon Products Co., Inc.*, Knox County Superior Court Docket No. CV-04-81, Order on Motion for Partial Summary Judgment (Oct. 26, 2007 at 3 (“a nuisance claimant must present evidence of a quantitative decrease in the value of the property”) (granting Dragon summary judgment on the Darneys’ nuisance claim)<sup>1</sup>; *North Sebago Shores, LLC v. Mazzaglia*, 2005 WL 3956723, \* 2 (Me. Super. Aug. 2, 2005) (“Common law nuisance

<sup>1</sup> A copy may be found attached as Ex. J. to the Declaration of Eric J. Wycoff (April 30, 2009).  
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claims require plaintiffs to show ‘substantial interference,’ such that ‘the land is reduced in value because of the defendant’s conduct.’”) (citing *Charlton*, ¶ 36, 774 A.2d at 377); *Plourde v. Valley Sno-Riders, Inc.*, 2002 WL 747903, at \* 5 (Me. Super. March 18, 2002) (“On the basis of the current record however, the court cannot find sufficient proof of reduced land value for the Plourdes’ property. This is a required finding to sustain a nuisance claim.”).

**C. The Darneys Failed to Prove Any Unreasonable Interference with the Use and Enjoyment of Their Property.**

Even if dust, vibration or noise from Dragon interfered with the Darneys’ use and enjoyment of their property, no evidence was presented other than the Darneys’ subjective impressions that such interference was substantial or unreasonable. In order for interference to be substantial and unreasonable, it must be “definitely offensive, seriously annoying, or intolerable.” *Prosser and Keeton* § 88 at 628. The harm must also be “significant” under circumstances in which “it would not be reasonable to permit the defendant to cause such an amount of harm intentionally without compensating for it.” *Charlton*, 2001 ME 104, ¶ 36, 774 A.2d at 377 (quoting *Prosser and Keeton*, § 88 at 626).

1. Maine’s Nuisance Statute Defines What Level of Interference is Unreasonable and There Is No Evidence That Standard Was Exceeded at the Darney Residence Because of Dragon.

Maine’s statutes provide that “[n]o person may discharge total suspended particulate matter to the ambient air in an amount or concentration that ... creates a nuisance condition.” 38 M.R.S.A. § 592-A(1). The statute defines the level at which nuisance conditions are created by suspended particulate matter, as follows:

[t]otal suspended particulate matter concentrations of less than 150 micrograms per cubic meter for any 24-hour period in the ambient air are presumed not to constitute ... nuisance conditions.

*Id.* This standard was established as part of a 1989 amendment of the statute. In the Statement of Fact that accompanied the amendment, the Legislature stated that the amendment “defines what constitutes [nuisance conditions].” Senate Amend A. to L.D. 221, Statement of Fact (114<sup>th</sup> Legis. 1989). *See e.g., Messer v. City of Dickinson*, 3 N.W.2d 241, 245 (N.D. 1942) (“The legislature has power to define and declare what are and what are not nuisances.”). The Maine nuisance standard for dust is the same as, and is based upon, the national secondary ambient air quality standard, which is required by statute to be “requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air.” 42 U.S.C. 7409(b)(2); Tr. at 546:16-547:1; *see also* 42 U.S.C. § 7407.

Here, applying the statutory standard to available data, there is no evidence of any exceedance of the standard at the Darney residence because of Dragon. Further, the historical data indicates that there has not been an exceedance in the area since 1982.

The air sampler installed at the Darney residence collected data until November 2007. Up to that time, the sampler provided 41 valid samples for analysis. Ex. 123.1 at 7. Of those 41 samples, only one, from July 19, 2007, suggested that Maine’s nuisance standard had been exceeded at the Darney residence. Ex. 123.1 at 8; Tr. at 622:9-12. On that particular date, the detected concentration was 250 micrograms per cubic meter, which is five times the average concentration in samples obtained at the Darney residence. Ex. 123.1 at 9, 12. Such an extreme variation can indicate a problem with the sample and the DEP considered the July 19 result to be an anomaly. Ex. 123.1 at 9, 12. Unless there were validating reasons, the DEP concluded that there was a 100% chance that this result was due to some kind of error. Ex. 123.1 at 12. The DEP was ultimately unable to explain the anomaly. Tr. at 622:16-623:9.

No evidence presented at trial demonstrated that the spike on July 19, 2007 was due to Dragon. On that day there were no operations at Dragon which could account for the high concentration of July 19, 2007 at the Darney residence: Dragon's kiln was neither in production nor generating any particulate emissions and no rock crushing operations occurred on that date at Dragon. Tr. at 938:5-940:4. However, there were other potential causes for a spike in particulate levels in the area. On July 18, 2007, construction on the nearby Lowe's project in Thomaston had reached the stage where a bypass lane at the nearby intersection of Old County Road and Dexter Street was started and on July 19, 2007, construction crews began tearing up the intersection. Ex. 123.1 at 12; Tr. at 625:6-626:14. Richard Marriner, a DEP employee, testified at trial that such extensive road work could have led to excessive dust in the area on July 19, 2007. Tr. at 625:6-626:14. The DEP's report, authored by Mr. Marriner, determined that construction activities in the area could have led to excessive dust in the area. Ex. 123.1 at 12. Although Mr. Marriner's report could not determine the cause of the July 19, 2007 spike in the Darney sample, it stated that dust in the sample (together with the other analyzed samples) could have resulted from a number of sources, including road repairs in the area, construction of a large commercial center nearby, the operations of Chemrock (a nearby manufacturer), Dragon's operations, usual summer traffic, lawn maintenance, backyard grills, or a "myriad of other human activities, and natural events." Ex. 123.1 at 2. Even assuming the July 19, 2007 data from the Darney residence is valid – which it probably is not – there is no evidence that the dust levels were attributable to Dragon.

That the spike was not caused by Dragon is further confirmed by historical data obtained from three other monitoring stations in close proximity to Dragon. That data demonstrates there have been no exceedances of the nuisance standard of 150 micrograms per cubic meter in the

area since 1982. Ex. 123.1 at 15, Tr. at 611:12-616:25. Thus, there is no evidence that the statutory nuisance limit of 150 micrograms per cubic meter was exceeded at the Darney residence as a result of Dragon's operations or otherwise. Therefore, the monitoring data constitutes compelling evidence that any airborne dust at the Darney residence did not rise to the level of a nuisance, regardless of where it came from. 38 M.R.S.A. § 592-A(1).

2. There is No Evidence Any Noise From Dragon's Operations Unreasonably Interfered with the Darneys' Use and Enjoyment of Their Property.

Even assuming that noise from Dragon affects the Darneys' use and enjoyment of their property, the Darneys presented no evidence that the noise was of such a nature as to unreasonably interfere with such use and enjoyment. At trial, the sole evidence regarding noise consisted of the Darneys' testimony that they hear trucks early in the morning and hear a "constant humming" at night from the plant. Tr. at 503:25-504:5. The Darneys presented no evidence that the noise unreasonably interfered with their use and enjoyment of their property. In fact, the evidence presented by the Darneys established that the noise levels produced by Dragon are within the levels allowed by the Town of Thomaston.

Thomaston's ordinances provide that noise may not exceed 75 decibels during a consecutive eight-hour period. Ex. 5 (§ 716.9). At trial, the Darneys presented evidence that noise levels from Dragon are well within the levels allowed by Thomaston ordinance. The Darneys sought the admission of Exhibit 4, which relates, in part, to sound measurements taken at Dragon. The study measured sound from Dragon's operations at the west end of the quarry, near where the Darneys live, for eight hours and measured a time-weighted average of 61 decibels. Ex. 4 at FedDrag 20172, 20185, 20186. Thomaston's Land Use and Development Ordinance provides that noise may be equal to but not exceed 75 decibels during any

consecutive eight-hour period. Ex. 5 at §716.9. The Darneys failed to meet their burden of proof that any noise from Dragon unreasonably interfered with the Darneys' use and enjoyment of their land and Dragon is entitled to judgment on the Darneys' claim that noise from Dragon's operations creates a nuisance.

3. The Darneys "Came to the Nuisance" and Therefore Would Not be Entitled to Relief even if They Could Show a Nuisance.

In *Eaton v. Cormier*, the Maine Superior Court found a nuisance existed and limited the plaintiff's damage award because the plaintiffs "came to the nuisance." 2000 ME 65, ¶¶ 1, 5-6, 748 A.2d 1006, 1007-1008. On appeal the Law Court affirmed the damage award and held that although "coming to the nuisance" does not act as a bar to a suit for nuisance, "it is not wholly irrelevant to a determination of the appropriate remedy in a nuisance action." 2005 ME 65, ¶ 6, 748 A.2d at 1008 (citing *Escobar v. Continental Baking Co.*, 596 N.E.2d 394, 397-398 (Mass. App. Ct. 1992)). See also Restatement (Second) of Torts, § 840D ("The fact that the plaintiff has acquired or improved his land after a nuisance interfering with it has come into existence is not itself sufficient to bar his action, but it is a factor to be considered in determining whether the nuisance is actionable."); *Prosser and Keeton* at 635 ("The matter of 'coming to the nuisance' is simply one factor on the issue of whether or not the defendant's use is an unreasonable interference."); *Amaral v. Cuppels*, 831 N.E.2d 915, 920 (Mass. App. Ct. 2005) ("While the factor [of coming to the nuisance] is not dispositive in deciding whether an activity constitutes a nuisance, it weighs heavily in determining whether a plaintiff is entitled to relief.") (internal citation omitted).

Rhode Island law holds that coming to the nuisance is a factor to consider in determining whether or not a defendant's conduct was an unlawful interference and is relevant on the issue of damages. *Weida v. Ferry*, 493 A.2d 824, 827 (R.I. 1985). That is so, because if

one's coming to the nuisance were not taken into consideration, it could "result in a windfall to a plaintiff who purchases property at a depressed price because of its proximity to a nuisance such as a feed lot and then is allowed successfully to maintain a suit for either damages or abatement of the nuisance and, at the expense of the defendant, experience a substantial increase in the market value of the plaintiff's real estate." *Id.* fn 2. Here, the existence of Dragon was, in the opinion of Monroe Hall, the reason why real estate prices in the area were so "reasonable." Tr. at 1012:10-19. In other words, if Dragon's existence permitted the Darneys to purchase their property at a depressed price, permitting them to also recover damages would allow them to obtain a windfall at Dragon's expense.

In *Escobar*, cited by the Law Court in *Eaton*, homeowners sought to enjoin the owner of a bakery distribution center that adjoined the homeowners' property from continuing nighttime deliveries to the site, arguing that the noise was a nuisance. 596 N.E.2d 394. The trial court denied injunctive relief, but awarded the plaintiffs damages. The Court of Appeals reversed, holding that while there were some situations where damages may be awarded when injunction was too severe a remedy, under the facts in *Escobar* it was not reasonable to impose the cost of the noise encountered by plaintiffs on the defendant, since the plaintiffs' property had increased in value, plaintiffs were able to maintain their business from their home, and the plaintiffs were aware of the bakery business and aware that the area was commercial when they purchased the property. *Id.* at 398.

The Restatement also provides the following illustration of how coming to the nuisance may preclude liability:

X City discharges its sewage into a slough connecting with a river. Plaintiff purchases land on the bank of the slough, sets up a shingle mill and rafts logs through the slough. With the growth of the city, the logs become increasingly coated with sewage, and the shingles are unfit for sale or use. The only other

possible method of sewage disposal on the part of the city would involve prohibitive expense, out of all proportion to the harm done. This fact, together with the fact that plaintiff has come to the nuisance, may be held to prevent plaintiff's recovery for the public or the private nuisance.

Restatement (Second) of Torts, § 840D, illus. 4. Here, in the case of vibrations, the only way to eliminate vibrations would be to stop blasting, because there is no other cost-effective alternative to obtain the rock necessary to manufacture cement. Tr. at 935:10-936:5. If Dragon had to stop blasting, the plant would not have the necessary raw material and would have to stop operating. This would be a very large expense, out of all proportion to the harm allegedly suffered by the Darneys. That, combined with the fact that the Darneys came to the nuisance, should preclude the Darneys from recovering for nuisance.

### **III. THE DARNEYS DID NOT PROVE THEIR COMMON LAW TRESPASS CLAIM.**

At trial, the Darneys failed to prove the essential elements of their common law trespass claim. Their common law trespass claim is based on their allegation that dust and vibrations from Dragon are invading their property, resulting in a trespass. First, as previously argued to this Court, Maine law does not recognize a common law trespass claim based on dust or vibrations, therefore, Dragon is entitled to judgment on the trespass claim as a matter of law. Even assuming Maine law did permit a trespass claim based on dust and vibrations, there is no evidence any dust from Dragon invaded the Darney property and no evidence that any vibrations from Dragon's blasting operations have caused any damage to the Darneys' property.

#### **A. The Maine Common Law of Trespass Does Not Recognize a Cause of Action Based on Dust or Vibrations.**

Both trespass and nuisance are ancient causes of action. Each doctrine is designed to protect different sticks in the bundle of property rights held by a possessor of land. The Maine Law Court has long recognized that trespass protects the exclusive possession of land, while

nuisance protects a possessor's use and enjoyment of that land. *Jacques v. Pioneer Plastics, Inc.*, 676 A.2d 504, 505 fn 1 (Me. 1996) (citing *Prosser and Keeton* § 87, at 622). Recognition of a claim sounding in trespass for dust and/or vibrations would contradict established Maine precedent and go against Maine's fundamental conception of trespass.

1. Recognizing a Common Law Trespass Cause of Action Based on Dust and Vibrations Would Contravene Maine's Long-Established Rules.

The Darneys have not established they have been deprived of the exclusive possession of their property, which is a necessary element of a claim for common law trespass. Further, Maine law requires a tangible intrusion for a trespass claim to lie. Neither dust nor vibrations are tangible, therefore they cannot supply the factual basis for a common law trespass claim in Maine.

The Darneys allege they have suffered property damage based on dust and vibrations from Dragon's Thomaston facility. Complaint at ¶¶ 35-38, 40-43. They allege dust and vibrations have damaged their personal property and real estate. At trial, they presented no evidence that dust or vibrations have interfered with the exclusive possession of their property.

As described above, the very essence of a trespass claim is the protection of the possessor's exclusive possession of land. *Hawkes v. Commercial Union Ins. Co.*, 2001 ME 8, ¶ 10, 764 A.2d 258, 264; *Jacques*, 676 A.2d 504, 505 fn 1; *Harlow v. Pulsifer*, 122 Me. 472, 120 A. 621, 624 (1923); *Inhabitants of Millinocket v. Mullen*, 108 Me. 29, 78 A. 1120, 1121 (1911); *Morgan v. Boyes*, 65 Me. 124, 1876 WL 4105 at \* 1 (1876). See also J. Simmons, et al., *Maine Tort Law* (2004 ed.) § 5.02 at 5-3 ("Trespass protects possession of land."). Maine's trespass law protects possession of land from one who "intentionally enters land in the possession of the other, or causes a thing or a third person to do so." *Medeika v. Watts*, 2008 ME 163, ¶ 5, 957 A.2d 980, 982 (quoting Restatement (Second) of Torts § 158(a)). The

Darneys presented no evidence that they were deprived of the exclusive possession of their property, nor did they present evidence they were forced to leave their property. Simply put, the Darneys have not proved that they have been deprived of their exclusive possession in any way. Without being able to establish that element, the Darneys may not recover.

To support a trespass claim Maine law requires a physical entry by a person or thing onto real estate. *Gibson v. Farm Family Mut. Ins. Co.*, 673 A.2d 1350, 1353 (Me. 1996); *Medeika*, 2008 ME 163, ¶ 5, 957 A.2d at 982. Because neither dust nor vibrations are persons, dust and vibrations may only serve as the basis for a trespass claim if they are “things,” *i.e.*, concrete or tangible objects, which physically enter the Darney property. *See Shone v. State*, 279 A.2d 522, 524 (Me. 1971) (“Webster defines the word ‘thing’ as a concrete or tangible object...”).

In this context, dust suspended in the air is intangible. Black’s Law Dictionary (Seventh Edition) (1999) at 811 (definition of intangible is “Not capable of being touched; impalpable”). Similarly, a vibration is also not an object. Therefore, neither airborne dust nor ground vibrations may serve as the basis for a trespass. *Gibson*, 673 A.2d at 1353; *Medeika*, 2008 ME 163, ¶ 5, 957 A.2d at 982.

2. The Maine Law Court Was Dubious About the So-Called Modern Theory.

As the Court will recall, it certified to the Maine Law Court the question of whether Maine follows the so-called “modern” theory of trespass by recognizing a cause of action for trespass based on intangible invasions by dust or vibrations. Although the Law Court declined to answer the question, its decision expressed hesitancy with the concept of adopting the so-called modern theory of trespass and recognizing a trespass cause of action based on dust and vibrations. The Law Court observed that the modern theory was not the majority approach, and

that those jurisdictions that have adopted it have generally required proof of damage to the invaded property, which is not required to establish a traditional common law trespass in Maine. *Darney v. Dragon Products Co., LLC*, 2010 ME 39, ¶ 14, 994 A.2d 804, 807. The Law Court also observed that Courts that have rejected the modern theory have cautioned that the new trespass action, with its engrafted requirement of damages, resembles an action for nuisance. *Id.* In light of the Law Court's decision declining to answer the certified questions, it is unlikely the Law Court would recognize a trespass claim on the basis of dust and vibrations.

3. Decisions From Other Jurisdictions Support The Determination That Dust and Vibrations Cannot Serve As the Basis For a Common Law Trespass Claim.

Decisions in other jurisdictions support the determination that dust and vibrations cannot serve as the basis for a trespass claim under Maine law. For example, in *Adams v. Cleveland-Cliffs Iron Company*, the Michigan Court of Appeals considered a case in which the defendant was a mine operator. 602 N.W.2d 215, 217 (Mich. App. 1999). The defendant engaged in blasting operations approximately three times a week, year round, and also engaged in the extraction and processing of iron ore, which generated large amounts of airborne dust. *Id.* The plaintiffs in that case claimed that the defendant's blasting sent tremors through their property and that dust from the defendant's operations accumulated inside and outside their homes. *Id.* The Michigan court confirmed the validity of the traditional rules of trespass, and held that where a possessor of land is "menaced" by noise, vibrations, dust, smoke, soot, or fumes, the possessory interest implicated is the use and enjoyment of the land, and not the right to exclusive possession of it. *Id.* at 222. Therefore, the appropriate remedy for a claim based on noise, vibrations, and dust is an action for nuisance and not for trespass. *Id.* at 222-223.

*John Larkin, Inc. v. Marceau* involved an adjoining landowner who brought a trespass claim against a neighbor who operated an apple orchard, alleging that winds carried detectable levels of pesticides used in the orchard onto the adjoining landowner's property. 959 A.2d 551, 552 (Vt. 2008). The Vermont Supreme Court considered whether the deposit of airborne particles on land, such as pesticides, may sound in trespass rather than nuisance. *Id.* at 553. The court determined that because the plaintiff failed to demonstrate any impact on his property from the pesticides, there was no interference with the landowner's right to exclusive possession and, therefore, there was no claim for trespass. *Id.* at 555. *See also, e.g., Lipscomb v. Hercules, Inc.*, 414 So.2d 82, 84-85 (Ala. Civ. App. 1981) (vibrations from explosions, absent deposit of particulate matter, are insufficient for trespass claims); *Celebrity Studios, Inc. v. Civetta Excavating Inc.*, 340 N.Y.S.2d 694, 704 (N.Y. App. Div. 1973) (vibrations projected across or onto land of another does not constitute trespass).<sup>2</sup>

4. The Leading Commentators Agree That Dust and Vibrations Cannot Serve As the Basis for a Common Law Trespass Claim.

The leading commentators agree that dust and vibrations cannot serve as the basis for a trespass claim. *Prosser and Keeton's* view is that in order for an entry to be actionable as a

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<sup>2</sup> California, Washington and Oregon have held that dust, vibrations and other intangible intrusions can form the basis for trespass. *See e.g., Martin v. Reynolds*, 342 P.2d 790, 794, *et seq.* (Or. 1959) (action causing gases and particulates, invisible to naked eye, to become airborne and settle upon owner's land rendering it unfit for raising live-stock during such period constituted a direct trespass); *Elton v. Anheuser-Busch Beverage Group, Inc.*, 58 Cal.Rptr.2d 303, 306 (Cal. App. 1996) ("intangible intrusions such as noise and vibrations may constitute a trespass if they cause actual physical damage"); *San Diego Gas & Elec. Co. v. Superior Court*, 920 P.2d 669, 695 (Cal. 1996) ("Recovery allowed in prior trespass actions predicated upon noise, gas emissions, or vibration intrusions has, in each instance, been predicated upon the deposit of particulate matter upon the plaintiffs' property or on actual physical damage thereto."); *Bradley v. American Smelting & Refining Co.*, 709 P.2d 782 (Wash. 1985) (intentional depositing of microscopic particles, undetectable by human senses, upon person's property could give rise to cause of action for trespass if plaintiff could show invasion affecting interest and exclusive possession of property). However, each of these cases can be distinguished in that they involved courts applying the law of nuisance to claims they label as "trespass" and/or applying rules of law to trespass claims which are inconsistent with Maine law.

trespass, *i.e.*, an entry that interferes with the exclusive possession of the land, a tangible object must invade the land:

While it is generally assumed and held that a personal entry is unnecessary for a trespass, the defendant's act must result in an invasion of *tangible* matter. Otherwise, there would be no use or interference with possession.

*Prosser and Keeton* § 13 at 71 (footnotes omitted) (emphasis added). That being the case, invasions by intangible items cannot serve as the basis for a trespass claim, but rather are to be remedied under the common law of nuisance:

Thus, it is not a trespass to project light, noise, or vibrations across or onto the land of another. These acts may give rise to liability because of a private nuisance resulting from intentional interference with the use and enjoyment of property, or because of harm attributable to negligence, or because of liability for harm caused by an abnormally dangerous activity. It is, however, reasonably clear that the mere intentional introduction onto the land of another of smoke, gas, noise, and the like, without reference to the amount thereof or other factors that are considered in connection with a private nuisance, is not actionable as a trespass.

*Id.*

Similarly, Professor Dobbs in *The Law of Torts* agrees that only tangible things can support a trespass claim:

Because the action for trespass was conceived as a means of protecting possession, a tangible entry upon the land was traditionally required. Anything less than a tangible entry, such as penetration by the land of smoke, noise, or light, might affect enjoyment, but it would not affect possession.

Dan B. Dobbs, 1 *The Law of Torts* (2001) § 53 at 104. Smoke, of course, includes particulate matter.

Thus, as recognized by leading authorities and Maine law, a tangible entry is required for trespass to lie. Dust and vibrations are intangible and cannot invade land. Therefore, they cannot interfere with possession of land and cannot be the basis for a trespass claim and a litigant must resort to the law of nuisance for a remedy.

**B. Even Assuming Maine Law Permits a Trespass Claim Based on Dust, There is No Evidence Any Dust From Dragon Invaded the Darney Property.**

Even if Maine law recognized a common law trespass claim based on dust, the Darneys have still failed to prove the essential elements of their claim. Under Maine law, to prove a trespass claim the plaintiff must establish an invasion of his or her interest in the exclusive possession of land which results in a physical presence. *Jacques*, 676 A.2d 504, 505 fn 1 (“trespass is an invasion of the plaintiff’s interest in the exclusive possession of his land”); *Gibson*, 673 A.2d at 1353 (the “entry” which serves as the gist of a trespass action is a *physical* act by the defendant resulting in a “*physical presence*” on the land) (emphasis added) (citing *Simmons, Zillman & Gregory, Maine Tort Law* § 5.12 at 5-22 (1995)); *see also* *Simmons, Zillman & Gregory, Maine Tort Law* (2004 ed.) at § 5.09 at 5-14 (“‘Entering’ refers to a physical act by the defendant and does mean what it says, namely, an entry on land.”).

As described above, the evidence established that the dust in the samples from the Darneys’ property was from a source other than Dragon. There is no evidence that any dust from Dragon entered the Darneys’ property. Further, the Darneys presented no evidence that anything interfered with their exclusive possession of their land.

**C. Even Assuming Maine Law Permits a Trespass Claim Based on Vibration, the Darneys Have Not Established Any Damages.**

As described above, there is no evidence that vibrations or airblast from Dragon’s blasting operations caused any damage to the Darney residence during the relevant period. Further, even if the Court ignored the undisputed expert testimony of Mr. McKown and accepted the Darneys’ testimony that their property has been damaged by vibrations from Dragon’s operations, they still may not recover any property damages. The Darneys were unable to estimate the cost of any repairs they made to their house as a result of any damage

allegedly caused by Dragon. Tr. at 716:21-717:4. Further, there is no evidence as to the value of the property before or after the alleged trespass. Without more, any award of damages would be purely speculative. *Reardon v. Lovely Development, Inc.*, 2004 ME 74, ¶ 8, 852 A.2d 66, 69 (in order to be recoverable, damages must not be uncertain or speculative, but must be grounded on facts and evidence). Therefore, even assuming a trespass occurred, the Darneys may not recover for any property damage as the result of blasting.

#### **IV. THE DARNEYS DID NOT PROVE THEIR STATUTORY TRESPASS CLAIM.**

The Darneys have also asserted a claim for statutory trespass under 14 M.R.S.A. § 7551-B based on dust and vibrations. Complaint at ¶ 40. The Darneys can only seek to recover under § 7551-B(1)(B), and under the facts of this case, neither dust nor vibrations from Dragon can be “litter” for purposes of the statute. Further, even if dust could serve as the basis of a statutory trespass claim, since there is no evidence of dust from Dragon invading the Darney’s property the Darneys may not recover under the statute.

##### **A. The Trespass Statute Cannot Support the Darneys’ Claim Against Dragon.**

###### **1. The Darneys Only Seek to Recover Under § 7551-B(1)(B)**

The trespass statute, 14 M.R.S.A. § 7551-B(1), provides as follows:

A person who intentionally enters the land of another without permission and causes damage to property is liable to the owner in a civil action if the person:

- A. Damages or throws down any fence, bar or gate; leaves a gate open; breaks glass; damages any road, drainage ditch, culvert, bridge, sign or paint marking; or does other damage to any structure on property not that person’s own; or
- B. Throws, drops, deposits, discards, dumps or otherwise disposes of litter, as defined in Title 17, section 2263, subsection 2, in any manner or amount, on property not that person's own.

14 M.R.S.A. § 7551-B(1).

Although the Darneys' complaint does not state whether they assert a claim under § 7551-B(1)(A) or § 7551-B(1)(B), presumably they seek to recover under § 7551-B(1)(B).

Under § 7551-B(1)(A) "a person who intentionally enters the land of another without permission and causes damage to property is liable to the owner in a civil action if the person ... does other damage to any structure on the property not that person's own." The plain language of the statute requires a "person" to intentionally enter the land of another and to damage a structure thereon. The Darneys do not allege and did not prove that any person from Dragon intentionally entered their land and caused damage to a structure thereon. Further, neither dust nor vibrations are "a person who intentionally enters the land of another." Therefore, the Darneys may not recover against Dragon based on dust and vibrations under § 7551-B(1)(A) and they may only attempt to recover against Dragon based upon 14 M.R.S.A. § 7551-B(1)(B).

2. Any Dust or Vibrations From Dragon Are Not "Litter" for Purposes of 14 M.R.S.A. § 7551-B(1)(B) and Cannot Be the Basis of a Statutory Trespass Claim.

A claim under 14 M.R.S.A. § 7551-B(1)(B) must be based on a person disposing of "litter" on the property of another. "Litter," for purposes of 14 M.R.S.A. § 7551-B(1)(B), is defined as

all waste materials including but not limited to, bottles, glass, crockery, cans, scrap metal, junk, paper, garbage, rubbish, offal, except waste parts or remains resulting from the normal field dressing of lawfully harvested wild game or the lawful use of waste parts or remains of wild game as bait, feathers, except feathers from live birds while being transported, abandoned ice-fishing shacks, old automobiles or parts of automobiles or similar refuse, or disposable packages or containers thrown or deposited as prohibited in this chapter, but *not including the wastes of the primary processes of mining, logging, sawmilling, farming or manufacturing.*

17 M.R.S.A. § 2263 (2) (emphasis added).

To the extent any dust or vibrations from Dragon are deposited on the Darneys' property, they do not fit the definition of "litter" for purposes of the statute. First, vibrations are not "litter." In order for something to be "litter" it must be a "waste material." Vibrations are not materials, much less are they "waste materials," as they must be to fit within the statutory definition. 17 M.R.S.A. § 2263(2). Without being "litter," vibrations cannot serve as the basis for a statutory trespass claim under 14 M.R.S.A. § 7551-B(1)(B).

Further, any dust that might be coming from Dragon's operations cannot fit within the definition of litter because it is expressly excluded from the definition. Excluded from the definition of "litter" are any "wastes of the primary processes of mining, logging, sawmilling, farming or manufacturing." 17 M.R.S.A. § 2263(2). This exclusion encompasses any dust coming from Dragon. It is clear from the evidence at trial that the Darneys seek to recover for dust coming onto their property from either Dragon's manufacturing operations or its blasting operations. *See e.g.*, Tr. at 498:23-499:20, 702:4-708:2. *See also* Complaint ¶ 40 ("Dragon has intentionally entered onto the Darneys' property with dust and blasting vibrations from its *Plant operations.*") (emphasis added)). Because wastes from "mining" or "manufacturing" are expressly excluded from the definition of "litter," dust from Dragon's limestone mining and cement manufacturing operations cannot be the basis for a statutory trespass claim under 14 M.R.S.A. § 7551-B(1)(B).

**V. THE DARNEYS HAVE NOT PROVED THEIR NEGLIGENCE CLAIM AGAINST DRAGON.**

The Darneys' negligence claim against Dragon is based on their allegation that Dragon had a duty to take reasonable precautions to prevent the migration of noise, vibrations and dust from its plant to the Darneys' property. Complaint at ¶ 52. In order to prove a claim for negligence, a plaintiff must establish the four elements: duty, breach, causation and damages.

*Reid v. Town of Mount Vernon*, 2007 ME 125, ¶ 14, 932 A.2d 539, 544. Here, the Darneys failed to prove Dragon breached any duty owed to them and failed to prove they suffered any harm caused by Dragon.

**A. The Darneys Failed to Prove Dragon Breached Any Duty Owed to Them.**

The existence of a duty of care is a question of law. *Reid*, 2007 ME 125, ¶ 14, 932 A.2d at 544. Duty is a question of whether a defendant is under any obligation for the benefit of the plaintiff. *Reid*, 2007 ME 125, ¶ 15, 932 A.2d at 544. Where a court imposes a duty in a negligence case, that duty is “to conform to the legal standard of reasonable conduct in light of the apparent risk.” *Id.* The common-law test of duty is the probability or foreseeability of injury to the plaintiff. *Fortin v. The Roman Catholic Bishop of Portland*, 2005 ME 57, ¶ 75, 871 A.2d 1208, 1232. The risk reasonably to be perceived within the range of apprehension delineates the duty to be performed and the scope thereof. *Id.*

1. Dragon Did Not Violate Any Duty Owed the Darneys Regarding Noise.

The Darneys allege Dragon owed them a duty to take reasonable precautions to prevent the migration of noise, vibrations and dust from its plant to their property. Assuming Dragon owed such a duty, the Darneys failed to prove Dragon breached that duty. In the case of noise, the only evidence presented by the Darneys relating to how noise affects them was their testimony that they hear trucks in the morning and a constant humming from the plant at night. Tr. at 503:25-504:5. The only other evidence relating to noise established that the noise levels at Dragon were well within the Town of Thomaston’s noise ordinance. Exs. 4, 5. Presumably, the foreseeable risk of injury to Plaintiffs that Dragon may have a duty to prevent is hearing loss. On that score, the Darneys presented no evidence that noise from Dragon has impacted their hearing in any way, nor could they since this Court previously granted Dragon summary

judgment to the extent the Darneys sought to recover for any personal injuries. Order on Motion for Partial Summary Judgment (Aug. 6, 2009) at 9.

Further, the evidence at trial demonstrated that Dragon takes numerous steps to reduce noise from its facility. For example, Dragon uses stemming in its blasting operations to reduce noise while blasting. Tr. at 936:20-937:2. Dragon designs its shot patterns in order to minimize noise and does not conduct blasting operations on days in which atmospheric conditions make excessive overblast more likely, thus reducing excess noise. Ex. 70 at 10. Dragon uses equipment in the plant that has been supplied with acoustic designs built into the equipment, and Dragon has added acoustic designs to equipment to reduce noise. Tr. at 937:6-12. Dragon also soundproofed equipment and rooms at the plant in an effort to further reduce noise levels. Ex. 79 at 10; Tr. at 995:11-18. The Darneys made no effort to identify other reasonable steps Dragon could take to reduce noise from the plant. In short, the evidence at trial did not establish that Dragon breached any duty owed to the Darneys relating to noise, but rather that Dragon satisfied that duty.

2. Dragon Took Reasonable Steps to Minimize Ground Vibrations From Its Blasting Operations.

In the case of vibrations, the foreseeable risk of injury to Plaintiffs is that their property might suffer damage as a result of excessive vibrations from Dragon's blasting operations. At trial, extensive evidence was presented relating to the numerous steps Dragon takes to prevent damage to neighboring structures from its blasting operations. As described above at pages 6 and 8 of this brief, Ray DeGrass testified extensively regarding steps Dragon takes to minimize ground vibrations from its blasting operations and best management practices Dragon engages in with regards to its blasting operations. As described above, Dragon also offered to conduct a

pre-blast survey for the Darneys in order to establish a baseline, but the Darneys denied access before it could be completed. Tr. at 801:1-8; Ex. 53 at P069.

As Mr. McKown testified, Dragon's procedures and precautions have permitted it to effectively minimize any risk of harm to persons or property from its blasting operations to the point where its blasting operations pose a low degree of risk of harm to persons or property. Tr. at 856:24-857:23.

The Darneys did not attempt to identify any reasonable steps Dragon could take to minimize ground vibrations from its blasting operations that it is not already taking. In light of the extensive steps taken by Dragon to minimize ground vibrations and the absence of evidence regarding what more Dragon should have done, the Darneys failed to prove Dragon breached any duty to take reasonable steps to prevent vibrations from coming to their property. Without more, the Darneys failed to prove their negligence claim.

3. Dragon Took Reasonable Precautions to Prevent Dust From Going From Dragon to the Darneys.

The foreseeable risk of injury posed to Plaintiffs in the context of dust is that their property might suffer damage as a result of dust from Dragon's operations. As described above at pages 9 and 10 of this brief, extensive evidence was presented at trial relating to the numerous steps Dragon takes to prevent dust from leaving its facility. On the other hand, similar to noise and dust, the Darneys presented no evidence regarding additional reasonable steps Dragon might take to further prevent dust from leaving its facility. In light of the extensive steps taken by Dragon to minimize dust leaving its facility and no evidence regarding what more Dragon should have done, the Darneys failed to prove Dragon breached any duty to take reasonable steps to prevent dust from coming to their property. The evidence at trial

demonstrated that Dragon fulfilled any duty it may have. Without more, the Darneys failed to prove their negligence claim.

**B. The Darneys Failed to Prove They Suffered Any Damage Caused by Dragon.**

An essential element of a claim for negligence is that the defendant's negligence was the proximate cause of the plaintiff's harm. *Walter v. Wal-Mart Stores, Inc.*, 2000 ME 63, ¶ 17, 748 A.2d 961, 968. A plaintiff must show "that there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered." *Id.* The defendant's conduct must be a "substantial factor" in bringing about the plaintiff's harm in order for there to be proximate cause. *Id.* Further, to prove causation, the Law Court has held that the plaintiff must show more than "a 'mere possibility' of proximate cause; evidence that requires speculation or conjecture by the factfinder entitles [the defendant] to judgment as a matter of law." *Johnson v. Carleton*, 2001 ME 12, ¶ 12, 765 A.2d 571, 575. *See also Roney v. Wendy's Old Fashioned Hamburgers of New York, Inc.*, 2006 WL 696251, \* 10 (D. Me. March 17, 2006) (quoting *Merriam v. Wanger*, 2000 ME 159, ¶ 8, 757 A.2d 778, 781).

Here, the Darneys failed to prove they have suffered any damage as a result of noise, vibrations or dust from Dragon. In the case of noise, as described above, they did not present evidence at trial relating to any damages they have suffered as a result of noise, much less evidence that such damage was caused by Dragon. Similarly, as Mr. McKown testified, Dragon never created any ground vibrations which damaged the Darney residence during the relevant period. Tr. at 849:4-853:20. Finally, the evidence at trial established that the dust on the Darney property was from sources other than Dragon. Tr. at 1057:5-12. Without being able to prove causation, the Darneys' negligence claim fails and Dragon is entitled to judgment.

**VI. THE DARNEYS DID NOT PROVE THAT DRAGON IS SUBJECT TO STRICT LIABILITY FOR ITS BLASTING OPERATIONS.**

In their First Amended Complaint the Darneys asserted a claim for strict liability against Dragon based upon Dragon's blasting operations. The Darneys alleged that Dragon's blasting operation is an abnormally dangerous activity and that they have sustained damages to their property as a result of the blasting operations. First Amended Complaint (March 9, 2010) at ¶ 62. Because the Darneys did not prove that Dragon's blasting operations are an abnormally dangerous activity and did not prove that Dragon's blasting operations have damaged their property, the Darneys did not prove their strict liability claim.

**A. Dragon's Blasting Operations Do Not Constitute an Abnormally Dangerous Activity and Strict Liability May Not Be Imposed.**

In *Dyer v. Maine Drilling & Blasting, Inc.*, the Maine Law Court adopted Sections 519 through 520 of the Restatement (Second) of Tort, which impose liability on defendants conducting an abnormally dangerous activity without requiring proof of negligence. 2009 ME 126, ¶ 29, 984 A.2d 210, 219. However, a plaintiff must still prove causation. *Id.* Further, in the case of blasting – as with all instances of alleged abnormally dangerous activities – the *Dyer* Court provided that the factfinder must determine whether the activity in question constitutes abnormally dangerous activity. 2009 ME 126, ¶ 29, 31, 984 A.2d at 219.

The Law Court in *Dyer* stated that the following factors from the Restatement are to be considered in determining whether an activity is abnormally dangerous:

- (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
- (b) likelihood that the harm that results from it will be great;
- (c) inability to eliminate the risk by the exercise of reasonable care;
- (d) extent to which the activity is not a matter of common usage;
- (e) inappropriateness of the activity to the place where it is carried on; and

- (f) extent to which its value to the community is outweighed by its dangerous attributes.

*Dyer*, 2009 ME 126, ¶ 15 fn 4, 984 A.2d 210, 215 fn 4 (quoting Restatement (Second) of Torts § 520). A consideration of these factors demonstrates that Dragon's blasting operations do not constitute an abnormally dangerous activity.

At trial, Dragon presented the testimony of Andrew McKown, Dragon's retained blasting expert. Mr. McKown's area of expertise is drilling and blasting and has extensive experience and familiarity with quarries, particularly in New England. Tr. at . Tr. at 839:12-15, 840:1-14, 841:7. Mr. McKown testified regarding the factors contained in Section 520 of the Restatement based upon his education, experience, review of Dragon's blasting records, videos, and his observation of Dragon's blasting techniques. As described above, Mr. McKown testified that Dragon takes the necessary precautions to minimize any risk of harm to persons or property. Based on the precautions taken by Dragon, Dragon's blasting operations pose a low degree of risk of harm to other persons or property. Further, there is a low likelihood that harm will result from Dragon's blasting operations, based on the procedures utilized by Dragon, the monitoring undertaken by Dragon, and the care taken by Dragon in conducting its blasting. Dragon's precautions have eliminated the risks of blasting. Further, blasting of the type conducted by Dragon is very common, particularly in New England. Aggregate is needed from quarries for the production of concrete, asphalt, roadways, and other uses. Tr. at 858:6-20. Wherever there is rock near the ground surface, generally in New England and throughout the United States, there are quarries for obtaining aggregate. Tr. at 858:6-20. Such quarries and blasting are very common. Tr. at 858:6-20. It is common for residential structures to be near quarries in New England and Dragon's blasting operations are appropriate to the location in which they are carried out. Tr. at 858:21-7.

At trial, Dragon proved that its operations have substantial value to the surrounding community. Dragon currently employs 97 employees at its Thomaston facility, paying them wages and benefits of approximately \$5 million. Tr. at 898:6-9. Prior to the recession, during its peak employment numbers, Dragon employed about 126 persons and paid out about \$8.2 million in wages and benefits a year. Tr. at 898:10-14, 898:25-899:4. Dragon also pays about \$1.2 million in annual property taxes to the Town of Thomaston. Tr. at 899:5-8. As described above, Dragon has successfully minimized the dangerous attributes of its blasting operations to the extent that they are substantially outweighed by the value Dragon provides to its community.

The Darneys, on the other hand, made no effort to demonstrate that Dragon's blasting operations constitute an abnormally dangerous activity as defined by the strict liability factors. As the plaintiffs, the Darneys failed to meet their burden of proof regarding strict liability. The only record evidence – introduced by Dragon – clearly establishes that under the facts of this case, Dragon's blasting operations are not an abnormally dangerous activity. Therefore, strict liability may not be imposed.

**B. Even Assuming Dragon's Blasting Operations Were an Abnormally Dangerous Activity, the Darneys Failed to Prove They Suffered Any Damage As a Result of Dragon's Blasting.**

As the Law Court stated in *Dyer*, although Maine has recognized strict liability for abnormally dangerous activities, a plaintiff must still prove a causal relationship between the abnormally dangerous activity and the alleged property damage. *Dyer*, 2009 ME 126, ¶ 32, 984 A.2d at 219. Here, the Darneys failed to prove any causal connection between any property damage they allege and Dragon's blasting operations. As described above, no ground vibrations created by Dragon's blasting operations caused any damage to the Darney residence

during the relevant period. Tr. at 849:4-853:20. Further, no air blasts generated by Dragon's blasting operations have caused any damage to the Darneys' windows or home. Tr. at 854:4-23. Because no evidence of causation was presented connecting their alleged property damage to Dragon's blasting, the Darneys may not recover for their strict liability claim and Dragon is entitled to judgment on it.

## **VII. THE DARNEYS FAILED TO PROVE ENTITLEMENT TO INJUNCTIVE RELIEF.**

The Darneys have also asserted a claim for injunctive relief, which they seek to based upon their successful assertion of claims for trespass, nuisance and negligence. Complaint, Count V. Because they have failed to successfully assert their substantive claims, and because they have failed to prove the necessary prerequisites to obtaining injunctive relief, Dragon is entitled to judgment on the Darneys' claim for injunctive relief.

Before a Court can grant injunctive relief, the Court must find that the following four criteria are met:

- a. that the plaintiff will suffer irreparable injury if the injunction is not granted,
- b. that such injury outweighs any harm which granting the injunctive relief would inflict upon the defendant,
- c. that the plaintiff has exhibited a likelihood of success on the merits, and
- d. that the public interest will not be adversely affected by granting the injunction.

*Ingraham v. University of Maine at Orono*, 441 A.2d 691, 693 (Me. 1982). "Irreparable injury" is defined as "injury for which there is no adequate remedy at law." *Bangor Historic Track, Inc. v. Department of Agriculture*, 2003 ME 140, ¶ 10, 837 A.2d 129, 133.

The Darneys failed to prove any of these four criteria. First, the Darneys presented no evidence to establish that if an injunction is not issued, they will suffer an injury for which there is no adequate remedy at law. That is because they themselves do not perceive that to be the

case. To the Plaintiffs, this case has always been about damages. For example, in the Plaintiffs' Trial Memorandum (October 20, 2010) the words "injunctive relief" never appeared. Similarly, the Plaintiffs' Updated Pretrial Memorandum (September 1, 2010) never mentioned the words "injunctive relief," but did identify nearly \$6 million in damages that the Darneys seek in this lawsuit. There is clearly an adequate remedy at law, namely damages, that is available to the Darneys should they prove their claims against Dragon.

Further, the Darneys did not prove that any irreparable injury outweighs the harm granting an injunction would inflict upon Dragon. Here, the only way to stop vibrations from coming to the Darneys' property is to order Dragon to cease blasting operations. As the evidence established at trial, blasting is the only cost-effective method of obtaining limestone for Dragon's cement-manufacturing operations. Tr. at 264:3-10, 901:7-23, 935:10-936:5. Other methods of obtaining limestone, such as trucking it in, are prohibitively expensive. Tr. at 264:3-10, 901:7-23, 935:10-936:5. Therefore, if Dragon were forced to stop blasting, it would be effectively deprived of the raw material it needs to conduct its manufacturing operations and Dragon would be forced to cease operations. Tr. at 264:3-10, 901:7-23, 935-936. In 2004, Dragon invested \$50 million in the plant, therefore, if it were forced to cease operations, it would be at an expense to Dragon of at least that amount. Such harm to Dragon is totally disproportionate to the harm the Darneys have allegedly suffered and militates against an award of injunctive relief.

As illustrated by this brief, the Darneys failed to prove a likelihood of success on the merits in this lawsuit.

Finally, the Darneys made no effort to prove that the public interest will not be adversely affected if an injunction were granted. In fact, the contrary is true. If an injunction were

granted, 97 persons who are employed at Dragon's Thomaston facility, receiving \$5 million each year in payroll and benefits, would lose their jobs. That, of course, would also affect all of their families and not be in the public interest. Further, the Town of Thomaston would lose \$1.2 million in annual property tax revenue from Dragon. As is obvious, it would not be in the public interest for Thomaston to lose a large property taxpayer. Clearly, an injunction would adversely affect the public interest.

Because the Darneys failed to prove any of the criteria for issuance of injunctive relief, it would be inappropriate for this Court to order any.

### **VIII. ISSUES THE COURT ASKED THE PARTIES TO ADDRESS.**

At the close of trial, the Court asked the parties to address numerous issues in their post-trial briefing. Many of those issues have been addressed above. However, there are several additional issues, which Dragon addresses below.

#### **A. Dragon's Compliance Vel Non With State-Issued Licenses is Irrelevant To the Issues of Liability or Damages.**

The case of *Johnston v. Maine Energy Recover Co., Limited Partnership*, involved a statutory nuisance claim based on odor allegedly coming from a solid waste incinerator. The defendant in that case apparently argued that the nuisance claim was barred because the defendant's activity was licensed. 2010 ME 52, ¶ 17, 997 A.2d at 746. In response, the Maine Law Court held as follows:

We have never held that any activity conducted pursuant to a license is necessarily immune from private actions. To the contrary, the licensing status of an activity does not affect the determination of whether it is a private nuisance.

*Id.* Thus, Dragon's compliance or lack of compliance with State-issued licenses is irrelevant to the issues of liability or damages.

**B. The Darneys May Not Be Compensated For Their Time and Expenses Spent In Connection With This Case.**

The Darneys may not be compensated for their time and expenses spent in connection with this case. In *In re Hannaford Bros. Co. Customer Data Security Breach Litigation*, the Maine Law Court recognized that the torts of nuisance, false imprisonment, and abuse of process torts recognize a remedy for loss of time without corresponding personal or property damage. 2010 ME 93, ¶ 9 fn 1, 4 A.3d 492, 496. However, there is no authority to permit parties to recover for loss of time under the rubrics for negligence, common law trespass, statutory trespass and strict liability. *See Id.* Thus, of the claims asserted in this lawsuit, nuisance is the only that presents the possibility for recovery for loss of time. For that proposition, the Law Court in *In re Hannaford Bros.* cited two cases: *Brown v. Watson*, 47 Me. 161, 163 (1859) and *Eaton v. Cormier*, 2000 ME 65, ¶ 5, 748 A.2d 1006, 1008. A review of those cases is instructive as to what time may be compensable.

First, *Brown v. Watson* was a nuisance case in which the Law Court held that a man could recover for the time he spent taking a more circuitous route to his destination because the defendant obstructed the road. *See Brown*, 47 Me. At 163 (“[A] person, being obstructed on his journey and obliged to proceed by a more circuitous route, might recover for the loss of time and inconvenience, against the individual by whom the obstructions were erected.”). In other words, the Law Court permitted the plaintiff to recover for loss of time and inconvenience as a direct result of the nuisance. *Brown* does not stand for the proposition that time spent assisting in the prosecution of a nuisance claim is compensable. In *Eaton*, the Law Court did nothing more than state that compensation for nuisance may “include elements for inconvenience and annoyance.” *Eaton*, 2000 ME 65, ¶ 5, 748 A.2d at 1008. It did not, however, provide authority that one may recover for time spent assisting in the prosecution of a nuisance claim.

Mr. Darney estimates that he has spent “thousands” of hours per year assisting in the prosecution of this case by taking photographs, making videos, establishing his website regarding the health impacts of the cement plant, performing computer research which led to his worries about his family, and sending emails to Ms. McGehee. Tr. at 714:22-716:17. Aside from the fact that the Darneys did not prove how these activities assisted in the prosecution of this case, neither *Brown, Eaton*, nor any other case provides authority to permit the Darneys to be compensated for the time they have spent assisting in the prosecution of their claims against Dragon. Further, because Mr. Darney has been disabled since 2005, the time he spent helping Ms. McGehee was not time that he took away from work because he had not been working at the time. Tr. at 722:19-723:3. Therefore, the Darneys were not damaged by the time spent assisting in the prosecution of their claims against Dragon. Under the facts of this case, the Darneys may not recover for time spent assisting in the prosecution of their claims.

The Darneys also may not recover their attorney’s fees in connection with this case. Maine follows the American rule that litigants bear their own attorney fees in the absence of statutory authority or a contractual provision. *Soley v. Karll*, 2004 ME 89, ¶ 10, 853 A.2d 755, 758. Here, there is no contractual provision. Further, there is no statutory authority which permits an award of fees to the Darneys in connection with their claims for nuisance, common law trespass, negligence, strict liability, nor for injunctive relief. *See e.g., Fine Line, Inc. v. Blake*, 677 A.2d 1061, 1065 (Me. 1996) (no statutory basis for award of attorney fees for successful common law nuisance claim); *Sebra v. Wentworth*, 2010 ME 21, ¶ 18, 990 A.2d 538, 544 (no statutory basis to award fees for successful common law trespass claim). Therefore, the Darneys may not receive any award for attorney fees in this action for any of those claims.

Claims for statutory trespass do provide the possibility for recovery of reasonable attorney's fees in connection with preparing the claim and bringing the action under the trespass statute. 14 M.R.S.A. § 7551-B(3)(C). However, because the Darneys failed to prove their statutory trespass claim, as described above, they may not recover attorney fees under § 7551-B(3)(C). Thus, under the facts of this case, the Darneys may not recover their attorney's fees.

**C. Punitive Damages are Not Available Under the Facts of This Case.**

Under Maine law, punitive damages are available based upon tortious conduct only if the plaintiff can establish by clear and convincing evidence that the defendant's conduct was motivated by actual ill-will or was so outrageous that malice is implied. *Tuttle v. Raymond*, 494 A.2d 1353, 1361 (Me. 1985); *Palleschi v. Palleschi*, 1998 ME 3, ¶ 6, 704 A.2d 383, 385. To meet the clear and convincing evidence standard of proof, the factfinder must be convinced to high probability. *Haworth v. Feigon*, 623 A.2d 150, 159 fn 8 (Me. 1993).

At trial, the Darneys did not present any evidence – much less clear and convincing evidence – that Dragon exhibited tortious conduct motivated by actual ill-will. The Darneys also failed to prove that Dragon's conduct toward them was so outrageous that malice can be implied. On the contrary, the evidence at trial demonstrated that Dragon has gone to great lengths to minimize dust and vibrations from its operations. Without more, Dragon is entitled to judgment on the Darneys' claim for punitive damages.

**CONCLUSION**

For Dragon, this saga began in November 2004, when the Darneys filed their first lawsuit against Dragon. Over six years later, the Darneys have made no more progress establishing their claims against Dragon in this case than they did in the first lawsuit. At trial,

the Darneys failed to prove any one of their claims. Dragon is entitled to judgment and respectfully requests that this Court grant judgment to it.

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 7th day of January, 2011, I caused a copy of Defendant's Post-Trial Brief to be filed with the Clerk of Court using the CM/ECF system which will send notification of such filing to counsel of record.

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