

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

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

Plaintiffs

v.

DRAGON PRODUCTS COMPANY, LLC

Defendant

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Civil Action

Docket No. 2:08-CV-047

**PLAINTIFFS' UPDATED PRETRIAL MEMORANDUM**

Pursuant to Local Rule 16.4, and the Court's Notice of August 18, 2010, Plaintiffs file this Pretrial Memorandum, updating their Pretrial Memorandum filed on April 29, 2009.

**1. BRIEF FACTUAL STATEMENT**

Plaintiffs assert that Defendant's manufacturing and blasting cement facility, including a kiln and quarry, on a 1,100-acre site near Plaintiffs' home, causes caustic dust and ground vibrations to trespass on Plaintiffs' property, and is a nuisance. Plaintiffs assert further that Defendant is strictly liable for their damages caused by the blasting. The blasting has been coming closer to Plaintiffs' property over the last few years, causing progressive structural damage to their house and barn. The blasting explosions are also louder, disturbing the peace of mind of Mr. and Mrs. Darney, and their children.

The dust from the facility covers Plaintiffs' vehicles; their patio; the children's swing-set; their furniture; their food and drink; their skin; and is continually present in the air they breathe. Because it is caustic, Plaintiffs are concerned and believe that the dust not only damages their

personal property, by corroding the paint on their vehicles, and clogging their computer, but also causes their rashes, red eyes, sore throats and headaches. They are worried about the long term implications for their and their children's health. Their concerns cause them distress and sleeplessness, disturb their peace of mind, and cause them discomfort, inconvenience and annoyance.

Defendant has failed to pay for, or even to assess, the blasting damage to the area's residential and commercial properties, including Plaintiffs' property, such as by taking pre- and post- blasting surveys. Defendant is aware of the caustic nature of its limestone and cement dust as it advises its employees to protect themselves against it. Defendant has also been advised repeatedly by residents and the Maine DEP that its dust is migrating to off-site properties and that its blasting is causing property damage. There are reasonable measures Defendant can take to reduce the adverse impact of its operation, which it has failed to take. Instead, its response to residents' concerns and complaints has been to obfuscate, mislead, delay and deflect. In 2008 Defendant was fined over \$400,000 by the DEP and the EPA for its environmental violations.

### **DAMAGES ASSERTED**

To the extent that Defendant's blasting vibrations and noise and air contamination from dust and odor, have ceased permanently as of the date of trial, and Plaintiffs are able to continue to live in their home free from its trespass and nuisance, then the damages they seek for the damage done to date are: compensation for damage to their home, barn and yard, currently estimated at \$90,000, and attendant expenses for them to live elsewhere while the home, barn and yard are repaired in the estimated amount of \$15,000, as well as compensation for the damage to their personal property including computers and vehicles, in the estimated amount of \$10,000; compensation to Mr. Darney for his time and effort to obtain enforcement of

environmental impact regulations against Dragon over the past 5+ years in the amount of \$30,000 a year; compensation of \$400,000 for the distress caused each of the Plaintiffs, including their sleeplessness, disturbance of peace of mind, discomfort, inconvenience and annoyance; and attorneys fees' and costs, and punitive damages in the amount of \$5 million (so Plaintiffs may establish, with a majority of the after-tax amount of any such punitive damage award, a community fund to help pay for repairs to other residents' property caused by Defendant's blasting, and to help pay for other residents' treatment of adverse health effects believed to be caused by Defendant's operation).

To the extent Defendant's blasting vibrations and noise and air contamination from dust and odor have **not** ceased permanently as of the date of trial, Plaintiffs seek further an award in damages sufficient to fund their relocation to a home away from Defendants' facility, in the amount of \$220,000. This amount is sought as their current residential property is not marketable at any reasonable price because of Defendant's current operation and its plan to blast ever closer to Plaintiffs' property over the coming years.

These damage estimates may change upon further information. By reciting these amounts, Plaintiffs do not waive any other claims for damages or other forms of relief as are set forth in their complaint.

## **2. CONTROVERTED POINTS OF LAW; EVIDENTIARY QUESTIONS**

Plaintiffs are not aware of any controverted points of law that have not already been briefed.

There is an evidentiary question arising from Defendant's designation of categories of documents it produced in 2009 as "Confidential". Plaintiffs wish to adduce these documents at trial.

There may also be a question as to whether there was an agreement between the parties to deem September 2009 as the date past which there would be no further discovery as to new events. In 2009, in response to a protest by Defendant's counsel that Plaintiffs' discovery requests had no stopping point given their "continuing tort" assertions with each new blast and migratory dust event, Plaintiffs' counsel proposed a mutual 'stopping point' of September 2009, to which Defendant's counsel agreed. Accordingly, the parties neither sought nor provided documents or other discovery as to events occurring after September 2009. Indeed, they conducted no further discovery of any kind after the summer of 2009, except Defendant completed an unfinished 2009 deposition of Mr. Hunt in July 2010. At that July deposition, however, when Plaintiffs' counsel reminded Defendant's counsel of the agreement, Defendant's counsel asserted that they did not recall it. There was no written agreement. This may be an issue for resolution at the pretrial conference, to the extent more discovery would cause the trial to be delayed.

**3. PROPOSED STIPULATIONS**

Plaintiffs propose that the parties stipulate that legible complete copies of documents be admissible in lieu of originals.

**4. WITNESSES**

1. Stephen Darney  
Kathy Darney  
Stephen Darney, Jr.  
Kalen Darney  
24 Old County Road  
Thomaston, ME 04861  
207-354-7278
  
2. Mr. Frederick B. Darney  
46 Eastview Road  
Hopkinton, MA 04861  
508-435-3365

3. Daniel and Rachel Cross  
21 Marsh Road  
Thomaston, ME 04861  
207-354-8097
4. Mr. and Mrs. Robert Clark  
10 Marsh Road  
Thomaston, ME 04861  
207-354-6479
5. Tim and Teri Hallowell  
24 Marsh Road  
Thomaston, ME 04861  
207-354-8984
6. Ron Huber  
Stella Maris  
Rockland, ME 04841  
207-691-7485
7. Rhonda Lindahl-Henderson and Mr. Henderson  
3 Emery Avenue  
Thomaston, ME 04861  
Phone unknown
8. Tiffany Reeves  
P.O. Box 375  
Camden, ME 04848 (mail)  
18 Main Street  
Thomaston, ME 04861 (residence)  
207-354-0264
9. Daniel Allen  
106 Old County Road  
Thomaston, ME 04861  
207-354-2034
10. Daniel Dunkle  
The Republic/Village Soup Times  
71 High Street  
Belfast, ME 04915  
(207) 338-3333

11. Ann Thayer, former environmental manager of Dragon Products,  
128 Little John Rd  
Yarmouth, ME 04096-5109  
(207) 846-5383  
or c/o Dragon Products Company  
38 Preble Street  
Portland, ME 04104  
(207) 774-6355
12. Mickey Kuhns, former environmental manager of Dragon Products,  
35 Desert Pond Road  
Mt. Vernon, ME 04532  
(207) 293-2194  
or c/o Dragon Products Company  
38 Preble Street  
Portland, ME 04104  
(207) 774-6355
13. Michael Martunas, Environmental Compliance Coordinator  
Dragon Products Company  
38 Preble Street  
Portland, ME 04104  
(207) 774-6355
14. Terry Veysey, former President of Dragon Products  
11 Foreside Common Dr.  
Falmouth, ME 04105-2318  
Phone unknown  
or c/o Dragon Products Company  
38 Preble Street  
Portland, ME 04104  
(207) 774-6355
15. Manuel Llop, President Dragon Products  
Dragon Products Company, LLC  
38 Preble Street  
Portland, ME 04104  
(207) 774-6355
16. Manuel Llop, President Giant Holding, sole member of Dragon  
Products LLC  
c/o Dragon Products Company  
38 Preble Street  
Portland, ME 04104  
(207) 774-6355

17. Roy Rike, Compliance Officer  
Maine Department of Environmental Protection  
Bureau of Air Quality  
17 State House Station  
Augusta, ME 04333-0017  
(207) 287-4867
18. David Wright  
Maine Department of Environmental Protection  
17 State House Station  
Augusta, ME 04333-0017  
(207) 287-7673
19. Andrew Smith  
Maine State Toxicologist  
Department of Health and Human Services,  
11 State House Station  
Augusta, ME 04333  
207-287-5189
20. Mark Stebbins, Bureau of Land and Water Quality  
Maine Department of Environmental Protection  
17 State House Station  
Augusta, ME 04333-0017  
(207) 822-6367
21. Richard Marriner, II, Bureau of Air Quality  
Maine Department of Environmental Protection  
17 State House Station  
Augusta, ME 04333-0017  
(207) 287-3686
22. Alison E. Faulkingham, M.D.  
Pediatric & Adolescent Medicine  
1056 Commercial Street  
Rockport, ME 04856  
(207) 596-6722
23. Mr. Richard Hunt  
5 Broadway  
Thomaston, ME 04861  
(207) 354-0967

24. Jared Kelly, Analyst  
Pamela J. Landi, Analyst  
EMLab P&K  
148 Rangeway Road  
North Billerica, MA 01862  
(978) 667-1400
25. Dena Davis  
44 Hylar Street  
Thomaston, ME 04861  
207-354-0614
26. Daria Peck  
33 Gleason St.  
Thomaston, ME 04861  
207-354-8182
27. Gail Cross  
39 Beechwood Street  
Thomaston, ME 04861  
207-354-0016
28. Carole Westerveldt  
50 Thatcher Street  
Thomaston, ME 04861  
207-354-7094
29. Dr. Sam Wei Lew  
Pediatric & Adolescent Medicine  
1056 Commercial Street  
Rockport, ME 04856  
(207) 596-6722
30. Ken Friedenber  
Graceful Earth, Inc.  
838 Kealahou Street  
Honolulu, HI 96825  
(808) 394-2832
31. Charles Swift  
Manager, Midas Auto Service  
154 New County Road  
Thomaston, ME 04861

32. Bryce Sproul  
Division Director, Div. of Licensing & Enforcement  
Maine Department of Environmental Protection  
17 State House Station  
Augusta, ME 04333-0017  
(207) 287-7048
  
33. John Benzinger, M.D., Lab Director  
MaineGeneral Medical Center  
6E Chestnut Street  
Augusta, ME 04330  
207-626-1400

**5. EXHIBITS**

Plaintiffs provide below a description, by category, of documents, data compilations, and tangible things that they may use to support their claims or defenses. Plaintiffs do not identify items that may be used for the purposes of impeachment or rebuttal. Plaintiffs reserve the right to identify additional items that may be used as evidence or to present evidence under Rules 702, 703 or 705 of the Federal Rules of Evidence. All the documents, data compilations and tangible things listed will be made available for inspection and copying upon request of Defendant.

Plaintiffs further reserve the right to present any categories of things disclosed in the initial or any subsequent disclosures of Defendant, or any documents formally or informally produced by Defendant, and any categories of things mentioned in any documents formally or informally produced by Defendant or mentioned in any depositions that may be taken in this proceeding.

<b>Exhibit No.</b>	<b>Exhibit Description</b>
<b>1</b>	Darney deed to property
<b>2</b>	Realtor's property disclosure statement
<b>3</b>	Purchase and Sale Agreement
<b>4</b>	Mortgage Bank Appraisal, 2002
<b>5</b>	Property tax bills
<b>6</b>	Dragon Products DEP Site Location Findings of Fact and Order, #L-004152-16-B-A, Nov. 3, 1987
<b>7</b>	Dragon Products' Part 70 Air Emission License and Amendments

8	DEP and EPA Records of Dragon's Air Emissions Violations
9	Records of Dragon Opacity Violations
10	Photographs of dust from Dragon Products facility
11	Photographs of dust at Darney residence
12	Report (signed by Pamela J. Landi--ref. EMLab P&K # 338957) of EMLab P & K to Maine Department of Environmental Protection, and attachments, with cover letter (signed by Jared Kelly--ref. EMLab P&K # 363194) comparing dust from Dragon facility with dust on Darney property
13	Notices of Air Emissions License Violations
14	Department of Environmental Protection, Notice of Violation, Issued to Dragon Products, Feb. 28, 2006
15	Dragon Products, Excess Emission Report, Fourth Quarter, 2006
16	Letter from Dragon to DEP and Summary Report re First Quarter 2006 Air Excess Emission, April 21, 2006
17	VHS Videos of dust, filmed by Stephen Darney, Videos 1-4
18	Dragon Products, Air Emission License Reports, Compliance Certifications, Excess Emissions Reports, and associated cover letters, 2001-present
19	Dragon Products Air Emissions Summary of Reporting History
20	Photographs of dust and CKD pile at Dragon Products' plant, 2005 (including 4 posters)
21	DVD of Fugitive Dust Emissions leaving Dragon plant, Dec. 14, 2006
22	June 22, 2007 Board Order re Dragon CKD and Waste Clinker Storage Permits
23	DVD from DEP re Results of Video Record Obtained at Dragon Products from July 27-Aug. 31, 2007
24	Dragon Products' Blasting License
25	Dragon Blasting Violations, & DEP blasting records
26	Dragon blast logs and records, 2001-2009; DEP Blasting Records, 2001-2009; CD provided by DEP, Jan. 2008 containing blasting logs, 2001-2006, blasting monitoring records, 2001-2007, and Maine Environmental Laboratory Report on dust samples, 2006-2007; Typewritten Index of Dragon information contained on CD DRAG00020281-DRAG000021837 and DRAG000010730-DRAG000020280 with packet of accompanying information from Pierce Atwood
27	Dragon Products Blasting Plan
28	Table of Dragon Blasting Shots
29	Photographs of Dragon quarry
30	Photographs of blast vibration damage to Darney property, Picture CD & photographs of blasting damage
31	Comparative Market Analysis re Stephen Darney's home at 24 Old County Road, April 6, 2005
32	Affidavit of Stephen Darney, January 29, 2007
33	7 DVDs of Structural Documentation Photos, produced by Dragon Products, marked DRAG000004725-DRAG000004730
34	Patriot Mutual, Darney's Homeowner Insurance Policy, 2004-2005
35	Appraisal of the Darney Home, 24 Old County Road, for Sun Mortgage-New England, Inc., by Angel Torrey, as of Feb. 21, 2002
36	Knowlton Moving and Storage, Moving and Storage Estimate for Stephen Darney, May 14, 2007
37	Affidavit of Richard Hunt, Oct. 12, 2007
38	Affidavit of Richard Hunt, Feb. 8, 2007
39	Real Estate Listing for the Darney Home, 2007
40	Thomaston Real Estate Comparison, a table showing differences in real estates prices, 2002 & 2005-2006
41	Letter from Mark Stebbins, Mining Coordinator, Division of Land Resource Regulation, to Stephen Gartshore, Quarry Manager, Dragon Products re Blast Records, Feb. 27, 2007 & Appendix A, Blast Records, Feb. 2007
42	Email from Michael Kuhns to Mark Curtis re "blasting complaint," June 27, 2007

<b>43</b>	Email from Mark Curtis to Michael Kuhns re “complaints,” June 28, 2007
<b>44</b>	Letter from Stephen B. Gartshore, P.E., Dragon Products to Mark Stebbins, Mining Coordinator, Maine Department of Environmental Protection, Re: Seismograph Calibration Certificates, April 13, 2004 & copies of seismograph calibration certifications
<b>45</b>	Dragon warning notices to its employees
<b>46</b>	Darney Medical and School Records
<b>47</b>	Medical Records: Kalen and Stephen Darney
<b>48</b>	Summary of Symptoms Experienced by Residents Near Dragon Products
<b>49</b>	Lafarge North America, Material Safety Data Sheet on Cement Kiln Dust
<b>50</b>	Summary: Exploratory Preliminary Study, Table I & Health Effects of CKD and Chemical Components / Symptoms From Testimonies of Residents Near Dragon Products, Table II
<b>51</b>	Cement Kiln Dust, Overview of Health Effects, From Material Safety Data Sheet issued by Lafarge North America
<b>52</b>	Research re Health Effects of Cement Kiln Dust
<b>53</b>	The Proposed St. Lawrence Cement Plant in Greenport and Hudson: Understanding the Impact
<b>54</b>	Boston Globe Article: “Dust Plume in Charlestown sends 61 to Hospital...” Sept. 28, 2006
<b>55</b>	Material Safety Data Sheets, Chemical Sampling Information, and OSHA proposed rules for Respiratory Protection for Cement Kiln Dust, Limestone, Clinker
<b>56</b>	Technical Background Document, Population Risks From Indirect Exposure Pathways, and Population Effects from Exposure to Airborne Particles from Cement Kiln Dust Waste, Office of Solid Waste, U.S. Environmental Protection Agency, Aug. 1997 Draft
<b>57</b>	OSHA Chemical Data Sheet and Chemical Sampling Information and related records as to calcium oxide and other elements found in quarry and cement dust
<b>58</b>	2007 E-mails from DEP Roy Rike re late filing by Dragon
<b>59</b>	2008 records regarding Dragon's violations of federal Clean Air Act, and Right to Know Act (EPCRA) regarding failure to reduce emission of air toxics
<b>60A</b>	Records from U.S. Bureau of Mines and National Stone Council and other industry references regarding Best Practices for Quarrying Stone
<b>60B</b>	Emails from Stephen Darney to Peggy McGehee re Dangers of Rock Dust, Feb. 4, 2008, and re Dragon Blasting Today, Feb. 14, 2008, and Article “The Dangers of Rock Dust,” by Glen Kuban
<b>60C</b>	Article, ARI News, “Lawsuit Says Quarry’s Work Hurts Home,” June 29, 2007, by Zlati Meyer
<b>60D</b>	Article, Mineralogical Magazine, April 2003, v. 67, no. 2, p. 153-162, “Primary Blasting in a Limestone Quarry: Physiochemical Characterization of the Dust Clouds,” by T. Jones, et al.
<b>60E</b>	Article, “South Wallingford Couple Says Quarry’s Noises, Dust Still a Hazard,” by Bruce Edwards, Sept. 26, 1993, <a href="http://www.vtce.org/92693.html">http://www.vtce.org/92693.html</a>
<b>60F</b>	South Dakota State Cement Plant Commission v. Wausau Underwriters Insurance Co., 2000 S.D. 116
<b>61</b>	Logs of resident complaints
<b>62</b>	Compilation of Residents Complaints re Dragon to DEP and the Town of Thomaston, from DEP and Town records
<b>63</b>	2006 Correspondence from DEP to Dragon regarding undisclosed or missing daily fuel logs for 2004
<b>64</b>	Water Testing Results, 1990-2006 – table prepared by Neighbors for a Safe Dragon from DEP records
<b>65</b>	Groundwater Testing Results, 1990-2006 – table prepared by Neighbors for a Safe Dragon from DEP records
<b>66</b>	Surface Water Testing Results, 1990-2006 – table prepared by Neighbors for a Safe Dragon from DEP records
<b>67</b>	Water Sampling Results – table prepared by Neighbors for a Safe Dragon from data provided by Richard Heath, Senior Geologist at DEP
<b>68</b>	Testimony of Nick Bennett, Staff Scientist, Natural Resources Council of Maine re Dragon’s Applications for Closure and Reclamation of its Cement Kiln Dust and Waste Clinker Piles, September 21, 2006

<b>69</b>	Administrative Consent Agreement, # A-326-70-A-I, Sept. 12, 2006
<b>70</b>	OSHA: Dragon's Health-Related Violations
<b>71</b>	In Re: Proceeding before Maine Board of Environmental Protection – Dragon Products Co., Inc. (S-020777-WO-B-N and S-020778-WO-C-N): Neighbors for a Safe Dragon (“NSD”) Prefiled Testimony of: Residents (Huber, Walker, Pearlman, Darneys, Crosses, Hunt); Businesses: Midas Muffler; Director, Maine Toxics Action Center; and Hydrogeologist P. Garrett
<b>72</b>	In Re: Proceeding before Maine Board of Environmental Protection – Dragon Products Co., Inc. (S-020777-WO-B-N and S-020778-WO-C-N): Rebuttal Testimony of P. Garrett
<b>73</b>	In Re: Proceeding before Maine Board of Environmental Protection – Dragon Products Co., Inc. (S-020777-WO-B-N and S-020778-WO-C-N): Exhibits Volume 1 to NSD Prefiled Testimony (P-62 above) (index attached hereto)
<b>74</b>	In Re: Proceeding before Maine Board of Environmental Protection – Dragon Products Co., Inc. (S-020777-WO-B-N and S-020778-WO-C-N): Exhibits Volume 2 to NSD Prefiled Testimony (P-62 above) (index attached hereto)
<b>75</b>	Dragon Products' Amendment Application for Cement Kiln Dust Storage Pile Closure, Thomaston, ME (December, 2005 – Revised June, 2006, October, 2006, December 2006)
<b>76</b>	Dragon Products' Amendment Application for Waste Clinker Storage Pile Closure, Thomaston, ME (December, 2005 – Revised June, 2006, October, 2006, December, 2006)
<b>77</b>	Photos of leachate on Dragon Products' property (including 2 boards)
<b>78A</b>	Letter from Renee A. Goodwin, Maine Staff Assistant to Olympia J. Snowe, to Stephen Darney, April 14, 2004
<b>78B</b>	Letter from Stephen Darney to U.S. Senator Olympia J. Snowe, April 13, 2004
<b>78C</b>	Email from Roy Rike to Stephen Darney re “Air Complaints Regarding Dragon Products, Thomaston of April 4 and April 9,” April 9, 2004
<b>78D</b>	Letter from U.S. Environmental Protection Agency to U.S. Senator Olympia J. Snowe re “Dragon Products and Constituent Stephen Darney in Thomaston, Maine,” April 30, 2004
<b>78E</b>	Letter from Renee A. Goodwin, Maine Staff Assistant to Senator Olympia J. Snowe to Stephen Darney, May 7, 2004
<b>78F</b>	Letter from Maine Department of Environmental Protection to Stephen Darney, June 1, 2004
<b>78G</b>	Documents produced by Perkins Thompson and hand delivered to Attorney Wycoff, March 3, 2005, Bates stamp numbers 1-267 and 603-672, including Research, Articles, Emails, and Letters to and from concerned citizens, including Stephen Darney, re property damage and health risks posed by the operations of Dragon Products
<b>79</b>	Letter to the Editor, “Readers Share Their Views,” Debby Atwell, The Courier Gazette, Sept. 18, 2004
<b>80</b>	Letter to the Editor, “Readers Share Their Views,” Ann W. Thayer, Environmental Manager, Dragon Products, The Courier Gazette, Sept. 25, 2004
<b>81A</b>	Email from Rolfe Gerhardt to Ann Thayer, Sept. 25, 2004
<b>81B</b>	Email from Ann Thayer to Rolfe Gerhardt, Oct 6, 2004
<b>81C</b>	Email from Ron Huber to Chris R., et al. re “Dragon-DEP visit summary,” Oct. 19, 2004
<b>82</b>	Deposition of Stephen C. Darney, Sept. 30, 2005
<b>83</b>	Deposition of Kathy Darney, Sept. 30, 2005
<b>84</b>	Defendant's Documents produced May 7, 2009 that it designates as confidential being: daily production reports; quality control reports; laboratory control analyses; fuel analyses; analyses of raw materials; annual production summaries; clinker analyses; cement analyses; production analyses; analyses of production inputs; daily console logs; and TRI reports.

85	Defendant's Documents produced June 18, 2009 per Court Order "to ascertain the types of information withheld: including 14 e-mail chains.
86	Defendant's Answers to Interrogatories dated June 18, 2009, and documents produced on June 18.
87	Defendant's Documents Produced May 18, 2009, Bates numbered FedDrag 020138- FedDrag 020526.

Dated at Portland, Maine this 1st day of September, 2010.

/s/ Peggy L. McGehee, Esq.  
Peggy L. McGehee  
Attorney for Plaintiffs

**PERKINS | THOMPSON, P.A.**  
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pmcgehee@perkinsthompson.com

**CERTIFICATE OF SERVICE**

I hereby certify that on September 1, 2010, I electronically filed the foregoing Plaintiffs' Updated Pretrial Memorandum with the Clerk of Court using the CM/ECF system which will send notification of such filing to all counsel of record in this action. I have mailed by United States Postal Service, the document on the following non-registered participants:

N/A

/s/ Peggy L. McGehee, Esq. \_\_\_\_\_  
Peggy L. McGehee  
Attorney for Plaintiffs

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