





(“April 5<sup>th</sup> Production”). The April 5<sup>th</sup> Production consisted of approximately 15,000 pages of documents, produced in over 2,000 separate files, the majority of which were in PDF format, as well as almost 140 Excel spreadsheet files. Johns Manville did not serve a Rule 214 affidavit with its April 5<sup>th</sup> Production.

4. The April 5<sup>th</sup> Production consisted, in part, of the following documents, listed in the order in which they were produced<sup>1</sup>:

<b>Bates Range</b>	<b>Date</b>	<b>Document Type</b>
JM 7217	11/02/07	LFR invoice
JM 7218	11/03/07-11/30/07	LFR invoice
JM 7219	12/28/07	LFR invoice
JM 7220-7234	08/02/16-08/08/16	Email thread regarding lab reports
JM 7235	08/03/16	Spreadsheet with sampling results
JM 7236-7252	08/02/16-08/10/16	Email thread regarding new Site 6 lab reports
JM 7254-7272	08/02/16 – 08/12/16	Email thread regarding new Site 6 lab reports
JM 7276-7317	01/22/09	LFR/Arcadis invoice and supporting documentation
JM 7318-7343	02/17/09	LFR/Arcadis Invoice and supporting documentation
JM 7344-7357	03/16/09	LFR/Arcadis Invoice and supporting documentation
JM 7358-7367	04/21/09	LFR/Arcadis Invoice and supporting documentation
JM 7368-7393	05/21/09	LFR/Arcadis Invoice and supporting documentation
JM 7394-7431	07/13/09	LFR/Arcadis Invoice and supporting documentation
JM 7432-7448	08/24/09	LFR/Arcadis Invoice and supporting documentation
JM 7449-7450	9/23/09	LFR/Arcadis Invoice and supporting documentation
JM 7451-7703	01/10/14-03/17/14	Monthly Invoicing Report
JM 7704	02/02/10	Arcadis invoice summary
JM 7705	02/08/12	Arcadis invoice summary

<sup>1</sup> The 22 documents listed in Paragraph 4 represent what IDOT believes is a representative sample taken from amongst the approximately 10,000 pages of documents contained on one flash drive which was produced by Johns Manville to IDOT on April 5<sup>th</sup>. IDOT could easily have provided many more examples of sequences of documents that were produced by Johns Manville that evidence no logical order, suggesting that such documents were not produced in the manner in which they are normally kept.

JM 7706-7733	10/22/09	LFR/Arcadis Invoice and supporting documentation
JM 7734-7886	03/08/14-04/11/14	Monthly Invoicing Report #7
JM 7887	03/10/10	Arcadis Invoice Summary
JM 7888	02/24/12	Arcadis Invoice Summary

5. On April 6, 2017, Johns Manville's counsel sent a IDOT's counsel an external hard which included copies of all documents from the April 5<sup>th</sup> Production, as well as more than 15,000 additional pages of new documents (the vast majority of which appear to be photographs), contained in over 10,0000 separate files. Johns Manville did not serve a Rule 214 affidavit with its April 5<sup>th</sup> Production.

6. Finally, on April 17, 2017, Johns Manville's counsel sent IDOT's counsel a flash drive which contained 644 pages of apparently new material contained within 59 separate files ("April 17<sup>th</sup> Production"). Johns Manville did not serve a Rule 214 affidavit with its April 17<sup>th</sup> Production<sup>2</sup>.

7. On April 10, 2017, IDOT's counsel sent a Rule 201(k) letter to Johns Manville's counsel ("First Rule 201(k) Letter"). A copy of the First Rule 201(k) Letter is attached as Exhibit A to this Motion.

8. IDOT raised several issues with Johns Manville regarding the manner in which Johns Manville had produced documents in response to its Document Requests. The chief issue that IDOT raised about its April 5<sup>th</sup> and April 6<sup>th</sup> Productions was that they did not "appear to have been produced in the order in which they are kept 'in the usual course of business.' (Ill. Sup. Court Rule 214)." (First Rule 201(k) Letter, p.5.) IDOT's counsel went on to note that:

We highly doubt that this is the manner in which these documents are kept. We also do not see how producing documents in this fashion can be considered to comply with the requirements of Illinois Supreme Court Rule 214. More

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<sup>2</sup> It should be noted that the approximately 30,000 pages of documents which Johns Manville has produced to IDOT in its April 5<sup>th</sup>, April 6<sup>th</sup> and April 17<sup>th</sup> Productions are four times the volume of documents which Johns Manville produced to IDOT during the initial/liability phase of this case.

importantly, however, by producing these documents to IDOT in this fashion, JM has imposed an extraordinary burden on IDOT, because it must now reorder these documents in a logical/chronological order, before it can begin to analyze these documents regarding JM's cost claims. We believe it is therefore incumbent upon JM to take all necessary steps to provide IDOT with all documents that are responsive to its Fourth Request for Production of Documents and to do so in a way which conforms to Rule 214's requirements.

9. IDOT also requested that Johns Manville produce the requisite Rule 214 affidavit for its April 5<sup>th</sup> and April 6<sup>th</sup> Document Productions. (First Rule 201(k) Letter, p. 6.)

10. On April 17, 2017, Johns Manville responded to IDOT's Rule 201(k) Letter. A true and correct copy of Johns Manville's 201(k) response ("Response") is attached hereto as Exhibit B.

11. In its Response, Johns Manville's counsel asserted that the documents which it had produced in its April 5<sup>th</sup> and April 6<sup>th</sup> Productions had been produced as "kept in the ordinary course of business." (Response, p.3.) Johns Manville's counsel also responded to IDOT's request that Johns Manville provide a Rule 214 affidavit for its document productions, stating that:

Given that JM is producing supplemental documents and may produce additional documents in the future in this conjunction with expert discovery, JM will not be providing an affidavit of completeness [for the documents that it had produced]." (Response, p.3.)

12. On April 21, 2017, IDOT's counsel sent Johns Manville's counsel a second 201(k) letter ("Second Rule 201(k) Letter"). Regarding Johns Manville's contention that it had produced documents in the manner in which they are kept, IDOT's counsel stated:

It is difficult to understand how documents – most especially, documents pertaining to the costs which have been incurred by your client – could be maintained in a fashion which first requires substantial reorganization before those documents can be used in any meaningful fashion. (Second 201(k) Letter, p.1.)

13. The Second Rule 201(k) Letter again requested that Johns Manville take “all necessary steps” to provide IDOT with all documents that are responsive to its Documents Requests “and to do so in a way which conforms to rule 214’s (sic) requirements.” (Id. p.2.)

14. IDOT’s Second 201(k) Letter also objected to Johns Manville’s continuing failure to provide Rule 214 affidavit for its document productions, stating, among other things, that Johns Manville counsel’s response “would potentially allow [Johns Manville] to ever provide any affidavit . . .” (Second 201(k) Letter, p.2.)

15. As of the date of the filing of this Motion, Johns Manville has not responded to this Second 201(k) Letter, has taken any steps to produce responsive documents to IDOT in the manner in which they are kept and has also failed to provide a Rule 214 affidavit to IDOT.

**ARGUMENT**

16. “The Illinois Supreme Court rules on discovery are mandatory rules of procedure subject to strict compliance by the parties.” *Seef v. Ingalls Memorial Hospital*, 311 Ill.App.3d 7, 21 (1999). The dual purposes of the Illinois Supreme Court’s discovery rules are to “avoid surprise and discourage tactical gamesmanship.” *Gee v. Treece*, 365 Ill. App.3d 1029, 1038 (5<sup>th</sup> Dist. 2006).

17. Illinois Supreme Court Rule 214 provides, in pertinent part, as follows:

Production of documents shall be as they are kept in the usual course of business or organized and labeled to correspond with the categories in the request, and all retrievable information in computer storage in printed form or (2) serve upon the party so requesting written objections on the ground that the request is improper in whole or in part.

\* \* \*

The party producing party documents shall furnish an affidavit stating whether the production is complete in accordance with the request

18. As detailed above in Paragraph 4 (which represents only one small example of a much wider pattern). The documents which Johns Manville has produced to IDOT thus far are clearly related to costs which Johns Manville has incurred in investigating and remediating the Johns Manville sites, but has produced them in a highly irregular fashion. Johns Manville's April 5<sup>th</sup> and 6<sup>th</sup> Productions raise several serious questions as to whether it has made these productions in strict compliance with Supreme Court Rule 214's requirements.

19. First, it is highly doubtful that a large, sophisticated corporate entity such as Johns Manville (which, in turn, is owned by Berkshire Hathaway, a vastly larger corporate entity), would maintain records related to the costs it has incurred in conducting a USEPA-ordered site investigation and cleanup, in the manner in which Johns Manville has produced those apparently same documents to IDOT.

20. Second, pursuant to Section XI ("Record Retention") of the Administrative Order on Consent ("AOC"), Johns Manville is required to maintain copies of all non-identical records that are "related in any manner to the performance of the Work (i.e., site investigation and remedial work at Sites 3, 4, 5 and 6)." (AOC, Sec. XI, para. 30, p. 15.) Unquestionably, the invoices, cost records, and other documents which Johns Manville has produced to IDOT are also records which Johns Manville is required by Section XI of the AOC to preserve. While Section XI admittedly does not specify the manner in which Johns Manville is supposed to retain its records, presumably, it would make sense for them to be kept in an orderly fashion, so that Johns Manville could ensure that it was meeting its obligations under the AOC.

21. Finally, it also defies logic that Johns Manville would keep records in a haphazard fashion, where those records pertain to costs which are potentially tax deductible. There is a strong likelihood that Johns Manville could deduct some of the costs it has incurred

with respect to the investigation and cleanup of Sites 3 and 6. *See e.g., Dominion Resources Inc., v. United States*, 219 F.3d 359, 370-71 (4<sup>th</sup> Cir. 2000) (discussing the standard for treating environmental cleanup costs as deductible under the Internal Revenue Code). However, in order to be in a position to possibly deduct its investigation and cleanup costs, Johns Manville would have to know where the documents supporting such deductions could be found. Presumably that task would be made easier if those documents were kept in some sort of chronological order.

22. Given all these reasons why Johns Manville would want to kept its records in an orderly fashion, there is simply no good reason why it has produced documents in response to IDOT's Document Requests in a manner which can only be seen as the result of Johns Manville's gamesmanship.

23. Johns Manville has also failed to demonstrate strict compliance with the requirements of the Illinois Supreme Court's rules governing discovery by refusing to provide IDOT with the requisite Rule 214 affidavit. The plain language of this rule contemplates that an affidavit of completion will be provided by the party responding to a production request at or near the time that it responds.

24. Johns Manville contends that Rule 214's requirements do not need to be complied with now, because it may produce additional documents to IDOT in the future, in conjunction with as-yet-to-be conducted expert discovery. (Response Letter, p.2.) Johns Manville's position is not supported by the law. In *Knudsen v. Liberty Mut. Ins. Co.*, 2004 WL 625679, \*5 (Ill. Cir. Ct. – Cook Cty.) (Mar. 6, 2004), for example, the trial court noted that a party had engaged in a “deliberate attempt to stall the completion of discovery . . . [by failing] to provide an appropriate Rule 214 Affidavit after it had produced some documents.” *Knudsen*

stands for the proposition that a responding party's failure to provide the requisite Rule 214 affidavit in conjunction with the production of at least some documents is potentially sanctionable, where that party fails to provide a Rule 214 affidavit each and every time it produces documents. Accordingly, the Hearing Officer should order Johns Manville to provide such an affidavit to IDOT by a date certain.

25. Because of the seemingly non-compliant manner in which Johns Manville has produced documents, IDOT believes it will be necessary to revise the scheduling for this case to allow it sufficient time to complete written discovery before commencing with taking fact depositions in this case.

WHEREFORE, Respondent, the Illinois Department of Transportation, requests that the Hearing Officer issue an order requiring Complainant Johns Manville to:

- 1) Produce all documents that are responsive to IDOT's document requests, in the order in which they are ordinarily maintained within twenty-one (21) days from the date of the filing of this Motion;
- 2) Produce a Rule 214 affidavit to IDOT within seven (7) days from the date of the filing of this Motion;
- 3) Establish a revised schedule for this matter; and,
- 4) Grant such other relief as the Board may find to be appropriate.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

***Johns Manville v. Illinois Department of Transportation, PCB 14-3 (Citizens)***

I, EVAN J. MCGINLEY, do hereby certify that, today, April 25, 2017, I caused to be served on the individuals listed below, by electronic mail, a true and correct copy of “IDOT’s First Motion to Compel” on each of the parties listed below:

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s/Evan J. McGinley  
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