

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

JOHNS MANVILLE, a Delaware corporation,)	
)	
Complainant,)	
)	
v.)	PCB No. 14-3
)	(Citizen Suit)
ILLINOIS DEPARTMENT OF)	
TRANSPORTATION,)	
)	
Respondent.)	

NOTICE OF FILING AND SERVICE

To: ALL PERSONS ON THE ATTACHED CERTIFICATE OF SERVICE

Please take note that today, May 16, 2017, I have filed with the Clerk of the Pollution Control Board the Illinois Department of Transportation's Reply in Support of its First Motion to Compel and have served each person listed on the attached service list with a copy of the same.

Respectfully Submitted,

By: s/ Evan J. McGinley
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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, May 16, 2017, I caused to be served on the individuals listed below, by electronic mail, a true and correct copy of IDOT's Reply in Support of Its First Motion to Compel on each of the parties listed below:

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IDOT’S REPLY IN SUPPORT OF ITS FIRST MOTION TO COMPEL

Johns Manville’s Response – such as it is – attempts to muddy the waters by discussing issues concerning the “technical difficulties” which Johns Manville apparently encountered in responding to IDOT’s Fourth Set of Requests for Production (“Production Requests”). (Response, p.2.) Johns Manville further notes that due to these difficulties, it had to produce its responsive documents in a series of productions. IDOT, however, did not bring its Motion because it took issue with Johns Manville producing its documents on a rolling basis.

The crux of IDOT’s First Motion to Compel is that Johns Manville appears to have produced documents in response to IDOT’s Production Requests in a manner which does not comply with the requirements of Supreme Court Rule 214. More specifically, Johns Manville appears to have produced documents in response to IDOT’s Production Requests in such a way as to call into question whether they were actually produced “in the manner in which they are ordinarily kept. Johns Manville’s Response does nothing to either refute or dispel the conclusion that it has violated Rule 214’s requirements.¹

¹ IDOT’s Motion also sought to compel Johns Manville to produce a Rule 214 affidavit of completeness. (Motion, pp. 7-8, ¶¶23-24.) Apparently, in response to IDOT’s Motion, Johns Manville has now produced a Rule 214 Affidavit, although the affidavit makes no mention that the documents which it has produced were produced in compliance with Rule 214’s requirements.

The support for this conclusion is set forth on Pages 2 and 3 of IDOT'S Motion, where IDOT lists 22 consecutively produced documents that it believes accurately reflect the highly irregular manner in which Johns Manville produced thousands of responsive documents. The vast majority of these 22 documents consist of invoices and supporting cost documentation which, according to Johns Manville, came from the files of its contractor, AECOM. (Motion, p. 4.) Yet, what is striking about these documents is that although they were apparently produced from the same source (AECOM), and largely dealing with the same subject matter (billing for AECOM's site investigative and remedial work), there is no chronological order to these documents. Thus, these documents, generated over a period of seven years, go back and forth in time, despite having been consecutively produced.

It simply does not make sense that Johns Manville or any of the sophisticated third parties working on a complex, multi-year, multi-million dollar clean-up project would keep critical billing costs and payment information in such a haphazard, arbitrary fashion. As the Northern District of Illinois noted in *In re Sulfuric Acid Antitrust Litigation*, 231 F.R.D. 351 (2005): “[a] business has an obvious incentive to keep needed documents in a way that maximizes their usefulness in the day-today-operations of the business.” *Id.* at 363 (Emphasis added). Presumably, that same “obvious incentive” applies to both Johns Manville and its contractors, for the reasons identified in IDOT's Motion. (*See*, Motion, pp. 6-7, ¶¶20-21).

Johns Manville's attempts to explain away the disorderly and non-chronological manner in which it has produced documents to IDOT are unavailing. The best it can offer is to flippantly state that “IDOT seems to think that Johns Manville has some special database or room that houses all of the documents relating to the investigation and removal activities performed over the past 19 years at the Southwest Sites . . .” (Response, p. 4.) Johns Manville's comments miss

the mark and fly in the face of commonsense. They do not explain Johns Manville's failure to comply with the requirements of Supreme Court Rule 214. IDOT is not contending that there is some "special database or room". Rather, IDOT is contending that wherever the responsive records are stored, they are almost certainly kept in some sort of logical order, particularly, if as claimed by Johns Manville, some of the documents it has produced are kept by the "AECOM Custodian." (Response, p.4.)

Johns Manville could have easily put this matter to rest had it simply attached an affidavit/affidavits from the person or persons that provided the documents Johns Manville has produced to IDOT, stating that, although seemingly irregular, the documents had been produced in the manner in which they are ordinarily kept. Johns Manville's failure to put this matter to rest in such a manner speaks volumes.²

WHEREFORE, Respondent, the Illinois Department of Transportation, requests that the Hearing Officer grant it all relief which it has prayed for in its underlying Motion.

Respectfully Submitted,

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² In its Response, JM notes that it has produced an "Index of documents". (Response, p. 4.) This index does not rectify the issue which led to IDOT having brought its Motion, in that it sheds no light on why JM or the various third parties working on its behalf would keep documents in such a disorganized fashion, in the ordinary course of business.

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