

SERVICE LIST

Evan J. McGinley
Office of the Illinois Attorney General
69 West Washington Street, Suite 1800
Chicago, IL 60602
E-mail: emcginley@atg.state.il.us

Matthew D. Dougherty
Assistant Chief Counsel
Illinois Department of Transportation
Office of the Chief Counsel, Room 313
2300 South Dirksen Parkway
Springfield, IL 62764
E-mail: Matthew.Dougherty@illinois.gov

Ellen O'Laughlin
Office of Illinois Attorney General
69 West Washington Street, Suite 1800
Chicago, IL 60602
E-mail: eolaughlin@atg.state.il.us

Illinois Pollution Control Board
Brad Halloran, Hearing Officer
James R. Thompson Center
100 W. Randolph, Suite 11-500
Chicago, IL 60601
E-mail: Brad.Halloran@illinois.gov

Illinois Pollution Control Board
Don Brown, Clerk of the Board
James R. Thompson Center
100 W. Randolph, Suite 11-500
Chicago, IL 60601
E-mail: Don.Brown@illinois.gov

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

| | | |
|--|---|---------------------|
| In the Matter Of: |) | |
| |) | |
| JOHNS MANVILLE, a Delaware corporation, |) | |
| |) | |
| Complainant, |) | PCB No. 14-3 |
| |) | |
| v. |) | |
| |) | |
| ILLINOIS DEPARTMENT OF TRANSPORTATION, |) | |
| |) | |
| Respondent. |) | |

MOTION TO QUASH SUBPOENA

Complainant JOHNS MANVILLE (“JM”) hereby moves to quash Respondent ILLINOIS DEPARTMENT OF TRANSPORTATION’S (“IDOT”) Subpoena Duces Tecum to David Peterson (“Subpoena”) pursuant to 35 Ill. Admin. Code 101.622(d). In support thereof, JM states as follows:

INTRODUCTION

On April 19, 2018, IDOT filed its Notice of Service of Subpoena Duces Tecum with respect to David Peterson (“Peterson”). Once again, IDOT does not believe the rules apply to it. Illinois does not have subpoena power over an out-of-state, non-party witness Peterson, who currently resides in Ohio. Though IDOT has misrepresented the nature of Peterson’s connection to JM in the past, to be clear, Peterson is not, and has never been, a JM employee. Nevertheless, despite Peterson’s request and JM’s subsequent requests that IDOT follow proper protocol for obtaining and serving a subpoena on an out-of-state, non-party witness, IDOT refused to do so.

The Subpoena is facially invalid. The Ohio Rules of Civil Procedure (at least in part) govern subpoenas to Ohio residents for foreign proceedings. IDOT, however, went through none

of the proper channels to obtain subpoena power over Peterson. For these reasons and those stated below, the Subpoena should be quashed.

ARGUMENT

The Hearing Officer is vested with the power to quash subpoenas and should exercise it in this instance. The Pollution Control Board Rules provide the Hearing Officer with this ability:

The hearing officer, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance, may quash or modify the subpoena if it is unreasonable or irrelevant.

35 Ill. Admin. Code 101.622(d). The Board's rules provide that the Hearing Officer has all powers necessary to avoid delay and to "limit or condition the production of information when necessary to prevent undue delay, undue expense, or harassment, or to protect materials from disclosure." 35 Ill. Admin. Code 101.610; 35 Ill Admin. Code 101.614; *see also* 35 Ill. Admin. Code. 101.616(d).

1. The Subpoena Should Be Quashed Because Peterson Does Not Reside Or Work In Illinois And IDOT Has Not Abided By The Ohio Rules of Civil Procedure.

Neither the Board nor Illinois courts have subpoena power over Peterson, a resident of the State of Ohio. Yet, without regard for Peterson's out-of-state residence, IDOT has issued an IPCB Subpoena. This cannot stand.

It is a long-standing principle of Illinois law that subpoenas issued by Illinois courts can only compel witnesses within the state. A state has no power to subpoena witnesses over which it has no jurisdiction. *See, e.g. People v. Smith*, 362 Ill. App. 3d 1062, 1077, 501 (1st Dist. 2005) ("Generally, a state has no power to subpoena witnesses over which it has no jurisdiction . . . compulsory process cannot extend beyond the territory of the state, and a state court cannot require the attendance of a witness who is a nonresident of, and is absent from, the state"), *citing* Am. Jur. 2d *Witnesses* § 15 (2000). Illinois courts have not hesitated to apply this basic

application of law. *See, e.g., Gridley v. State Farm Mut. Auto. Ins. Co.*, 217 Ill.2d 158 (2005) (noting that out-of-state witnesses are not subject to the subpoena power of Illinois courts); *Laverty v. CSX Transp., Inc.*, 404 Ill. App. 3d 534, 538 (5th Dist. 2010) (same). IDOT's Subpoena has no validity with respect to Peterson, an Ohio resident. Accordingly, the Subpoena should be quashed.

2. The Subpoena Should Be Quashed Because IDOT Has Not Properly Filed A Return Of Service.

Even assuming that IDOT had followed the rules and procured a proper Ohio subpoena, which it has not, service would have had to be made in accordance with the Ohio Rules of Civil Procedure. OHIO REV. CODE ANN. § 2319.09(E). The Ohio Rules of Civil Procedure do not permit service by electronic mail and pursuant to Ohio Rule of Procedure 45(B), when a subpoena is served by certified mail delivery, "the person filing the return shall attach the signed receipt to the return." IDOT has filed no such return of service and its counsel's verification of mailing is insufficient to establish service was effectuated and actually received by certified mail. For these reasons, IDOT's Subpoena cannot be enforced.

3. The Subpoena Should Be Quashed Because The Document Requests Therein Duplicate What JM Has Already Produced.

Even if IDOT cured the above-mentioned defects and properly complied with the Ohio Rules and procedures thereunder, the document requests in the Subpoena should be quashed on the bases that it requests documents not within Peterson's possession, custody or control and/or that it has requests documents that have already been produced by JM in discovery. As to the former, the Subpoena requests all "documents," which is defined as documents within the "possession, custody or control of the Respondent," which is IDOT in this matter. (*See Rider to Subpoena, Definitions, ¶ 4.*) By contrast, "you" and "your" are defined to be the deponent,

Peterson. (*Id.*, ¶ 12.) Peterson obviously does not know which documents are in IDOT's possession and cannot produce them. Further, IDOT is well aware of the fact that JM has already produced documents it obtained from Peterson as well as numerous other documents at issue in the Subpoena. Neither Peterson nor JM should be burdened by engaging in a deposition concerning documents unknown to Peterson or by producing documents IDOT has previously obtained from JM. See *Green v. Rogers*, 384 Ill. App. 3d 946, 952 (2d Dist. 2008), *aff'd*, 234 Ill. 2d 478 (Ill. 2009) (quashing subpoena after noting that it would not be "appropriate to subpoena information from third parties until it was clear whether the information would be available from the defendant"); *In re All Asbestos Litig.*, 385 Ill. App. 3d 386, 391 (1st Dist. 2008) (citing *People ex rel. General Motors Corp. v. Bua*, 37 Ill. 2d 180 (1967)).

4. Peterson's Mere Involvement With The Sites Does Not Allow IDOT To Disregard Its Procedural Obligations.

JM anticipates IDOT may argue that Peterson is an important witness and therefore it should be able to take his deposition regardless of whether IDOT follows procedure. But as a non-party, Peterson's involvement with respect to the Sites has no bearing on whether the IPCB or an Illinois court has subpoena power over him in this matter. In a recent communication, IDOT took the position that it would object to Peterson testifying or JM using any documents Peterson drafted at hearing if IDOT cannot figure out how to take Peterson's deposition. But it is incumbent upon IDOT to follow the proper protocol and procedures with respect to third party discovery, which it has not done. There is "no provision in Rules 201 through 218 allowing a party or a court to require a litigant to submit for deposition persons who are not under the control of that party and who necessarily would have to be subpoenaed to obtain their presence." *Redmond v. Cent. Cmty. Hosp.*, 65 Ill. App. 3d 669, 674 (1st Dist. 1978).

Accordingly, JM should be free to call Peterson or use documents he authored notwithstanding whether IDOT takes his deposition.¹

5. Discovery In This Matter Should Not Be Extended.

IDOT has had more than ample opportunity to determine whether and how it could properly obtain discovery from Peterson, but failed to do so. In fact, had IDOT reasonably believed that Peterson was a key witness from whom it needed testimony, IDOT could have, should have, and would have researched the law and figured out how to properly procure such testimony long ago. Apparently, IDOT did not do so.

After the Board issued its Interim Opinion and Order on December 15, 2016, the Hearing Officer set a discovery schedule for the hearing on JM's cleanup costs. (*See* February 28, 2017 Hearing Officer Order; March 1, 2017 Hearing Officer Order). Then, almost a year ago, IDOT sent JM a list of depositions it desired to take in the second phase of this case and none of the deponents included Peterson. (*See* May 23, 2017 correspondence, attached hereto as **Exhibit A**.) It was not until several weeks later, on June 15, 2017, that IDOT first identified Peterson as someone it wanted to depose. (*See* June 15, 2017 correspondence, attached hereto as **Exhibit B**.) In response, JM's counsel immediately made clear to IDOT that Peterson was located in Ohio, was not a JM employee, and that any documentation or subpoenas necessary to take depositions would be required. (*Id.*) On June 19, 2017, IDOT recognized that Peterson's deposition would need to take place outside of Illinois (*see* June 19, 2017 correspondence, attached hereto as **Exhibit C**), yet took no steps in Illinois or Ohio in the following year to make that happen.

During a call with the Hearing Officer on April 19, 2018, the Hearing Officer recognized that IDOT has provided no justification as to why it did not take Peterson's deposition a year

¹ This assumes that either JM follows the proper procedures necessary to compel Peterson's testimony or that Peterson agrees to appear voluntarily, and that the testimony/documents are otherwise admissible

ago. The Hearing Officer's April 19, 2018 Order then provided that "no further discovery extensions will be granted without good cause." Given that IDOT has failed to determine how to properly procure a deposition of Peterson in Ohio since June 2017, IDOT cannot demonstrate good cause for further extending discovery to do so now. IDOT's Subpoena should be quashed and the current discovery deadlines in this matter should not be extended any further. IDOT has unnecessarily expanded the scope and prolonged discovery enough.

CONCLUSION

WHEREFORE, Complainant JOHNS MANVILLE respectfully requests that the Hearing Officer enter an order quashing to Subpoena Duces Tecum issued to David Peterson filed by IDOT on April 19, 2018 and such other relief the Hearing Officer's deems appropriate, which could include, among other relief, a tailored Protective Order. Further, to avoid having to re-litigate this issue in the future, JM also requests that the Hearing Officer enter an order clarifying that JM will not be barred from calling Mr. Peterson at hearing or from using documents authored by him at hearing (which are otherwise admissible) solely because IDOT does not take or is unable to take his deposition.

Dated: May 1, 2018

Respectfully submitted,

BRYAN CAVE LEIGHTON PAISNER LLP

Attorneys for Complainant Johns Manville

By: /s/ Lauren J. Caisman

Susan E. Brice, ARDC No. 6228903

Lauren J. Caisman, ARDC No. 6312465

Robert W. Brunner, ARDC No. 6203884

161 North Clark Street, Suite 4300

Chicago, Illinois 60601

(312) 602-5079

Email: susan.brice@bclplaw.com

Lauren.caisman@bclplaw.com

robert.brunner@bclplaw.com

CERTIFICATE OF SERVICE

I, the undersigned, certify that on May 1, 2018, I caused to be served a true and correct copy of *MOTION TO QUASH SUBPOENA* upon all parties listed on the Service List by sending the documents via e-mail to all persons listed on the Service List, addressed to each person's e-mail address.

/s/ Lauren J. Caisman
Lauren J. Caisman

SERVICE LIST

Evan J. McGinley
Office of the Illinois Attorney General
69 West Washington Street, Suite 1800
Chicago, IL 60602
E-mail: emcginley@atg.state.il.us

Matthew D. Dougherty
Assistant Chief Counsel
Illinois Department of Transportation
Office of the Chief Counsel, Room 313
2300 South Dirksen Parkway
Springfield, IL 62764
E-mail: Matthew.Dougherty@illinois.gov

Ellen O'Laughlin
Office of Illinois Attorney General
69 West Washington Street, Suite 1800
Chicago, IL 60602
E-mail: eolaughlin@atg.state.il.us

Illinois Pollution Control Board
Brad Halloran, Hearing Officer
James R. Thompson Center
100 W. Randolph, Suite 11-500
Chicago, IL 60601
E-mail: Brad.Halloran@illinois.gov

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Don Brown, Clerk of the Board
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100 W. Randolph, Suite 11-500
Chicago, IL 60601
E-mail: Don.Brown@illinois.gov

EXHIBIT A

Caisman, Lauren

From: McGinley, Evan <emcginley@atg.state.il.us>
Sent: Tuesday, May 23, 2017 2:31 PM
To: Brice, Susan; Caisman, Lauren
Cc: Dougherty, Matthew D. (Matthew.Dougherty@Illinois.gov); O'Laughlin, Ellen
Subject: Johns Manville v. IDOT - Dates for Depositions

Susan and Lauren:

We would like to depose the following individuals during the second half of June:

- Donald Manikas
- Douglas Dorgan
- Brent Tracy
- AECOM Documents Custodian
- Johns Manville Documents Custodian

Please advise as to: 1) whether we will need to subpoena non-JM employees for their depositions or whether a deposition notice will suffice; and 2) possible dates for each of the above listed individuals.

Thank you for your attention to this matter.

Evan J. McGinley
Assistant Attorney General
Environmental Bureau
69 West Washington Street, Suite 1800
Chicago, IL 60602
312.814.3153 (phone)
312.814.2347 (fax)
emcginley@atg.state.il.us

EXHIBIT B

Caisman, Lauren

From: Brice, Susan
Sent: Thursday, June 15, 2017 12:40 PM
To: 'McGinley, Evan'; Caisman, Lauren
Cc: O'Laughlin, Ellen; Matthew D. Dougherty
Subject: RE: Scheduling of Depositions

Evan: Lauren and I are both out of the office. With respect to JM PMK and AECOM document custodian, we need more information from you. Please issue the appropriate paperwork with respect to the PMK and provide more information regarding "AECOM document custodian." Do you have an order you want to take the depositions? Brent and Scott are located in Denver and David Peterson is located in Ohio (and not a JM employee). We are not agreeing to bring any out of state people on your list to Chicago for deposition. Are you planning to travel? Please let us know as it impacts how we proceed.

We are happy to coordinate with you on dates once you have provided us with the information requested above and have obtained the subpoenas or other documents necessary to be able to take these depositions. It would be easier to schedule all of this if you provide us with where you are proposing to take each deposition and some sort of order of witnesses. Thanks

 **Susan Brice**
Partner
susan.brice@bryancave.com T: +1 312 602 5124

From: McGinley, Evan [<mailto:emcginley@atg.state.il.us>]
Sent: Thursday, June 15, 2017 11:15 AM
To: Brice, Susan; Caisman, Lauren
Cc: O'Laughlin, Ellen; Matthew D. Dougherty
Subject: Scheduling of Depositions

Susan and Lauren:

Would you have some time this afternoon to discuss the scheduling and procedures for the depositions of JM and JM-related witnesses? We are presently interested in deposing the following individuals:

- Brent Tracy
- Scott Myers
- JM PMK regarding the circumstances regarding the location of City of Waukegan water main on site 3
- David Peterson
- Tat Ebihara
- AECOM document custodian
- Donald Manikas

Thank you for your attention to this matter.

Evan J. McGinley
Assistant Attorney General

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Environmental Bureau
69 West Washington Street, Suite 1800
Chicago, IL 60602
312.814.3153 (phone)
312.814.2347 (fax)
emcginley@atg.state.il.us

EXHIBIT C

Caisman, Lauren

From: McGinley, Evan <emcginley@atg.state.il.us>
Sent: Monday, June 19, 2017 11:51 AM
To: Brice, Susan; Caisman, Lauren
Cc: Matthew D. Dougherty; O'Laughlin, Ellen
Subject: Johns Manville v. IDOT - Depositions of Out of State Deponents

Susan and Lauren:

Last week, you offered to make Johns Manville employees available for deposition by telephone. While we appreciate the offer, it does not satisfy IDOT's position that Johns Manville should make Brent Tracy, Scott Myers and a Johns Manville document custodian available for deposition here in Chicago. Conversely, we recognize that if we wish to proceed with taking David Peterson's deposition, we will likely need to take that deposition out of state.

IDOT believes that its position that Johns Manville deponents be made available here in Chicago for deposition is fully supported by Illinois Supreme Court Rule 203, which provides:

Unless otherwise agreed, depositions shall be taken in the county in which the deponent resides or is employed or transacts business in person, or, in the case of a plaintiff-deponent, in the county in which the action is pending. However, the court, in its discretion, may order a party or a person who is currently an officer, director, or employee of a party to appear at a designated place in this State or elsewhere for the purpose of having the deposition taken. The order designating the place of a deposition may impose any terms and conditions that are just, including payment of reasonable expenses.

(Emphasis added.)

Please advise immediately if you will agree to produce Mr. Tracy, Mr. Myers and a Mansville document custodian in Chicago. If not, we will bring the issue before Mr. Halloran, so that we can resolve this issue as quickly as possible and finalize the scheduling of IDOT's depositions.

Thank you for your attention to this matter.

Regards,

Evan J. McGinley
Assistant Attorney General
Environmental Bureau
69 West Washington Street, Suite 1800
Chicago, IL 60602
312.814.3153 (phone)
312.814.2347 (fax)
emcginley@atg.state.il.us