

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

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

**NOTICE OF FILING**

To: See Attached Service List

PLEASE TAKE NOTICE that on October 25, 2019, I caused to be filed with the Clerk of the Pollution Control Board of the State of Illinois, *Complainant's Motion to Exclude Witnesses from the Hearing Room*, a copy of which is attached hereto and herewith served upon you via e-mail. Paper hardcopies of this filing will be made available upon request.

Dated: October 25, 2019

Respectfully submitted,

BRYAN CAVE LEIGHTON PAISNER LLP

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| <b>Respondent.</b>                             | ) |                     |

**COMPLAINANT’S MOTION TO EXCLUDE WITNESSES FROM THE HEARING ROOM**

Complainant JOHNS MANVILLE (“JM”) hereby submits its Motion to Exclude Witnesses from the Hearing Room (“Motion”). In support of this Motion, JM states as follows:

1. Pursuant to the Illinois Administrative Procedures Act, 5 ILCS 100/10-4(a), the Illinois Rules of Evidence apply to a hearing in this matter. Under Illinois Rule of Evidence 615, “[a]t the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion.” (emphasis added). The purpose of such an order “is to prevent the shaping of testimony by one witness to match that of another and discourage fabrication.” *Smith v. City of Chicago*, 299 Ill. App. 3d 1047, 1053 (Ill. App. Ct. 1998); *In re C.A.C.*, 2019 Il App (2d) 190098-U, ¶ 64; *In re H.S.H.*, 322 Ill. App. 3d 892, 896-97 (Ill. App. Ct. 2001).

2. A court, and therefore the Board, can exclude a lay or an expert witness from being present during the testimony of other witnesses. *Smith*, 299 Ill. App. 3d at 1053; *see also Friedman v. Friedman v. Park Dist. of Highland Park*, 151 Ill. App. 3d 374 (Ill. App. Ct. 1986)

(holding plaintiff's expert was not improperly excluded from the courtroom). Indeed, the Hearing Officer has sequestered, and the Board has affirmed sequestering, witnesses. *See e.g., KCBX Terminals Co. v. Ill. Env'tl. Protection Agency*, PCB 14-110, 2014 WL 175982, \*1 (Apr. 28, 2014) (B. Halloran); *Ill. Env'tl. Protection Agency v. Citizens Utilities Co.*, PCB 70-142, 1980 WL 13488, \*1 (Apr. 3, 1980).

3. Further, “[i]f a trial court possesses the inherent authority to exclude witnesses from a courtroom in an effort to prevent fabrication, it necessarily follows that the court also possesses the power to instruct witnesses not to discuss their testimony with other witnesses. Implicit in such an instruction to a witness is also a prohibition against a party or her attorney from informing a subsequent witness of an admonished witness’s trial testimony.” *Smith*, 299 Ill. App. 3d at 1053.

4. Other than a party representative, there is no need for Hearing witnesses to be present in the Hearing room before they testify in this case. *See e.g., Goesel v. Boley Int’l (H.K.) Ltd.*, No. 09-cv-4595, 2012 WL 5269234, \*4 (N.D. Ill. Oct. 24, 2012) (“Nothing tendered to this Court suggests that the presence of any of either side’s opinion witnesses is ‘essential to the presentation of the party’s cause.’”); *see also U.S. v. Olofson*, 563 F.3d 652, 660 (7th Cir. 2009) (holding that respondent did not show expert witness’s presence was essential to the presentation of his case and that Rule of Evidence 615<sup>1</sup> “plainly does not provide for such a per se exception” to sequestration). This is particularly so where the testimony of the expert witnesses in this case should be limited to only those opinions already disclosed in the various Expert Reports that have been exchanged. The likelihood of changing of expert opinion testimony would be mitigated by witness sequestration.

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<sup>1</sup> The language of Federal Rule of Evidence 615 is identical to that of Illinois Rule of Evidence 615.

5. Though a request to exclude witnesses from a courtroom need only be made by the outset of trial/hearing, *see In re Marriage of L.M.F. & S.P.F.*, 2017 IL App (3d) 160669-U, ¶ 43 (citing *Friedman*, 151 Ill. App. 3d at 390), JM brings this Motion in advance now that the parties have finalized their witness list.

WHEREFORE, Complainant JOHNS MANVILLE respectfully requests that the Hearing Officer enter an Order excluding witnesses, other than a party representative, from being present in the Hearing room prior to their testimony, and for an instruction that witnesses are not to discuss their testimony with other witnesses.

Dated: October 25, 2019

Respectfully submitted,

BRYAN CAVE LEIGHTON PAISNER LLP

Attorneys for Complainant Johns Manville

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**CERTIFICATE OF SERVICE**

I, the undersigned, certify that on October 25, 2019, I caused to be served a true and correct copy of *Complainant's Motion to Exclude Witnesses from the Hearing Room* 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

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