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

To: ALL PERSONS ON SERVICE LIST

Please take note that today, August 12, 2014, I have filed the following documents the above-referenced matter with the Clerk of the Illinois Pollution Control Board, copies of which are attached hereto and are hereby served upon you:

- Respondent's Motion for Leave to File Reply *Instanter* and Reply Brief in Support of Section 2-619.1 Motion to Dismiss and Strike Portions of Amended Complaint; and,
- Respondent's Reply Brief in Support of Section 2-619.1 Motion to Dismiss and Strike Portions of Amended Complaint

Respectfully Submitted,

ILLINOIS DEPARTMENT OF TRANSPORTATION

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

RESPONDENT'S MOTION FOR LEAVE TO FILE REPLY *INSTANTER* AND REPLY BRIEF IN SUPPORT OF SECTION 2-619.1 MOTION TO DISMISS AND STRIKE PORTIONS OF AMENDED COMPLAINT

NOW COMES RESPONDENT, the Illinois Department of Transportation ("IDOT"), through its attorney LISA MADIGAN, Attorney General of the State of Illinois, who HEREBY moves the Pollution Control Board ("Board") to reply *instanter* to Complainant Johns Manville's Response to IDOT's Section 2-619.1 Motion to Dismiss Amended Complaint and to Strike Portions of Amended Complaint ("Motion to Dismiss"). IDOT states as follows in support of this Motion and Reply:

Section 1001.500(e) of the Boar's Procedural Rules, 25 Ill. Adm. Code 101.500(e), allows a party to file a reply in support of their underlying motion, in order to avoid prejudice. Johns Manville's Response to IDOT's Motion to Dismiss contains multiple factual and legal misrepresentations of IDOT's position, which requires a reply from IDOT. IDOT believes that these misrepresentations could result in material prejudice and therefore requests that the Board grant it leave to file its Reply. Amongst the prejudicial misrepresentations set forth in Johns Manville's Response are that it has brought its suit against IDOT under the guise of functioning as a "private attorney general." However, the allegations contained in its Amended Complaint,

as well as its Response, make it clear that Johns Manville brought this suit solely for the purpose of defraying the costs which it has and will continue to incur in complying with the June 13, 2007 Administrative Order on Consent ("AOC") which the United State Environmental Protection Agency forced it to enter into.

Johns Manville also makes a series of misrepresentations in its Response regarding the applicability of the statute of limitations, the corresponding discovery rule, and laches, which also need to be addressed by IDOT, in order to avoid prejudicing the Department's interests in this litigation.

WHEREFORE, Respondent, the Illinois Department of Transportation, requests that the Board:

1) Grant its motion for leave to file its attached reply brief, *instanter*; and,

2) Grant such other relief as the Board may find to be appropriate.

Respectfully Submitted,

ILLINOIS DEPARTMENT OF TRANSPORTATION

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

RESPONDENT'S REPLY IN SUPPORT OF ITS SECTION 2-619.1 MOTION TO DISMISS AND TO STRIKE PORTIONS OF AMENDED COMPLAINT

NOW COMES RESPONDENT, the Illinois Department of Transportation ("IDOT"), through its attorney LISA MADIGAN, Attorney General of the State of Illinois, who files the following reply in support of its underlying Section 2-619.1 Motion to Dismiss Amended Complaint and to Strike Portions of Amended Complaint ("Motion to Dismiss").

INTRODUCTION

The notion that Johns Manville has brought this action under the guise of acting as a private attorney general, seeking to enforce violations of the Environmental Protection Act, is preposterous. Johns Manville did not initiate this suit out of concern for the environment or the public's health and wellbeing. Instead, Johns Manville brought this suit in order to defray its continuing pecuniary losses incurred as the result of its entering into an Administrative Order on Consent ("AOC") with the United States Environmental Protection Agency ("USEPA") for the investigation and cleanup of the Johns Manville Superfund Site in Waukegan, Illinois ("Site").

The proof for these assertions can be gleaned from the very facts which Johns Manville has alleged in its Amended Complaint and its Response to IDOT's Motion to Dismiss, as well as

the AOC. By late 1998, Johns Manville was aware of the presence of asbestos-containing material ("ACM") on and beneath the surface of Areas 3 and 6 at Site. And, by June 11, 2007, when USEPA signed off on the AOC, not only did Johns Manville know that ACM was present at and beneath Areas 3 and 6 at the Site, more importantly, it knew that it was now legally responsible for investigating the extent of the ACM contamination and cleaning it up. Had Johns Manville truly been concerned about the ACM at the Site and its impact on the environment and the public's health and well-being, it most certainly possessed knowledge of the relevant facts that would have allowed it to have filed the present suit years before it did.

Instead, Johns Manville waited to file this suit, even with all of the knowledge it possessed about conditions at Areas 3 and 6. It waited until years after USEPA had already compelled Johns Manville to take action regarding the Site. It was only after Johns Manville had better ascertained the scope of its financial obligations (as plead at length throughout its Amended Complaint), that it filed this action. This sequence of events demonstrates with crystal clarity just what this suit is about; although nominally filed as a citizen enforcement action, it is not. It is, instead, nothing more than an attempt by Johns Manville to get IDOT to reimburse it for the costs that Johns Manville will otherwise bear itself. As such, it is a frivolous use of the citizen enforcement mechanism provided for under the Act and the Board's rules and this case is deservedly dismissed by the Board.

ARGUMENT

A. The Law of the Case Doctrine Does Not Bar IDOT's Motion to Dismiss

Johns Manville initially responds to IDOT's Motion to Dismiss asserting that that the law of the case doctrine requires dismissal of the motion. (Resp. at 9.) In support of this assertion, it cites to the Board's July 7, 2011 order in *Elmhurst Mem'l Healthcare and Elmhurst Mem'l Hosp.*

v. Chevron U.S.A., Inc. and Texaco, Inc., PCB 99-66, 2011 WL 2838628 ("*Elmhurst Mem'l*") ("July7th Order"). Johns Manville asserts that *Elmhurst Mem'l* stands for the proposition that "a rule established as controlling in a particular case will continue to be the law of the case, as long as the facts remain the same." (Resp. at 10.) While Johns Manville accurately states the general principles to be gleaned from *Elmhurst Mem'l* regarding the law of the case doctrine, this case is distinguishable on its facts from the present case.

In *Elmhurst Mem'l*, the respondent filed a number of affirmative defenses, including, for example, that its liabilities had been discharged in bankruptcy, along with its answer to EHMC's complaint. The Board granted the respondent's affirmative defenses on the discharge in bankruptcy grounds. (July 7th Order, at *27.) Thus, when in response to EHMC's amended complaint, respondent again raised the identical affirmative defense, the Board found that, having previously ruled in respondent's favor on this affirmative defense, the law of the case was applicable to this affirmative defense. (Id.)

By comparison to the situation present to the Board in *Elmhurst Mem'l*, none of the grounds which IDOT raised in its underlying Motion to Dismiss were previously raised by IDOT in its motion to dismiss Johns Manville's original complaint. Presumably, if Illinois law required a defendant to raise all possible grounds for dismissal or striking of a complaint in its initial motion to dismiss, Johns Manville would have cited those cases to the Board in its Response.

B. Because the Board Cannot Grant Injunctive and Equitable Relief Requested by Johns Manville, Its Case is Frivolous

Johns Manville next states in its Response that IDOT has failed to demonstrate that its Amended Complaint is duplicative or frivolous. (Resp. at 10.) Johns Manville then goes on to argue that because the Board has previously found in response to IDOT's initial Motion to Dismiss that there was nothing frivolous about the initial complaint in this action that somehow

still pertains to IDOT's current Motion to Dismiss

As argued in its underlying Motion to Dismiss, it is IDOT's position that Johns Manville's Amended Complaint seeks relief which the Board cannot grant, because it is equitable and injunctive in nature and the Legislature did not invest the Board with such authority through the Act. While the Board has the authority under the Act to grant certain forms of relief, it does not have the authority to grant injunctive relief.

There is no provision in the text of Section 5(d) of the Act, 415 ILCS 5/5(d) (2012), which provides the Board with the authority to grant the injunctive relief. Similarly, nothing in Section 31 of the Act, 415 ILCS 5/31 (2012), vests the Board with the authority to grant injunctive or equitable relief to a complainant. Thus, Johns Manville's request for injunctive relief from the Board, when the Board has no authority to grant such relief, is the very definition of frivolous. *People v. Blair*, 215 Ill.2d 427, 445 (2005) (the Illinois Supreme Court noting that the definition of frivolous encompasses matters "having no basis in law or fact.").[1] Had the Legislature wanted to vest the Board with the authority to grant injunctive relief, it would have needed to specifically provide for this in the Act. *Rudolph v. State of Illinois*, 53 Ill.Ct.Cl. 58, 2000 WL 34447702, *3 (2000) (the Court of Claims finding that it lacked the authority to grant injunctive relief, as the Legislature had not granted it with that authority); *See also, Chemetco, Inc. v. Poll. Control Bd.,* 140 Ill.App.3d 283, 286 (5th Dist. 1986) (the court noting that administrative agencies are limited to powers vested in them by statute.)

Ultimately, Johns Manville's argument that the Board is vested with certain remedial authority under the Act misses the point. (Resp. pp. 11-12.) This is because it is Johns Manville that has framed its Amended Complaint in such a way that it requests certain relief from this

[1] It is also frivolous because Johns Manville is bringing this suit before the Board under the guise of being a private attorney general seeking to enforce a violation of the law, claiming to vindicate the rights of the people of this State.

Board that it does not have the power to grant. Johns Manville is the master of its complaint and it is therefore incumbent upon it to request redress that lies within the scope of the authority which the Legislature has granted to the Board. Because Johns Manville has not done this, its Amended Complaint should be accordingly dismissed.

C. A Five Year Statute of Limitations Applies to Johns Manville's Claims and the Statute Ran Prior to Johns Manville's Filing of this Case

1. Johns Manville's Claim That it is Acting as a Private Attorney General is Self-Serving and Disingenuous

In response to IDOT's Motion to Dismiss on statute of limitations grounds, Johns Manville argues that no statute of limitations or laches applies to this action, because it has brought this case acting as a private attorney general to enforce against purported violations of the Act. (Resp. pp. 13-14.) In making this argument, Johns Manville conflates the question of what statute of limitations should govern cases for enforcement of the Act that are brought by the public prosecutors or other governmental entities with citizens suits brought by private attorneys general.

The concept of the private attorney general has arisen and is embodied in certain statutes out of the Legislature's recognition that regulatory agencies lack the resources to police every violation of a law which they administer and enforce, *Harris v. Manor Healthcare Corp.*, 111 Ill.2d 350, 369 (1986), as well as to "vindicate important public rights." *Bd. of Ed. of Sch. Dist. 170, Cook Cty. V. Ill. St. Bd. of Ed*, 122 Ill.App.3d 471, 478 (1st Dist. 1984). Johns Manville's equating its efforts in this case as being those of a private attorney general are unavailing because both through its Amended Complaint, as well as its Response to IDOT's Motion to Dismiss, Johns Manville makes it clear that it is not acting as a private attorney general. This is because this action was not instituted to vindicate any important public right. As the allegations in its

Amended Complaint make quite clear, Johns Manville filed this action long after USEPA initially instituted its own enforcement proceedings against Johns Manville regarding conditions at the Site. Moreover, Johns Manville only filed this action long after it became apparent just how much its compliance with the terms of the AOC would cost. (*See e.g.,* Am. Complaint, ¶48 (Johns Manville noting that the cleanup of Area 3 will cost between $1.7 million and 2.1 million dollars); and ¶ 50 (noting that the cleanup of Area 66 will cost in excess of $1.8 million dollars); *See also*, Resp. at 19 (discussing the cost of the remedy USEPA has required Johns Manville to perform.) Thus, rather than seeking to vindicate an important public right, what Johns Manville is actually hoping to achieve through this action is to defray the very substantial costs it has incurred under the AOC. Where, as here, a plaintiff is alleging a direct, substantial economic injury, they are clearly not acting in the capacity of a private attorney general. *DiSanto v. City of Warrenville*, 59 Ill.App.3d 931, 936 (2d Dist. 1978).

2. A Five Year Statute of Limitations Applies to Johns Manville's Claims Against IDOT

In its underlying Motion to Dismiss, IDOT cited the Board order in *Caseyville Sport Choice, LLC v. Seiber*, PCB 08-30, 2008 WL 5716999 (Oct. 165, 2008). (Mot., at 8.) In *Caseyville Sport*, the Board noted that the five year statute of limitations applied to actions which are brought alleging violations of the Act which are not brought by either the Attorney General or a States Attorney. *Caseyville Sport*, *2. Johns Manville never addresses this precedent in its Response. (*See generally*, Resp. pp. 14-16.)

Instead, Johns Manville attempts to argue that its case does not involve a claim for property damage and thus the five year statute of limitations under Section 13-205 of the Code of Civil Procedure, 735 ILCS 5/13-205, does not apply. (Resp. p. 14.)[2] This argument has no

[2] Interestingly, Johns Manville cites the case of *Meyers v. Kissner,* 149 Ill.2d 1, 12 (1992) in its Response for the

merit, however, because Section 13-205 provides that it applies to host of enumerated types of claims, as well as "all civil actions not otherwise provided for[.]" Thus, Section 13-205 provides the appropriate statute of limitations because Johns Manville's claim falls within that section's catchall clause.

3. Application of the Discovery Rule Bars Johns Manville's Claims

As IDOT noted in its Motion to Dismiss, under the discovery rule, as interpreted by Illinois courts, the relevant statute of limitations begins to run when a plaintiff is put on inquiry notice and thus has reason to believe that they have been injured. (Mot. at 9). *Khan v. Deutsche Bank*, 2012 IL 112219 (2012) provides that it is not necessary for a plaintiff to have fully ascertained the full extent of their injuries before the clock will start to run under the discovery rule. *Khan*, ¶45. Thus, applying *Khan* to the present case, one can argue that the statute of limitations began to run after Johns Manville entered into the AOC in June of 2007, because it was clearly on notice at that point in time that it would have to undertake investigation and cleanup activities on Areas 3 and 6 at the Site. For Johns Manville to then argue in its Response that was not on notice until July 8, 2008, when it received notice purportedly through its environmental consultant informing it about certain site conditions, (Resp. at 16), turns the discovery rule's requirements on its head. Moreover, for purposes of the Board's consideration of IDOT's current motion, Johns Manville's reference to this purported July 8, 2008 "notice" is unavailing, as this supposed fact cannot be considered now for purposes of defeating this Motion to Dismiss because it was not pled in the Amended Complaint, and is also completely without evidentiary foundation. *Fellhauer v. City of Geneva*, 142 Ill.2d 496, 516 (1991).

Under the circumstances, the five year statute of limitations under Section 13-205 of the

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proposition that that the five year statute of limitations is "not directly controlling in suits seeking equitable relief." (Resp. p. 14.) Presumably, this is a further indication of Johns Manville's intentions to improperly obtain equitable relief through this action.

Code of Civil Procedure, 735 ILCS 5/13-205, began to start running once Johns Manville was put on notice of the conditions at the Site, possibly as early as December 1989 and most definitely by June 13, 2007, after the AOC was executed.

D. Johns Manville's Amended Complaint Should Be Dismissed Based on the Doctrine of Laches

In its Response, Johns Manville argues that laches does not bar its action against IDOT, asserting that "[t]he fact that certain witnesses may be unavailable does not prevent IDOT from mounting a defense in this case." (Resp. at 17), citing *Elmhurst Mem'l Healthcare,* at 9. But the reason why laches should lie in this case – and why the case should be dismissed - is because the lynchpin to Johns Manville's case against IDOT concerns statements purportedly made by Duane Mapes, a deceased IDOT engineer. Mr. Mapes statements' suggest that IDOT's contractors buried and otherwise dealt with asbestos pipe during a construction project that was undertaken at Areas 3 and 6 in the early to mid-1970s. (Am. Compl. ¶ 30.) Thus, Johns Manville's categorical reliance on this statement, and IDOT's inability to question its former employee Mr. Mapes, poses a very significant, and indeed prejudicial, problem to the Department's ability to adequately defend itself in the present action. Such prejudicial impairment to IDOT's ability to defend itself warrants the dismissal of this action under the doctrine of laches. *Senese v. Climatemp, Inc.*, 289 Ill.App.3d 570, 580 (1st Dist. 1997).

Finally, Johns Manville asserts that laches does not apply to enforcement actions under the Act. (Resp. at 17.) That assertion misstates the law, because it mistakes the application of the doctrine where a state actor is bringing suit against a private party, and assumes that laches would therefore not be available to a respondent in a citizen suit. Notably, both of the cases which Johns Manville cites in its Response, *People v. Big O, Inc.,* PCB 97-130 (April 17, 1997), and *People v. Cmty. Landfill Co,, Inc.* PCB 971-3 and 040207 (April 20, 2006), were cases

brought by the Attorney General's office, and were not citizen suits. This is consistent with the fact that Illinois courts have held that, as a general rule, laches will not lie against a governmental entity, absent extraordinary circumstances. *Gersch v. Ill. Dpt. of Prof'l* Regulations, 308 Ill.App.3d 649, 661 (1st Dist. 1999). This standard applies because, to hold otherwise, could potentially impair the functioning of the governmental body in the discharge of its duties, and valuable public interests could be jeopardized or lost by the negligence, mistakes, or inattention of public officials at no fault of citizens. *Van Milligan v. Bd. of Fire and Police Com'rs of Village of Glenview*, 158 Ill.2d 85, 90-91 (1994).

The considerations that have led Illinois courts to place a very high bar for asserting laches against a governmental plaintiff simply do not apply in the present case. This is particularly true because Johns Manville is not seeking to vindicate any public rights, but rather, it is requesting the Board to issue an order that will only inure to its unique benefit. As such, IDOT has appropriately raised laches in response to Johns Manville's Amended Complaint, and laches should bar Johns Manville's claim.

E. IDOT's Motion to Strike

IDOT reincorporates the arguments previously made in support of its Section 2-615 motion for purposes of this reply, but wishes to draw the Board's attention to one part of Johns Manville's Response to this motion. Johns Manville generally seeks to rebut this motion by arguing that the facts which IDOT seeks to challenge are "key to understanding the scope and cost of the remedy JM is required to perform . . ." (Resp. at 19.) (Emphasis added.) IDOT believes that this statement, as much as anything else which Johns Manville has stated in its Response, exposes its claims that it brought this action as a private attorney general to vindicate certain violations of the Act. It assuredly did not. This statement is essentially an admission of

the unique financial harm that Johns Manville is concerned about, and is attempting to use the citizens suit mechanism to remedy. As a result, Johns Manville's Amended Complaint should be dismissed.

CONCLUSION

For the reasons set forth above in this Reply, as well as in its underlying Motion to Dismiss, IDOT requests that this Board dismiss Johns Manville's Amended Complaint. In the alternative, should the Board not grant its Motion to Dismiss, IDOT requests that the Board grant its Motion to Strike those portions of the Amended Complaint that are enumerated in the underlying Motion to Dismiss.

Respectfully Submitted,

ILLINOIS DEPARTMENT OF TRANSPORTATION

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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, August 12, 2014, I caused to be served on the individuals listed below, by first class mail, a true and correct copy of the attached Respondent's Motion for Leave to File a Reply and Respondent's Reply in Support of its Section 2-619.1 Motion to Dismiss and Strike Portions of Amended Complaint.

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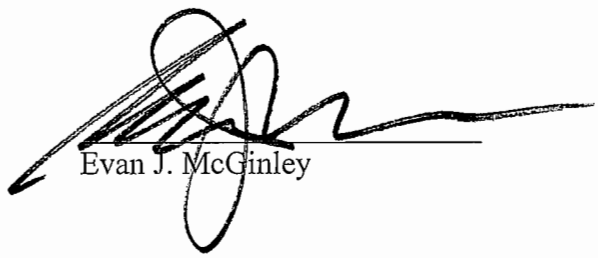

Evan J. McGinley