**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.** | ) | |

**COMPLAINANT'S RESPONSE TO RESPONDENT'S MOTION FOR PROTECTIVE ORDER**

Complainant JOHNS MANVILLE ("JM") hereby submits its response to Respondent ILLINOIS DEPARTMENT OF TRANSPORTATION ("IDOT")'s Motion for Protective Order (the "Motion") as follows:

**INTRODUCTION**

Throughout this case, IDOT has concealed its interest in a right of way, located on the southern side of Greenwood Avenue on Sites 3 and 6 of the property that is the subject of this action in Waukegan, Illinois (hereinafter referred to as the "Right of Way"). IDOT consistently led JM to believe that IDOT's Right of Way was transferred to the City of Waukegan, when in fact, IDOT has retained an interest in the Right of Way from the 1970s to the present. Only recently, upon receipt of a title search Report from Property Insight, did JM learn that IDOT's interest in the Right of Way persisted, despite the prior representations of IDOT's expert witness, Steven Gobelman, and despite IDOT's failure to correct his statements. JM subsequently received leave to, and did, file its Second Amended Complaint to conform the allegations of its

pleadings to the newly discovered evidence of IDOT's interest in the Right of Way on Sites 3 and 6.

While IDOT, as the party with an interest in the Right of Way, does or should already have all information regarding the Right of Way in its possession, custody, and/or control, IDOT nevertheless implored the Board and the Hearing Officer to allow discovery on the new issues raised in JM's Second Amended Complaint — issues pertaining to IDOT's interest in the Right of Way. Yet, even now that discovery has been reopened with respect to such issues, IDOT still fails to be forthcoming with respect to its interest in the Right of Way by seeking to be excluded from its obligations to disclose the information and documents requested by JM regarding the Right of Way.

However, it was IDOT, not JM, who sought to reopen discovery in this matter, and who expanded it by introducing expert discovery (over JM's objection). IDOT, then, cannot now complain that JM's issuance of discovery requests rises to the level of "gamesmanship" or that it would be unjust, disadvantageous, or oppressive to require IDOT to respond to JM's discovery requests, including document requests, interrogatories, and requests for admission, which are all permitted under the Illinois Rules of Civil Procedure and IPCB regulations. Yet, in doing so, IDOT misreads JM's Proposed Discovery Schedule and, again, misconstrues the record, when it claims that "IDOT's counsel relied upon the representations put forth by JM's counsel during these status hearings and in JM's Discovery Schedule" (Motion, p. 5) in proposing its own discovery schedule, when IDOT's proposed discovery schedule was submitted before JM's, before any telephonic status hearings regarding the scope of discovery occurred, and before the Hearing Officer addressed and allowed expert discovery. JM is not doing anything more than seeking discovery on a narrow set of issues pertaining to the Right of Way and IDOT's interest

therein. IDOT fails to demonstrate how any of JM's discovery requests are not pertinent to the new issues raised in JM's Second Amended Complaint, particularly when information on these Right of Way issues has not been forthcoming from IDOT to date.

**THE PROPOSED DISCOVERY**

On March 10, 2016, pursuant to the Hearing Officer's March 7, 2016 Order, both IDOT and JM filed proposed schedules for discovery on the new issues raised in JM's Second Amended Complaint. Noticeably absent from IDOT's Motion, however, is mention that IDOT submitted its proposed schedule first, at 3:14 P.M. (*See* Email Correspondence from E. McGinley, attached hereto as **Exhibit A**.) Without having seen JM's Proposed Discovery Schedule, IDOT suggested March 16, 2016 as the deadline by which to propound written discovery and April 5, 2016 by which to respond — dates which were not that different from those posed by JM. While IDOT attempts to fault JM for not having made "reference to its intention to pursue taking any other additional written discovery" (Motion, p. 2), neither did IDOT. Rather, IDOT's proposed discovery schedule was silent on the type of discovery sought by IDOT, other than "written discovery" and "oral discovery." (*See* Exhibit A.) JM served its Proposed Discovery Schedule later in the day at 4:00 P.M. (*See* Email Correspondence from L. Caisman, attached hereto as **Exhibit B**.)

IDOT, however, misreads JM's Proposed Discovery Schedule in assuming that JM would only issue five interrogatories, and seek no further discovery. JM asked for leave to propound five *additional* interrogatories, only due to the limit on the number of interrogatories allowed under the Illinois and Board Rules. In case JM would otherwise exceed the thirty interrogatory limit with this new round of discovery, JM asked for leave to serve a few additional interrogatories. There was no need to address document requests or requests for admission as

these are unlimited in number under the applicable rules. IDOT, too, did not feel any need to address the number of discovery requests it would be propounding in its proposed discovery schedule. Thus, it cannot fault JM for not having included this information prior to issuing discovery requests.

On March 14, 2016, the parties participated in a telephonic status conference with the Hearing Officer to discuss the parties' proposed discovery schedules. It was only during this conference, that IDOT, for the first time, revealed the subjects on which it intended to offer expert opinion testimony. At that time, JM expressed its concerns that expert discovery would expand the scope of discovery that would otherwise be necessary and indicated its need to address potential issues raised by IDOT's proffered, yet previously undisclosed, expert, Keith Stoddard.

On March 16, 2016, JM propounded its Second Set of Document Requests, Third Set of Interrogatories, and First Set of Requests for Admission (the "Discovery Requests"). JM's Discovery Requests were limited to the issues of (1) IDOT's ownership, interest, in, and/or control over portions of Sites 3 and 6, including the Right of Way; (2) the exact location of the Right of Way; (3) IDOT's knowledge of its interest in the Right of Way; and (4) the extent of IDOT's ownership, possession, and/or control over the areas in the Right of Way — precisely what was indicated by IDOT as topics for its expert witness and on which JM had expected to issue written discovery, as set forth in JM's Proposed Discovery Schedule. In turn, given that IDOT also propounded six Interrogatories as well as Document Requests, it seems disingenuous for IDOT to take issue with JM's corresponding service of six Interrogatories and Document Requests. That JM took advantage of the discovery available to it and also propounded Requests

for Admission, and IDOT did not, provides no reason for IDOT to be excused from responding to JM's Requests for Admission.

**ARGUMENT**

Generally, "[a]ll relevant information and information calculated to lead to relevant information is discoverable." *See* 35 Ill. Admin. Code 101.616(a). In fact, the goal of the discovery process in Illinois is full disclosure. *See Payne v. Hall*, 2013 IL App (1st) 113519, ¶ 13 (citing *Schuler v. Mid-Central Cardiology*, 313 Ill. App. 3d 326, 331 (4th Dist. 2000) (finding that discovery disclosure was not an attempt to gain an unfair tactical advantage over the opponent)). While a protective order can be entered to prevent "unreasonable annoyance, expense, embarrassment, or oppression," none of which are present here, protective orders are "primarily applied in circumstances where there is the potential for the release of sensitive discoverable materials to third parties, confidential information is sought to be discover, or there is a lack of due diligence in taking discovery of witnesses" — again, circumstances which are not present in the case at hand. *See Payne*, 2013 IL App (1st) 113519, at ¶ 16 (affirming trial court's denial of request for protective order) (collecting cases); *see also* Ill. S. Ct. R. 201(c). Nor has JM engaged in any "gamesmanship" to be discouraged by entry of a protective order. IDOT has not cited a single authority in support of its position that JM's issuance of its Discovery Requests was an "unsportsmanlike tactic" as IDOT alleges. (*See* Motion, p. 4.)

To the contrary, in none of the cases cited by IDOT (Motion, p. 4) was it found that any party "subverted the discovery rules to gain tactical advantage" or that a protective order was warranted. *See e.g., Boland v. Kawasaki Motors Mfg. Corp.*, USA, 309 Ill. App. 3d 645, 651 (4th Dist. 2000); *Gee v. Treece*, 365 Ill. App. 3d 1029, 1038 (5th Dist. 2006) (finding that disclosure of an expert witness's opinions, even after the time allowed by the Illinois Rules of

Civil Procedure, actually satisfied the purposes behind the discovery rules to avoid surprise and discourage tactical gamesmanship). Similarly, JM has not engaged in any untoward discovery tactics that warrant entry of a protective order in this matter. Rather, JM simply issued its Discovery Requests as allowed under the IPCB regulations and the Illinois Supreme Court Rules. *See* 35 Ill. Admin. Code 101.618 (allowing requests to admit)[1]; 35 Ill. Admin. Code 101.620 (allowing interrogatories and permitting the Hearing Officer to allow a party to serve more than thirty written interrogatories); Ill. S. Ct. R. 214 (allowing requests for production of documents).

This is particularly so as evidenced by IDOT's claim that its "counsel relied upon representations put forth by JM's counsel during these status hearings and in JM's Discovery Schedule concerning the scope of written discovery" (Motion, p. 5), though, as discussed above, IDOT submitted its proposed discovery schedule before JM did and before any conferences regarding the scope of ordered discovery were had. Still, while IDOT claims that "[it] was with these representations in mind that IDOT's counsel was able to commit to respond to JM's written discovery by March 29, 2016" (Motion, p. 5), without having had any discussions regarding the scope of discovery to be conducted, IDOT proposed April 5, 2016, only a few days later, as the deadline for the completion of written discovery. Yet, now, IDOT seeks to unduly take advantage by enlarging the discovery period even more than previously proposed and by attempting to postpone hearing in this matter.

IDOT has failed to demonstrate, let alone point to a singular specific example, because it cannot, how any of JM's Discovery Requests are inappropriate, not tailored to the new issues raised in JM's Second Amended Complaint, or "go beyond simply seeking information to

[1] Note that this regulation requires JM to include certain cautionary language on its Requests for Admission related to the time in which a party being served is required to respond. Nevertheless, though the Illinois discovery rules fix periods of time to respond to requests for admission, interrogatories, and requests for production, these deadlines could be, and were, rightly modified by the Hearing Officer. *See* 35 Ill. Admin. Code 101.6161.

pertaining to its new claims." (*See* Motion, p. 5.) JM's Discovery Requests are, in fact, all confined to the new issues raised, including issues JM anticipates IDOT's proffered expert witness to raise. JM's Discovery Requests are all in line with the topics on which JM disclosed it would seek discovery in its Proposed Discovery Schedule and on which IDOT stated it would offer expert witness opinion testimony. Moreover, because of the expert issues, the scope of which was only ordered during the March 14, 2016 status conference with the Hearing Officer, after JM submitted its Proposed Discovery Schedule, the Discovery Requests propounded by JM are necessary, appropriate, and fair in order to also address the expert issues raised, but not otherwise contemplated in JM's Proposed Discovery Schedule.

While IDOT complains that certain of JM's Discovery Requests cover topics of prior discovery requests, JM is not intending for IDOT to re-produce documents or information already exchanged in this case. Rather, JM issued refined, narrow Discovery Requests to IDOT for information and documents not previously produced by IDOT, pertaining solely to the Right of Way and IDOT's exercise of its interest therein. JM is entitled to this discovery.

It is IDOT's burden to demonstrate good cause for a protective order. *See e.g., Jackson v. Jackson*, No. 02 L 577, 2002 WL 32391735, **2-3 (Cir. Ct. Ill. June 19, 2002). IDOT has not met this burden. Only in conclusory fashion does IDOT claim that it would be "impossible for IDOT to be able to fully respond to JM's discovery by the deadline." (Motion, p. 6.) Nor does IDOT explain why it needs additional time to respond to JM's Discovery Requests. Contrary to IDOT's claim, it is not unreasonable to expect IDOT to honor the Hearing Officer's Order and to abide by the discovery and hearing deadlines set in this case. IDOT does not provide any valid reason justifying departure from this schedule. Based on the foregoing, IDOT should be held to

the original discovery schedule to which it committed and discovery and hearing in this case should proceed as previously planned.

## CONCLUSION

For the reasons set forth above,[2] JM requests that the Board deny Respondent IDOT's Motion for Protective Order in its entirety.

Dated: March 23, 2016

Respectfully submitted,

BRYAN CAVE LLP

Attorneys for Complainant Johns Manville

By: *___/s/ Lauren J. Caisman*

Susan Brice, ARDC No. 6228903
Lauren J. Caisman, ARDC No. 6312465
161 North Clark Street, Suite 4300
Chicago, Illinois 60601
(312) 602-5079
Email: lauren.caisman@bryancave.com

[2] JM also incorporates by reference its response to IDOT's Rule 201(k) correspondence (attached hereto as **Exhibit C**) as set forth fully herein.

**CERTIFICATE OF SERVICE**

I, the undersigned, certify that on March 23, 2016, I caused to be served a true and correct copy of *Complainant's Response to Respondent's Motion for Protective Order* 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
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Illinois Pollution Control Board
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E-mail: John.Therriault@illinois.gov

# EXHIBIT A

## Caisman, Lauren

**From:** McGinley, Evan <emcginley@atg.state.il.us>
**Sent:** Thursday, March 10, 2016 3:14 PM
**To:** Brad Halloran (Brad.Halloran@illinois.gov)
**Cc:** Brice, Susan; Caisman, Lauren; O'Laughlin, Ellen; Dougherty, Matthew D.
**Subject:** JM v. IDOT, PCB 14-3: IDOT's Proposed Discovery Schedule

Dear Mr. Halloran:

IDOT proposes the following expedited schedule for conducting limited discovery regarding the new claims alleged in Johns Manville's recently accepted Second Amended Complaint. IDOT's schedule is designed to allow for discovery to proceed during the time period allowed by the Board's March 3rd order for IDOT to answer the Second Amended Complaint. IDOT believes that its proposed schedule achieves this purpose and will also work with your expressed intention to reschedule this matter for hearing in the first half of May.

**A. Written Discovery**

- All written discovery to be propounded by March 16th
- All written discovery to be responded to by April 5th

**B. Oral Discovery**

- All depositions (both fact and expert) to be taken by April 19th

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

# EXHIBIT B

## Caisman, Lauren

**From:** Caisman, Lauren
**Sent:** Thursday, March 10, 2016 4:00 PM
**To:** Brad Halloran (Brad.Halloran@illinois.gov)
**Cc:** Brice, Susan; O'Laughlin, Ellen; Dougherty, Matthew D.; 'McGinley, Evan'
**Subject:** RE: JM v. IDOT, PCB 14-3: IDOT's Proposed Discovery Schedule
**Attachments:** JM__Proposed_Discovery_Schedule.pdf

Mr. Halloran,

Attached please find Complainant's proposed discovery schedule.

Thank you,
Lauren

BRYAN CAVE
**Lauren Caisman**
*Associate*
lauren.caisman@bryancave.com T: +1 312 602 5079

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**From:** McGinley, Evan [mailto:emcginley@atg.state.il.us]
**Sent:** Thursday, March 10, 2016 3:14 PM
**To:** Brad Halloran (Brad.Halloran@illinois.gov)
**Cc:** Brice, Susan; Caisman, Lauren; O'Laughlin, Ellen; Dougherty, Matthew D.
**Subject:** JM v. IDOT, PCB 14-3: IDOT's Proposed Discovery Schedule

Dear Mr. Halloran:

IDOT proposes the following expedited schedule for conducting limited discovery regarding the new claims alleged in Johns Manville's recently accepted Second Amended Complaint. IDOT's schedule is designed to allow for discovery to proceed during the time period allowed by the Board's March 3rd order for IDOT to answer the Second Amended Complaint. IDOT believes that its proposed schedule achieves this purpose and will also work with your expressed intention to reschedule this matter for hearing in the first half of May.

**A. Written Discovery**

- All written discovery to be propounded by March 16th
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**B. Oral Discovery**

- All depositions (both fact and expert) to be taken by April 19th

Regards,

Evan J. McGinley
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**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

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

**COMPLAINANT'S PROPOSED DISCOVERY SCHEDULE**

Complainant JOHNS MANVILLE ("JM") hereby submits, pursuant to the Hearing Officer's March 7, 2016 Order, its Proposed Discovery Schedule as follows:

1. JM believes that all discovery proceedings, both written and oral, on the new, limited issues raised in JM's Second Amended Complaint can be completed by **April 21, 2016**. JM anticipates propounding limited, expedited written discovery, addressing IDOT's ownership, interest in and/or control over portions of Sites 3 and 6, including a right of way on the southern side of Greenwood Avenue (the "Right of Way"), the exact location of the Right of Way, and IDOT's knowledge of its interest in the Right of Way. JM hereby requests leave to propound five additional interrogatories upon IDOT to address these limited issues, which were not contemplated when the parties' originally engaged in written and oral discovery. JM can propound this discovery by **March 15, 2016** and believes IDOT should be able to respond by **March 29, 2016**. JM also anticipates taking the depositions of a Rule 206(a)(1) corporate representative of IDOT and, to the extent they are not the designated corporate representative, Keith W. Stoddard and Steven G. Warren, who were disclosed on IDOT's witness list as IDOT

fact witnesses to address these same issues. JM believes it could conclude this oral discovery by **April 21, 2016** and proceed to hearing the first or second week of May.

2. Expert discovery is neither needed nor appropriate on the issues raised in JM's Second Amended Complaint. First, whether IDOT holds or has held an ownership interest in, a possessory interest in and/or exercised control over the Right of Way is an issue of fact, not opinion, which does not require scientific, technical, or other specialized knowledge to assist the trier of fact. The key factual issues are whether IDOT conveyed or officially abandoned its interest in the Right of Way after 1984 and what actions IDOT has taken with respect to the Right of Way since that time.

3. The second set of issues raised by the Second Amended Complaint is whether IDOT held or exercised sufficient ownership/possessory interest/control over the areas in the Right of Way to be liable under Section 21(d) of the Illinois Environmental Protection Act, 415 ILCS 5/21(d), a legal issue plainly within the Board's purview and expertise. IDOT should not be permitted to extend what is meant to be limited discovery in this case by disclosing a new expert witness to further delay these proceedings. While JM named V. Gina Gianelli, VP Illinois State Counsel for Chicago Title Insurance Company as a potential *fact* witness, Ms. Gianelli's anticipated testimony was limited to the genuineness/admissibility of a title search commissioned by JM, only if a stipulation between JM and IDOT could not be reached regarding the same. Should the Hearing Officer permit IDOT to disclose an additional expert witness at this late juncture, JM will also need to retain and disclose an expert witness.

WHEREFORE, Complainant JOHNS MANVILLE respectfully requests that the Hearing Officer Board enter an Order adopting proposed discovery dates as set forth above.

March 10, 2016

Respectfully submitted,

BRYAN CAVE LLP

Attorneys for Complainant Johns Manville

By: ____*/s/ Lauren J. Caisman*

Susan Brice, ARDC No. 6228903
Lauren J. Caisman, ARDC No. 6312465
161 North Clark Street, Suite 4300
Chicago, Illinois 60601
(312) 602-5124
Email: lauren.caisman@bryancave.com

**CERTIFICATE OF SERVICE**

I, the undersigned, certify that on March 10, 2016, I caused to be served a true and correct copy of *Complainant's Proposed Discovery Schedule* 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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# EXHIBIT C

**Caisman, Lauren**

**From:** Caisman, Lauren
**Sent:** Monday, March 21, 2016 11:46 AM
**To:** 'emcginley@atg.state.il.us' (emcginley@atg.state.il.us); O'Laughlin, Ellen (EOLaughlin@atg.state.il.us); Dougherty, Matthew D. (Matthew.Dougherty@Illinois.gov)
**Cc:** Brice, Susan
**Subject:** Johns Manville v. IDOT, PCB 14-3 - Response to IDOT Rule 201(k) Letter

Evan,

We are in receipt of your Rule 201(k) letter dated March 18, 2016. While the Illinois Department of Transportation ("IDOT") claims that it "believes that the nature and scope of the Discovery Requests represents a gross divergence from the representations made by JM," such a belief is unfounded.

As an initial matter, Johns Manville's ("JM") Second Set of Document Requests, Third Set of Interrogatories, and First Set of Requests for Admission (the "Discovery Requests") are necessary in light of the fact that IDOT had failed to produce documents responsive to JM's First Set of Document Requests. Though JM's First Set of Document Requests included requests for, among others, "any and all documents related to Sites 3 and 6," almost no documents with respect to the Right of Way were produced, though situated on Sites 3 and 6. Thus, in some respects, JM is now seeking discovery on the relevant issues that it already should have received, but which IDOT did not produce or disclose.

It was IDOT, not JM, that sought to reopen discovery in this matter on the issues in JM's Second Amended Complaint. IDOT, then, cannot now complain that it is burdensome or "oppressive" to respond to the discovery requests, including all Document Requests, Interrogatories, and Requests for Admission propounded by JM. Once discovery was reopened, JM never indicated that it would seek only oral discovery or to solely serve written interrogatories. To the contrary, JM expressly asked the Hearing Officer to clarify that reopening discovery included written discovery, not just depositions. Under the Illinois Rules of Civil Procedure and the Illinois Pollution Control Board ("IPCB") regulations, written discovery includes interrogatories, requests for production, *and* requests for admission.

IDOT misreads JM's Proposed Discovery Schedule in assuming that JM would only issue 5 interrogatories, and seek no further discovery. JM asked for leave to propound 5 additional interrogatories, only due to the limit on the number of interrogatories allowed under the Illinois and IPCB Rules. In case JM would otherwise exceed the thirty interrogatory limit with this new round of discovery, JM asked for leave to serve a few additional interrogatories. There was no need to address document requests or requests for admission as these are unlimited in number under the applicable rules. In fact, IDOT did not feel the need to address the number of discovery requests it would be propounding in its proposed discovery schedule. Neither did JM.

Given that IDOT propounded six Interrogatories as well as Document Requests, IDOT should not complain that JM also propounded six Interrogatories and Document Requests. That JM took advantage of the discovery available to it and propounded Requests for Admission as well provides no reason for IDOT to be excused from responding to JM's Requests for Admission.

IDOT's Discovery Requests, not JM's, are the ones that are not narrowly tailored to the new issues raised by JM's Second Amended Complaint. IDOT's Interrogatories and Requests for Documents seek discovery about

allegations of JM's Second Amended Complaint, but not necessarily those that are changed or new. Further, nowhere in your correspondence does IDOT provide any explanation as to why or how JM's Discovery Requests are unrelated to the new claims or facts alleged in JM's Second Amended Complaint. JM's Discovery Requests are, in fact, all narrowly tailored to the new issues raised, including issues JM anticipates IDOT's proffered expert witness to raise. JM's Discovery Requests are all in line with the topics on which JM disclosed it would seek discovery in its Proposed Discovery Schedule. Nevertheless, it was IDOT, not JM, that expanded the scope of this limited round of discovery by introducing an expert witness in this case (over JM's objection). Because of the expert issues, the scope of which was only ordered during the March 14 status conference with the Hearing Officer, after JM submitted its Proposed Discovery Schedule, the Discovery Requests propounded by JM are necessary, appropriate, and fair in order to also address the expert issues raised, but not otherwise contemplated in JM's Proposed Discovery Schedule.

JM will not be withdrawing any of its Discovery Requests and will not hesitate to file a Motion Compel should IDOT not abide by its discovery obligations in this matter and respond in full to JM's Discovery Requests.

Please feel free to contact me if you would like to discuss further (Susan is out of the office this week).

Thank you,
Lauren

BRYAN CAVE **Lauren Caisman**
*Associate*

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