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, December 20, 2017, I have filed with the Clerk of the Pollution Control Board "IDOT's Motion for Leave to File Sur-Reply in Support of IDOT's Response to Complainant's Brief Regarding Relevance of Discovery Sought by IDOT" 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, December 20, 2017, I caused to be served on the individuals listed below, by electronic mail, a true and correct copy of "IDOT's Motion for Leave to File Sur-Reply in Support of IDOT's Response to Complainant's Brief Regarding Relevance of Discovery Sought by IDOT" on each of the parties listed below:

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IDOT's MOTION FOR LEAVE TO FILE SUR-REPLY IN SUPPORT OF IDOT'S RESPONSE TO COMPLAINANT'S BRIEF REGARDING RELEVANCE OF DISCOVERY SOUGHT BY IDOT

NOW COMES Respondent, the ILLINOIS DEPARTMENT OF TRANSPORTATION ("IDOT"), who files its Motion for Leave to File a Sur-Reply in Support of IDOT's Response to Complainant's Brief Regarding Relevance of Discovery Sought by IDOT ("Motion for Leave to File Sur-Reply"). In support of this motion, IDOT states as follows:

STATMENT OF FACTS

On November 27, 2017, Johns Manville filed its Motion for Leave to File Reply *Instanter* to IDOT's Response to Complainant's Brief Regarding Relevance of Discovery Sought by IDOT ("Johns Manville Motion").

On November 30, 2017, IDOT filed its response to JM's Motion, requesting that it be denied or, if the Board was inclined to grant JM's Motion, to be given two weeks in which to file a response to Complainant's Brief, filed as Exhibit A to their Motion.

On December 13, 2017, during a status hearing between the parties and the Hearing Officer, the Hearing Officer advised the parties that the Board had taken the Johns Manville Motion under advisement and further advised the parties that it was possible the Board might

issue a ruling on whether IDOT could proceed with taking discovery form Third Party Commonwealth Edison at either its December 21, 2017 or January 18, 2018 meetings.

Rather than waiting to see how the Board might rule on the Johns Manville Motion, or IDOT's November 30th response thereto, IDOT has instead opted to file this Motion for Leave to File Sur-Reply.

ARGUMENT

Section 101.500(e) of the Board's procedural rules, 35 Ill. Adm. Code 101.500(e), only permits a party to file a reply in order to prevent it from being subject to material prejudice. The Board has held that this same provision of the Board's procedural rules applies to the filing of sur-replies, as well. *City of Quincy v. IEPA*, PCB 08-86, slip op. at 3 (June 17, 2010).

IDOT seeks leave to file its sur-reply in order to prevent suffering material prejudice in both the immediate and longer terms. (A copy of IDOT's proposed sur-reply is attached hereto as Exhibit A.) The immediate likelihood of IDOT being material prejudiced arises out of arguments and assertions set forth in both Johns Manville's Motion and its attached Reply. Specifically, in its Motion and proposed Reply, Johns Manville argues that the collateral source rule should bar IDOT from taking any third party discovery from Commonwealth Edison. The arguments which Johns Manville advances in its proposed Reply regarding the applicability of the collateral source rule – a substantive and evidentiary rule that has never apparently been applied by the Board in any prior proceeding or by any circuit court in a case involving alleged violations of the Environmental Protection Act – are both legally inaccurate and factually distinguishable. It is IDOT's position that it would suffer material prejudice if it was not allowed to file a Sur-Reply to Johns Manville's proposed Reply, as this would allow

Johns Manville's erroneous statements of law regarding the collateral source rule to stand unchallenged.

In the longer term, IDOT also faces the prospect of suffering material prejudice if it is not allowed to take discovery from Third Party Commonwealth Edison and to ensure that the Board, in deciding whether or not to grant IDOT leave to take discovery from third party Commonwealth Edison, has a full and complete record before it, when it ultimately rules upon this critical issue. Given these circumstances, IDOT believes that it is vital to the preparation of its defense that it be given the opportunity to set the record straight on the inapplicability of the collateral source rule to the proceedings before the Board.

WHEREFORE, Respondent, the Illinois Department of Transportation, requests that the Hearing Officer:

1) Grant its Motion for Leave to File Sur-Reply; and,

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

Respectfully Submitted,

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EXHIBIT A – IDOT'S PROPOSED SUR-REPLY

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IDOT's SUR-REPLY IN SUPPORT OF ITS RESPONSE TO COMPLAINANT'S BRIEF REGARDING RELEVANCE OF DISCOVERY SOUGHT BY IDOT

NOW COMES Respondent, the ILLINOIS DEPARTMENT OF TRANSPORTATION ("IDOT"), who set forth its Sur-Reply in Support of its Response to Complainant's proposed Brief Regarding Relevance of Discovery Regarding Relevance of Discovery Sought by IDOT ("Proposed Reply").

INTRODUCTION

For over six months, Complainant Johns Manville and Third Party Commonwealth Edison have been doing everything within their powers to keep IDOT from taking discovery from Commonwealth Edison about its involvement in the removal action at Sites 3 and 6. Johns Manville's efforts to deny IDOT its right to take this discovery have now come to involve their raising entirely spurious arguments that find no support in the law, most particularly, that the collateral source rule applies to these proceedings (Reply, at pp. 2-3), and that the Board may interpret the Act to allow Johns Manville to obtain a double recovery. (Reply, at pp. 13-14.) In so doing, they have also – again – changed their position as to just what form of relief they are asking the Board to grant it as against IDOT. Specifically, they now assert for the very first time in these proceedings that the relief it is seeking from the

Board is to recover "the damages it incurred as a result of IDOT's violations of the Act." (Reply, p.13.)

Underlying Johns Manville's proposed Reply is the insinuation that although they are a signatory and responsible party (along with Third Party Commonwealth Edison) under the Administrative Order on Consent ("AOC") for the remediation of Sites 3 and 6, which they entered into with the United States Environmental Protection Agency ("USEPA"), that they are somehow an innocent party as far as the proceedings before the Board are concerned. This is a preposterous notion. The evidence which was presented at hearing in this matter last year flies in the fact of Johns Manville's position.

In order to prepare its defense for the next round of hearings in this matter, IDOT is entitled to take discovery from Commonwealth Edison regarding the nature of the relationship between Johns Manville and Commonwealth Edison. If Johns Manville has already received some form of payment from Commonwealth Edison that would apply to the portions of Sites 3 and 6 that the Board previously found IDOT liable for in its December 15, 2016 Interim Order and Opinion, then IDOT should be able to take discovery about such payments and other related matters, in order to ascertain the amount of "damages," if any, Johns Manville has incurred. To be denied this opportunity would materially prejudice IDOT's ability to develop a full and complete record upon which to mount its defense to Johns Manville's claims against it.

ARGUMENT

I. Johns Manville's Case Is Not a Tort Action and Thus Does Not "Sound in Tort"

In its Reply (which the Board has yet to accept), Johns Manville argues that "Violations of the Act sound in tort and thus the collateral source rule applies." (Reply, p. 2.) Johns Manville's assertion is quite simply erroneous and is directly contrary to the Board's long-

standing interpretations of the Environmental Protection Act's ("Act") scope and purpose.

For close to 50 years, the Board has held that proceedings before the Board alleging violations of the Act "are neither criminal in nature nor are they actions in tort. *E.P.A. v. City of Champaign*, PCB 71-51C (Sept. 16, 1971), Slip Op. at 6 (Emphasis Added). As the Board went on to note in *City of Champaign:* "[T]he action we are dealing with here is not a 'tort' claim but rather a new, statutory action, which did not exist at common law. *Id.; See also, People of the State of Illinois v. Boyd Brothers, Inc.*, PCB 94-275, (Feb. 16, 1995), Slip Op. at 3 (*citing City of Champaign,* PCB 71-51C, at 6). Clearly, then, as Johns Manville's claims against IDOT do not involve IDOT's commission of any torts, it follows that the collateral source rule, a rule which arises out of the common law of torts, *Bernier v. Burris,* 113 Ill.2d 219, 244 (1986), should not apply to this case.

II. The Application of the Collateral Source Rule to this Case Would Be Contrary to Long-Standing Board Precedent

Johns Manville next argues that the "collateral source rule has been applied to similar state law claims," citing *La. Dept. of Trans. and Dev. v. Kansas City South Ry. Co.*, 846 So. 2d 734 (La. 2003), and *Town of East Troy v. Soo Line R.R. Co.*, 653 F.2d 1123 (7th Cir. 1980). (Reply, at 4.) Johns Manville's assertion is inapposite, because while the application of the collateral source rule may have been approved by courts in other states involving "similar state law claims," in recognition of a defendant's status as a "tortfeasor" (*See e.g.*, 846 So. 2d at 739), as already discussed above, the Board does not view cases arising under the Act as tort actions. Therefore, the collateral source rule does not apply to this case, because it is not a case involving torts or tort law.

However, even assuming for the sake of argument that the collateral source rule somehow applied to this case, Johns Manville's situation is readily distinguishable on its facts

from either the Louisiana case or the *Town of East Troy* case. Most significantly, unlike the plaintiffs in either of the aforementioned cases who were completely innocent parties that had no role in causing the environmental contamination at issue in the respective cases, s*ee, La. Dept. of Transp. and Development*, 846 So.2d at 736; s*ee also, Town of Troy*, 653 F.2d at 1125, Johns Manville is in a fundamentally different position from those parties, because it is all but certain that they played a substantial role in causing or contributing to the asbestos contamination at Sites 3 and 6. Indeed, Johns Manville's own consultants opined that the source of the asbestos found at Site 6 "is not known but presumed to be debris that fell of trucks while driving on Greenwood Avenue." (Ex. 66-766.) Given the fact that Johns Manville is in a fundamentally different position from the plaintiffs in either the Louisiana or the *Town of East Troy* cases - because unlike those plaintiffs, Johns Manville almost certainly had a role in causing the asbestos contamination at Sites 3 and 6 – the Board should give no consideration to those cases in deciding whether the collateral source rule applies to the present case.

III. Federal Courts Have Clearly Stated that the Collateral Source Rule Does Not Apply in CERCLA Cases

Johns Manville seeks to refute the several cases that IDOT cited in its brief for the proposition that federal courts have found that the collateral source rule does not apply to CERCLA cases by claiming that this prohibition only applies to CERCLA contribution actions. (Reply, at 5.) Johns Manville's argument can at best be described as misleading. As the court in *Basic Management Inc., v. U.S.*, 569 F.Supp.2d 1106 (D. Nev. 2008) made clear, it included no limitations on its finding that the collateral source rule does not apply to CERCLA. 569 F.Supp.2d at 1123 ("there is no authority supporting application of the rule in a CERCLA context."). The *Basic Management* court's conclusion was based on its survey of a number of federal court cases addressing various provisions within CERCLA, all of which found that the

rule did not apply to a various provisions of CERCLA. *Id.* at 1124-25. Johns Manville's assertion that the *Basic Management* court somehow only held that the collateral source rule does not apply to CERCLA contribution claims is misleading and finds no support in that court's opinion. *Id.*

Ultimately, though, what is most misleading about this section of Johns Manville's reply is its groundless claim that "CERCLA decisions ha[ve] no bearing here as JM is not a culpable or 'responsible' party." (Reply, at 6.) Such an assertion boggles the mind, given the fact that Johns Manville and Commonwealth Edison are each a "responsible party under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a)." (Ex. 62-7, AOC, ¶ V.10.d.) As signatories to the AOC, Johns Manville and Commonwealth Edison are each "jointly and severally liable for performance of a response action . . ." (Id.)

A final problem with the third section of Johns Manville's Reply is the statement that "JM is seeking to be made whole for the damages it incurred as a result of IDOT's violations of the Act." (Reply, p. 13.) Unfortunately for Johns Manville, the Board has clearly stated that such awards are beyond the powers vested in the Board by the Act. *Kortas v. Metro. Sanitary Dist. of Greater Chicago*, PCB 78-15, Slip Op. at 1 (Feb. 16, 1978); *See also, Erickson, v. Charleston Classic Homes, Inc.*, PCB 04-26, Slip Op. at 2 (Nov. 6, 2003). Presumably, Johns Manville's reference to "damages" was made in an effort to bolster its weak arguments urging the Board to allow the collateral source rule to apply to this case and not because it has now changed (yet again) the nature and scope of relief that it seeks to obtain from the Board against IDOT.

IV. Johns Manville's Assertion that the Collateral Source Rule Could be Applied to this Case Runs Afoul of Well-Recognized Principles of Statutory Construction

Finally, Johns Manville asserts that "[u]nlike CERCLA, the Act does not contain a prohibition on double recovery. The Hearing Officer/Board need look no further." (Reply, 13; footnote and original emphasis omitted.) The Board should reject Johns Manville's suggestion and should go further in analyzing whether the legislature's failure to explicitly state in the Act's

text that collateral source rule did not apply to cases arising thereunder Act is an invitation to apply this rule to the present case.

Johns Manville's argument is flatly wrong as a matter of statutory construction and with the Illinois Supreme Court's case law on how this state's statutes should be read. As the Court noted in *Madison Two Assocs. v. Pappas*, 227 Ill.2d 474, 495 (2008), "a court may not add provisions that are not found in a statute[.]" Accordingly, Johns Manville's insinuation that the Board may read the Act so as to provide the possibility of a double recovery by Johns Manville is simply wrong and IDOT urges the Board to give no credence to Johns Manville's completely erroneous reading of the Act. *Id.*

CONCLUSION

Johns Manville's Reply asserts a number of spurious bases for why the collateral source rule should bar IDOT from taking the discovery that it has been trying to obtain for the past six months and why double recovery would be permissible. As argued above, Johns Manville's arguments in favor of its positions find no support in the law. Accordingly, the Board should disregard Johns Manville's arguments and should not allow the collateral source rule to be applied to these proceedings.

More importantly, IDOT should be allowed the opportunity to take discovery on an issue that is critical to this case; namely, whether Johns Manville has, in any way, already been

compensated for any portion of the work the Board has found IDOT responsible for. The denial of this opportunity will likely result in material prejudice to IDOT's ability to prepare its defense. Accordingly, IDOT requests that the Board grant its request to take discovery from Third Party Commonwealth Edison and in so doing, to allow IDOT the opportunity to move this case forward to conclusion.

Respectfully Submitted,

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