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 12, 2018, I have filed with the Clerk of the Pollution Control Board the attached Response to Complainant's Motion for Sanctions and have served each person listed on the attached service list with a copy of the same.

Respectfully Submitted,

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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 12, 2018, I caused to be served on the individuals listed below, by electronic mail, a true and correct copy of the attached Response to Complainant's Motion for Sanctions on each of the parties listed below:

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ILLINOIS DEPARTMENT OF	)	
TRANSPORTATION,	)	
	)	
Respondent.	)	

IDOT'S RESPONSE TO MOTION TO COMPLAINANT'S MOTION FOR SANCTIONS

Now comes Respondent, the Illinois Department of Transportation (IDOT") who herewith responds to "Complainant's Motion for Sanctions" ("Motion"), stating as follows:

INTRODUCTION

Johns Manville's Motion for Sanctions seeks to punish IDOT for complying with its obligations under Illinois Supreme Court Rule 213(i) and its duty to timely supplement its expert's, Steven Gobelman, opinions. In bringing this Motion, Johns Manville recycles arguments it has previously made in earlier phases of this case and which have, for all intents and purposes, been rejected by the Board. IDOT's supplementation of Mr. Gobelman's report was not done as any act of gamesmanship, in order to sandbag Johns Manville. Far from it. IDOT's supplementation of Mr. Gobelman's report was done for a far more mundane purpose: to correct an error in his initial report's base map. In his "Expert Rebuttal Supplemental Report of Steven Gobelman on Damages Attributable to IDOT Based on IPCB Order of December 15, 2016" ("Supplemental Report"), Mr. Gobelman does not present any new opinions or rely upon any new methods for arriving

at his allocation of the costs which IDOT is responsible for. As a consequence of Mr. Gobelman's correcting his erroneous base map, he has also revised some of his cost allocation calculations. Under Mr. Gobelman's revised calculations, IDOT will now pay Johns Manville 20% more than he had initially determined IDOT to be liable for (i.e., from an initial determination of $489,891 to just over $600,000). Interestingly, Johns Manville's Motion totally ignores these highly pertinent facts.

IDOT's supplementation of Mr. Gobelman's report was also timely, coming less than two weeks after Mr. Gobelman became aware of the error in the base map in his August 22, 2018 rebuttal report. Additionally, IDOT served Mr. Gobelman's Supplemental Report on Johns Manville some four months before the earliest date this case would have gone back to hearing. By disclosing Mr. Gobelman's Supplemental Report so far in advance, IDOT's actions were also consistent with the requirements of Illinois Supreme Court Rule 218(c), which requires "disclosures of all witnesses, including rebuttal witnesses" to be completed no less than 60 days before trial. Thus, IDOTs disclosure came with more than sufficient time for Johns Manville to depose Mr. Gobelman if it chose to and to issue a revised rebuttal report from its expert, if it chose to do so.

In an effort to bolster its Motion for Sanctions, Johns Manville cites to a litany of cases in which sanctions of one sort or another were imposed by the Board or a court. Johns Manville's reliance on these cases can at best be characterized as misplaced and, at worst, misleading. Seemingly every case cited by Johns Manville involves repeated, egregious instances where a party failed to comply with applicable discovery rules or court or Board orders, thereby impeding their opponent's ability to properly prepare for hearing or trial. By comparison, IDOT's issuance of Mr. Gobelman's Supplemental Report does

not even remotely rise to the level of conduct which will support the imposition of sanctions. Simply put, a supplemental disclosure which corrects an error, revises cost allocation calculations resulting in increased monetary liability for IDOT, was timely produced shortly after Mr. Gobelman learned of the error, and was issued months before this matter is slated to return to hearing does not rise to the level of sanctionable conduct. Given these circumstances, IDOT believes that Johns Manville's Motion should be denied and Mr. Gobelman's revised opinions in his Supplemental Report should be allowed to be presented at hearing.

STATEMENT OF FACTS

On June 9, 2016, following the initial three days of hearing in this matter, Johns Manville filed its "Brief in Support of its Objections to IDOT's Use of Undisclosed Opinion Testimony" ("Brief") with the Board. In its Brief, Johns Manville essentially alleged that Mr. Gobelman's testimony at hearing "represented a drastic departure from opinions and the bases for those opinions previously disclosed one year earlier . . ." (Brief, at 1; a copy of the Brief is attached as Exhibit G to the Johns Manville's Motion.)

In its Brief, Johns Manville asserted that Mr. Gobelman presented a new opinion at hearing which he had not previously set forth in his original expert rebuttal report, specifically, that the embankment work on Site 6 ended at Station 7 and that IDOT would not have used certain types of asbestos-containing materials such as roofing shingles or insulation in its construction work on Greenwood Avenue. In his subsequent order ruling on the issues presented by Johns Manville's Brief, the Hearing Officer found that "Mr. Gobelman's testimony *has not deviated significantly, if at all*, from his properly disclosed

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opinions. (June 21, 2016 Hearing Officer Order, at 4, citing *Wilbourn v. Clavanes,* 398 Ill. App.3d 837, 850 (1st Dist. 2010).) (Emphasis added.)

On August 12, 2016, following the conclusion of the first round of hearings in this matter, Johns Manville filed its Post-Hearing Brief. In its brief, Johns Manville continued with its attacks on Mr. Gobelman's credibility and the consistency of his hearing testimony, claiming among other things, that Mr. Gobelman had changed his testimony on numerous occasions. (*See,* Johns Manville Post-Hearing Brief, Exhibit A, "Inconsistency Chart.") [1]

On December 15, 2016, the Board issued its Interim Opinion and Order ("Interim Opinion") in this matter. In its Interim Opinion, the Board set this matter for further hearing on three issues, including:

* * *

2. the amount and reasonableness of JM's costs for this work.

3. The share of the (sic) JM's costs attributable to IDOT.

Notably absent from the Board's Interim Opinion was any finding that Mr. Gobelman had, in any way, changed his opinions at hearing from what he had previously disclosed in his initial expert report. Nor did the Board's Interim Opinion make any mention of Exhibit A to Johns Manville's Post-Hearing Brief.

On April 19, 2018, the Hearing Officer issued an order establishing a discovery schedule, with a tentative hearing date set for the week of January 14, 2019.[2]

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[1] Johns Manville also requested that the Board impose sanctions on IDOT for its alleged "repeated misrepresentations about the ownership interests it holds in the Sites during discovery." (Post-Hearing Brief, at p.58, paragraph D.) Notably, the Board found no basis for granting Johns Manville's requested sanctions, finding that there was no evidence of any "bad faith" on IDOT's part. (Interim Opinion and Order, at 21.)

[2] By Hearing Officer Order of October 30, 2018, the parties were directed to determine the availability of their witnesses to see if they would be available for hearing "for the last week of February and first three weeks In March [2019]."

On June 14, 2018, Johns Manville's expert, Douglas G. Dorgan, submitted his expert report in this matter ("Expert Report of Douglas G. Dorgan Jr. on Damages Attributable to IDOT") ("June 14th Dorgan Report"). Of the $5,579,794 in total costs which Mr. Dorgan determined Johns Manville had incurred in the course of performing the work mandated by USEPA for Sites 3 and 6 under the 2007 Administrative Order on Consent ("AOC"), Mr. Dorgan determined that $3,274,917 of those costs were attributable to IDOT. (June 14th Dorgan Report, at 1.)

On July 31, 2018, IDOT deposed Mr. Dorgan.

On August 22, 2018, IDOT submitted the "Expert Rebuttal Report of Steven Gobelman on Damages Attributable to IDOT based on IPCB Order of December 15, 2016" ("August 22nd Report"). In this report, Mr. Gobelman agreed with the amount of overall costs which Johns Manville had incurred in undertaking the work required under the AOC at Sites 3 and 6 and found these costs to be reasonable. (August 21st Gobelman Report, p. 3, § 4.) Mr. Gobelman further determined that IDOT was responsible for only $489,891 of the $5,579,794 in total costs which Johns Manville had incurred for this work based upon the criteria set forth in the Board's Interim Opinion. (A copy of the August 22nd Report is attached as Exhibit A to Johns Manville's Motion.)

On October 25, 2018, Johns Manville issued the "Expert Rebuttal Report of Douglas G. Dorgan, Jr. on Damages Attributable to IDOT" ("Dorgan Rebuttal Report") Mr. Dorgan's rebuttal report, in response to Mr. Gobelman's August 22nd Report and his deposition testimony.

On October 26, 2018, IDOT's counsel forwarded a copy of Mr. Dorgan's October 25th report to Mr. Gobelman. (Exhibit A, Affidavit of Steven Gobelman ["Gobelman Aff., ¶ 2.)

Shortly after receiving and reviewing Mr. Dorgan's October 25th Report, Mr. Gobelman realized that he had made an error in the base map to his August 22nd Report. (Gobelman Aff., ¶¶ 2-3.)

On November 7, 2018, 12 days after receiving the Dorgan Rebuttal Report, and approximately four months before this matter was set to return to hearing, IDOT issued the "Expert Rebuttal Supplemental Report of Steven Gobelman on Damages Attributable to IDOT Based on IPCB Order of December 15, 2016." ("Supplemental Report"). As noted in the Supplemental Report, Mr. Gobelman wrote it in order "to correct the location of the Parcel 0393 as shown on the base map [of his August 22nd Report.]" (Supplemental Report, at 1.) After correcting the location, and rerunning some of his calculations, Mr. Gobelman determined that IDOT was now responsible for $600,050 of the $5,579,794 in total costs which Johns Manville incurred, an increase of over 20% additional costs above his initial allocation.[3] (Compare August 22nd Gobelman Report at 6, § 6, with Supplemental Report at 8, § 5.)

On November 20, 2018, almost two weeks after IDOT served it with Mr. Gobelman's Supplemental Report, Johns Manville filed its Motion for Sanctions.

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[3] Notably, Johns Manville makes no mention of the fact that Mr. Gobelman's Supplemental Report <u>increases</u> the amount of money of Johns Manville's overall site costs that he believes IDOT is liable to Johns Manville.

ARGUMENT

A. IDOT PROPERLY SUPPLEMENTED MR. GOBELMAN'S OPINION AND IT SHOULD BE ALLOWED TO STAND

1. Standards Governing Supplementation of Rule 213(i) Disclosures

Illinois Supreme Court Rule 213(i) provides:

> (i) Duty to Supplement. A party has a duty to seasonably supplement or amend any prior answer or response whenever new or additional information subsequently becomes known to that party.
> (Emphasis added.)

As has often been stated, the purpose of Rule 213(i) is to "avoid surprise and to discourage tactical gamesmanship." *Gapinski v. Gujrati,* 2017 IL App (3d) 150502 (2017), ¶ 41. As the *Gapinski* court noted "[w]hen new or additional information becomes available, parties have a duty to 'seasonably supplement or amend' the prior disclosure." *Id.,* ¶ 41 (Citing rule 213(i)); *See also, Wilbourn v. Cavalenes*, 398 Ill.App.3d 837, 849 (1st Dist. 2010). Moreover, "[s]upplemental disclosure is required as soon as the additional information is known." *Id.* In those instances where a party seeks to supplement the disclosure of an expert opinion, the supplemental opinion must be encompassed within that expert's original testimony or disclosure. *Wilbourn*, ¶ 42.

2. IDOT Acted in Accordance with its Duty to Supplement

Consistent with its obligations under Rule 213(i), IDOT had a duty to seasonably supplement Mr. Gobelman's opinion, upon learning that he sought to correct an error in the map he had originally created for his August 22nd Report. Ill. Sup. Ct. Rule 213(i); *Wilbourn,* ¶ 42. As Mr. Gobelman states in his affidavit, he advised IDOT counsel that he was aware that he had made an error in creating the base map to his August 22nd Report shortly after receiving a copy of the Dorgan Rebuttal Report on October 26, 2018. (Gobelman Aff., ¶¶ 2-3.) He then set about revising his base map and recalculating the

amount of Johns Manville's costs attributable to IDOT. (Gobelman Aff., ¶¶ 3-5.) Thereafter, on November 7, 2018, IDOT issued Mr. Gobelman's Supplemental Report. Thus, less than two weeks elapsed between the time that Mr. Gobelman was made aware of the error in his August 22nd Report and when he finalized his Supplemental Report. All of this occurred some four months before this matter has been set to return to hearing. And perhaps even more importantly, this supplemental disclosure was made more than 60 days in advance of when this matter would return to hearing, as required by Rule 218(c). As such, the disclosure is timely. *Schuler v. Mid-Central Cardiology,* 313 Ill. Ap. 3d 626 (4th Dist. 2000) (The Appellate Court affirming trial court's decision to allow supplemental report to be filed 57 days prior to the scheduled start of trial, relying, in part, on Rule 218(c) in reaching this result).

3. **<u>Mr. Gobelman's Supplemental Disclosure is Not a New Opinion</u>**

Contrary to Johns Manville's assertions, Mr. Gobelman's supplemental disclosure does not represent any sort of new opinion. Nor will his supplemental disclosure result in any undue prejudice to Johns Manville. Importantly, Mr. Gobelman's Supplemental Report does not offer any opinions on subjects that were not contained within his August 22nd Report. Nor does Mr. Gobelman offer new reasons for his opinion. Instead, the revised base map and cost allocations in Mr. Gobelman's Supplemental Report were encompassed within his original report and are therefore permissible supplementation. *Wilbourn v. Cavalenes,* 398 Ill. App.3d 837, 849 (1st Dist. 2010).

By comparison to Mr. Gobelman's supplemental opinions, new opinions which have been found to have been impermissibly offered at trial included instances where, for example, an accident reconstruction expert testified at trial about new tests he had

performed (but had not disclosed that he had performed) after his deposition - but before trial - in which he determined that the accident at issue could have occurred as plaintiff had suggested it had. *Copeland v. Stebco Products Corp.*, 316 Ill.App.3d 932, 938 (1st Dist. 2000). Similarly, in *Wilbourn v. Cavalenes*, the plaintiff's expert witness offered a different opinion regarding causation at trial than he had previously offered during discovery. 398 Ill.App.3d at 849-50.

Ultimately, the admission of Mr. Gobelman's Supplemental Report is permissible because it is encompassed within the confines of his original August 22nd Report. As was the case with his original August 22nd Report and his Supplemental Report, both rely on a base map from which he then makes calculations regarding IDOT's share of Johns Manville's costs. Unlike the expert in *Copeland,* Mr. Gobelman has continued to employ the same cost allocation methodology in his Supplemental Report that he employed in his August 22nd Report.

4. **IDOT Had to Supplement In Order to Be Able to Present Mr. Gobelman's Supplemental Opinion at Hearing**

Johns Manville argues that IDOT should now be sanctioned for having supplemented Mr. Gobelman's opinion (Motion, at 9), even though this supplementation occurred at least four months before this matter had been scheduled to return to hearing. Had IDOT not disclosed Mr. Gobelman's supplemental opinions when it did, and only revealed them at hearing, there can be no doubt that Johns Manville would have objected to their admission. IDOT's duty to supplement is clearly set forth in Rule 213(i). Johns Manville's Motion ignores the reality of this obligation.

5. **<u>The Interests of Justice Require the Admission of Mr. Gobelman's Supplemental Opinions</u>**

One of the purposes of conducting discovery is to ensure that all parties are fully apprised of their opponents' cases. As the court noted in *Copeland,* 316 Ill.App.3d at 937, "[d]iscovery . . . is intended to be a mechanism for the ascertainment of truth, for the purpose of promoting either a fair settlement or a fair trial." Johns Manville's attempts to have IDOT sanctioned by asking the Board to bar IDOT from being able to present Mr. Gobelman's revised figure and calculations would effectively deny IDOT the ability to meaningfully defend itself at hearing. The interests of justice require that IDOT be allowed to present Mr. Gobelman's revised figure and calculations, *Cavalenes,* at 849, and the Board should therefore deny Johns Manville's Motion.

B. JOHNS MANVILLE'S ARGUMENTS IN SUPPORT OF ITS MOTION ARE UNAVAILING AND THE CASES IT CITES IN SUPPORT OF ITS MOTION ARE READILY DISTINGUISHABLE

1. **<u>Standard for Determining Whether Sanctions are Warranted</u>**

As the court in *Wilbourn* noted:

> In determining whether the exclusion of testimony is an appropriate sanction for nondisclosure, a trial court must consider the following factors: (1) the surprise to the adverse party; (2) the prejudicial effect of the testimony; (3) the nature of the testimony; (4) the diligence of the adverse party; (5) the timely objection to the testimony; and (6) the good faith of the party calling the witness. Sullivan, 209 Ill.2d at 110, 282 Ill.Dec. 348, 806 N.E.2d 645. The decision of whether or not to impose sanctions lies within the sound discretion of the trial court, and that decision will not be reversed absent an abuse of discretion. Sullivan, 209 Ill.2d at 110–11, 282 Ill.Dec. 348, 806 N.E.2d 645.

Wilbourn, 398 Ill.App.3d at 852.

The application of the six *Wilbourn* factors to Johns Manville's Motion demonstrates that no sanctions are warranted in this case. First, IDOT acknowledges that

it may have been surprising to Johns Manville that Mr. Gobelman issued his Supplemental Report.[4] However, any such surprise from Mr. Gobelman's Supplemental Report is more than mitigated by the fact that the report and his supplemental opinion were issued almost four months before the earliest date this matter was set to return to hearing. As such, this fact distinguishes this case from the long line of cases which have found that a party was surprised when an expert's supplemental opinion only becomes apparent at trial. *See e.g., Wilbourn*, at 852 (expert's new opinion rendered for the first time at trial, under cross examination, was prejudicial).

Second, the prejudice to Johns Manville from Mr. Gobelman's supplemental disclosure is minimal. Unlike cases such as *Wilbourn*, here there is little about Mr. Gobelman's Supplemental Report that is prejudicial to Johns Manville. His Supplemental Report simply corrects an error in his original August 22nd report. Additionally, his Supplemental Report uses the same methodology to calculate the amount of Johns Manville's costs that are attributable to IDOT. But perhaps most importantly, with this Supplemental Report, Mr. Gobelman has increased the amount of Johns Manville's total incurred costs of $5,579,794 from $489,981 to $600,050, a greater than 20% increase in IDOT's potential liability. A supplemental opinion that increases IDOT's financial liability to Johns Manville can hardly be found to be prejudicial. *See e.g., Berkheimer v. Hewlett-Packard Co.*, 12 C 9023, 2016 WL 3030170, *4 (N.D. Ill.) (wherein the court barred admission of a supplemental report which materially lowered defendant expert's damage assessment, partially on the grounds that it was prejudicial.)

[4] With that said, however, after having now litigated this case into its sixth year, there is little that can be said to be surprising about it.

Third, there is nothing in Mr. Gobelman's Supplemental Report that fundamentally changes the nature of his prior opinion or testimony in this matter; both in his August 22nd and Supplemental Reports, he has rendered opinions about the percentage of JM's costs which are attributable to IDOT, as the result of the Board's Interim Opinion.

Fourth, as is clear from the pertinent facts (i.e., when Johns Manville served Mr. Dorgan's Rebuttal Report and when IDOT served Mr. Gobelman's Supplemental Report), IDOT was diligent in providing Mr. Gobelman's Supplemental Report to Johns Manville. Moreover, IDOT did so of its own volition, cognizant of its duty to seasonably supplement under Rule 213(i); no effort on Johns Manville's part was required to bring Mr. Gobelman's revised opinions to light.

Fifth, IDOT acknowledges that Johns Manville has timely objected.

Finally, IDOT's decision to put forth this new testimony was done in good faith and was done simply to correct a minor error in Mr. Gobelman's underlying figure. Moreover, by submitting this Supplemental Report, IDOT has demonstrated its good faith, as through this report, IDOT now incurs a higher cost attribution of Johns Manville's overall site investigation and remedial costs.

2. <u>The Cases Which Johns Manville Cites in Support of its Motion for Sanctions are Readily Distinguishable From the Facts of This Case</u>[5]

Johns Manville cites numerous case in support of its contention that IDOT should be sanctioned for the filing of Mr. Gobelman's Supplemental Report. The cases cited by Johns Manville are all factually indistinguishable and unavailing. (Motion, pp. 7-13.) For example, Johns Manville string cites to several Board cases in which the Board imposed

[5] For purposes of its Response, IDOT has not attempted to respond to or distinguish each and every case cited by Johns Manville in its Motion, as to do so would require IDOT to greatly expand the scope of this response.

sanctions on a party (i.e., Motion, pp. 7-8), without seeking to analyze how those cases support their Motion.

Certainly, the Board has imposed sanctions in the past. The more pertinent question, though, is whether IDOT's conduct warrants the imposition of sanctions now. Simply put, the answer is "no." By way of example, there is nothing remotely similar in the present case to the situation faced by the Board in *Grigoleit Co. v. IPCB*, PCB 245 Ill. App. 3d 337 (4th Dist. 1993). *In Grigoleit*, the Appellate Court held that the imposition of sanctions against Illinois EPA were warranted by "the Agency's repeated refusal" to follow the Board's orders. 245 Ill. App. 3d at 346 (Emphasis added). This case is inapt here because IDOT has never refused to follow an order of the Board in this matter, let alone having done so repeatedly.

Johns Manville's reliance on *Dorothy v. Flex-N-Gate Corp.*, PCB 05-40 (Nov. 2, 2006), is similarly misplaced. In *Dorothy*, the Board imposed sanctions after it determined that the complainant in that action had "fail[ed] to timely respond to discovery requests, fail[ed] to meet deadlines, and repeated[ly] fail[ed] to comply with Board procedural rules and hearing office orders . . ." PCB 05-40, *8. Johns Manville's citation to this case is inapt because, once again, IDOT has never engaged in the types of repeated, violative conduct that supported the Board's imposition of sanctions in *Dorothy.* Johns Manville's citation to cases such as *IEPA v. The Celotex Corp.,* PCB 79-145 (Dec. 5, 1986), and *Patterman v. Boughton Truck & Materials, Inc.,* PCB 99-187 (Aug. 7, 2003) are similarly flawed, are factually distinguishable, and provide no basis for the imposition of sanctions on IDOT.

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Johns Manville argues that IDOT's issuance of Mr. Gobelman's Supplemental Report "is untimely, creates new opinions, and is highly prejudicial to JM." (Motion, at 9.) In order to support its arguments, Johns Manville misleadingly cites to a series of cases that it would have this Board find support for the imposition of sanctions. For example, Johns Manville cites the federal case of *Mudron v. Brown & Brown, Inc.*, 2005 WL 3019414 (N.D. Ill. Nov. 8, 2005), for the proposition that a supplemental report issued two months after the deadline was properly struck down by a federal court. (Motion at 9.) However, Johns Manville's framing of the proposition that this case stands for is misleading, because the issuance of the supplemental report two months after an established deadline was <u>but only one of several factors considered</u> by the court when it struck the report. 2005 WL 3019414, *7. Amongst the other factors which led to the federal court's decision – and which Johns Manville omits any mention of – were the facts that the supplemental report was "ten pages longer than the original report, contained new data, and new analysis." *Id.*

Johns Manville further seeks to support its request for sanctions by citing to another unpublished federal case, *Sloan Valve Co. v. Zurn Industries, Inc.,* 2013 WL 3147349 (N.D. IL June 19, 2013) (Mot. at 10.) While *Sloan Valve* involved the question of a whether a party should be allowed to file a supplemental report from their expert which was written to correct an error, that case is distinguishable on its facts. In *Sloan Valve*, the expert's error apparently came about because he had failed to fully review the opponent's expert witness's report. 2013 WL 3147349, *4. Here, as noted by Mr. Gobelman, the error that he sought to correct was simply one of his own making, which occurred when he drafted his report (*i.e.*, correctly locating certain pertinent features on the figure in his August 22nd

Report). Moreover, Mr. Gobelman quickly realized the nature of his error, revised his figure and some of his cost allocations and IDOT then issued his Supplemental Report less than two weeks after learning about the issue.

C. IDOT DID NOT ISSUE THE SUPPLEMENTAL REPORT IN ORDER TO GAIN ANY SORT OF UNFAIR ADVANTAGE OVER JOHNS MANVILLE

IDOT's issuance of Mr. Gobelman's supplemental report was not done in order to gain any sort of unfair tactical advantage over Johns Manville. As already noted, Mr. Gobelman's Supplemental Report merely revised the base map in his August 22nd Report and then recalculated certain cost allocations based on this revised base map. Moreover, IDOT served Mr. Gobelman's Supplemental Report at least four months before this matter is schedule to go back to hearing.

Nor was IDOT's issuance of Mr. Gobelman's Supplemental Report done as any sort of "end run" around any prior order by the Board or the Hearing Officer, such as was the case in *Noffsinger v. Valspar Corp.,* 2011 WL 2457944 (N.D. Ill. 2011), wherein plaintiff sought to "work around" prior rulings of the court barring its expert witness from offering certain opinions at trial. *Id.* at *1. Likewise, IDOT's issuance of Mr. Gobelman's Supplemental Report did not occur after any sort of repeated failure to comply with the Hearing Officer's prior orders, such as was the case in *Logsdon v. South Fork Gun Club*, PCB 00-177, *2-*3 (Dec. 19, 2002) (discussing how respondent's president repeatedly refused to retain an attorney, only retaining one the day before hearing and then was absent at hearing.)

This is also not an instance of an 11th hour (or later) disclosure, providing no time to an opposing party to explore or respond to a supplemented opinion. In this case, IDOT has provided the supplemental opinions of Mr. Gobelman to Johns Manville in sufficient

time to allow it to re-depose Mr. Gobelman if it wants to and for its expert witness to, in turn, revise his rebuttal report before this matter returns to hearing. Moreover, it is a simply and understandable correction. Finally, as also noted, as a result of this revision, Mr. Gobelman determined that IDOT now is responsible for <u>more of Johns Manville's costs</u>, not less. Issuing a supplemental opinion that results in IDOT having to pay more money than initially assessed can hardly be said to obtaining any sort of "tactical advantage" over Johns Manville.

D. JOHNS MANVILLE'S MOTION IS SIMPLY ANOTHER ATTEMPT TO MISREPRESENT IDOT'S ACTIONS AND TO ATTACK MR. GOBELMAN'S WORK IN THIS CASE

Johns Manville's Motion is simply the latest in a series of attempts which it has made to demonize IDOT's efforts to defend itself in this case. As can be seen from the Statement of Facts above, these efforts now go back several years.

Nor is this Johns Manville's first attempt to have the Board impose sanctions on IDOT. None of its prior attempts have succeeded, nor should this one. Indeed, the Board expressly rejected an earlier request by Johns Manville's for sanctions for IDOT's "false and misleading representations." (Interim Opinion, p. 21.) The Board rejected this request, finding that IDOT had not evidenced "any bad faith" that would warrant the imposition of sanctions. (Id.)

Similarly, Johns Manville has made repeated efforts to cast Mr. Gobelman's work for IDOT in the most negative possible light, in order to discredit him. (*See e.g.,* Motion, Exhibit G, Complainant's Brief in Support of its Objections to Bar IDOT's Use of Undisclosed Opinion Testimony and Bases; *See also,* Johns Manville's Post Hearing Brief, at 30, "It is obvious from his testimony [at hearing] that Mr. Gobelman was willing to say

just about anything to help IDOT's case.") Notably, the Board made no such findings about Mr. Gobelman's testimony at hearing in its Interim Opinion.

Johns Manville cites the case of *Harris v. Harris*, 197 Ill. App.3d 815, (1st Dist. 2005 (Motion, at 14), for the proposition that:

> The Board should not condone a party's disregard for court orders or discovery rules, particularly when it causes unwarranted delay, frustration and expense, or where the record 'reveals a pronounced pattern" of noncompliance or disregard of governing rules.

This case is entirely inapt to the circumstances at issue in Johns Manville's Motion. In *Harris,* an attorney sought to obtain discovery from his former client, as well as to take her deposition. *Id.* at 818. Over a period of several months, the former client failed to make herself available for deposition, despite agreements between the former attorney and client and, ultimately, in violation of court orders requiring her to appear for her deposition. *Id.* at 818-9. Ultimately, the court imposed sanctions for the former client's conduct.

Nothing even remotely similar to the circumstances at issue in *Harris* is present in this case. IDOT has not engaged in any sort of "pronounced pattern" of noncompliance during this case. Nor has IDOT not engaged in anything like the egregious conduct that was at issue in *Harris.*

The Board should not countenance the outrageous statements made by Johns Manville in support of its Motion. It has been Johns Manville's pattern and practice throughout this case to make overblown and unfounded arguments against IDOT and its expert witness, Mr. Gobelman. They have done so once again in this Motion.

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

1) Deny Complainant Johns Manville's Motion for Sanctions; and,

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2) To grant such other relief as the Board and/or the Hearing Officer deems appropriate.

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 12, 2018, I caused to be served on the individuals listed below, by electronic mail, a true and correct copy of IDOT's Response to Johns Manville's Motion for Sanctions of the parties listed below:

Bradley Halloran
Hearing Officer
Illinois Pollution Control Board
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Chicago, Illinois 60601
Brad.Halloran@illinois.gov

Don Brown
Clerk of the Pollution Control Board
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s/ *Evan J. McGinley*
Evan J. McGinley

EXHIBIT A – AFFIDAVIT OF STEVEN GOBELMAN

Electronic Filing: Received, Clerk's Office 12/12/2018

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

AFFIDAVIT OF STEVEN GOBELMAN

I, STEVEN GOBELMAN, certify under penalty of perjury that the statements set forth in this affidavit are true and correct, and hereby declare and state as follows:

1. I was asked by the Illinois Department of Transportation ("IDOT") to provide expert opinion and testimony in this matter. On August 22, 2018, I provided the "Expert Rebuttal Report of Steven Gobelman on Damages Attributable to IDOT based on IPCB Order of December 15, 2016." In this Report, I attached as an Exhibit a base map that I created for this matter.

2. On October 26, 2018, I was provided the "Expert Rebuttal Report of Douglas G. Dorgan Jr. on Damages Attributable to IDOT". In that Report, Dorgan wrote that the base map I created had the location of the right of way ("ROW") to Parcel 0393 wrong.

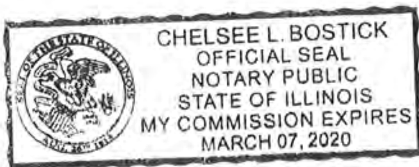
3. I then re-examined the placement of the ROW to Parcel 0393 on the base map I created, and realized during the process of placing the northern boundary of Site 3 to the existing fence line, and trying to line everything up, I did not make sure the location of the line for the ROW to Parcel 0393 was set. As a result on my base map, the ROW of Parcel 0393 was incorrectly pushed approximately ten feet to the north.

4. On October 30, 2018, we revised the base map and correctly set the ROW to Parcel 0393. The only significant change in re-creating the base map was to correct the placement of the ROW to Parcel 0393. By correcting the placement of the ROW line, the depiction of the site layout, including the northern boundary of Site 3 and the borings in Site 3, shifted approximately ten feet south.

5. Given the change in location of the ROW to Parcel 0393, the calculations needed to be corrected to adjust for the corrected base map. In correcting the placement of the ROW to Parcel 0393, IDOT's proportionate cost increased as more costs fell within its area of responsibility. I immediately re-did the calculations and completed my "Expert Rebuttal Supplemental Report of Steven Gobelman on Damages Attributable to IDOT Based on IPCB Order of December 15, 2016" on November 7, 2018.

FURTHER, AFFIANT SAYETH NOT.

STEVEN GOBELMAN



SUBSCRIBED AND SWORN to before me

this 12th day of December, 2018.