

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,)
)
 Plaintiffs,)
)
 STATE OF NEW YORK, STATE OF NEW)
 JERSEY, STATE OF CONNECTICUT,)
 HOOSIER ENVIRONMENTAL COUNCIL,)
 and OHIO ENVIRONMENTAL COUNCIL,)
) Civil Action No. 1:99-cv-1693-LJM-JMS
 Plaintiff-Intervenors,)
)
 v.)
)
 CENERGY CORP., PSI ENERGY, INC., and)
 THE CINCINNATI GAS & ELECTRIC)
 COMPANY,)
)
 Defendants.)

DECLARATION OF KATHLEEN A. DELANEY

Kathleen A. DeLaney, being of legal age and pursuant to 28 U.S.C. § 1746, deposes and states:

1. I am a competent adult and have personal knowledge of the following facts.
2. Attached hereto as Exhibit 1 is a true and accurate copy of my expert report, with attachments Exhibits A through B, prepared in the above captioned matter.
3. The report summarizes my analysis and findings and includes a complete statement of my opinions. The report also includes data and other information considered by me in forming my opinions (attached as Exhibit A), my resume outlining my qualifications and a list of publications I have authored within the past ten years (attached as Exhibit B), the

compensation to be paid for my expert services, and a listing of all cases in which I have testified as an expert at trial or by deposition within the last four years.

4. My opinions are expressed to a reasonable degree of professional certainty.
5. I affirm under penalties of perjury that the foregoing statements are true.

FURTHER AFFIANT SAYETH NAUGHT.

Date: January 8, 2009

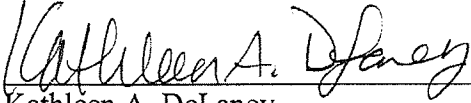

Kathleen A. DeLaney

EXHIBIT 1

UNITED STATES OF AMERICA, PLAINTIFF, ET AL.

V.

CINERGY CORP., ET AL.

EXPERT WITNESS REPORT OF

KATHLEEN A. DELANEY, ESQ.

MANAGING PARTNER
DELANEY & DELANEY LLC
3646 NORTH WASHINGTON BOULEVARD
INDIANAPOLIS, IN 46205

JANUARY 8, 2009

Objective: The objective of this report is to provide an independent analysis of Rules 26(a)(1)(A), 26(e)(1), and 34 of the Federal Rules of Civil Procedure in the context of the discovery dispute over the timing of production of the 2008 Batdorf Consulting Agreement which has arisen in the matter of *United States of America, et al. v. Cinergy Corp., et al.*, pending in the United States District Court for the Southern District of Indiana, as Case No. 1:99-cv-1693-LJM-JMS. The opinions and conclusions expressed in this report are based upon my background and experience as a practicing litigation attorney, my review of materials provided to me by counsel for Cinergy Corp., Barnes & Thornburg LLP, and my review of additional materials which have all been itemized as Exhibit A to this report.

Personal Information: I am a licensed attorney in private practice in Indianapolis, Indiana. My practice focuses on civil litigation, primarily handling matters pending in the United States District Court for the Southern District of Indiana. Since January of 2002, I have worked in a small firm environment where I am the managing partner of a firm of six attorneys. Prior to forming DeLaney & DeLaney LLC in 2002, I practiced in the litigation department at Ice Miller LLP. Immediately following graduation from law school, I completed a judicial clerkship with The Hon. David F. Hamilton, United States District Court, Southern District of Indiana.

I graduated from the Indiana University Maurer School of Law – Bloomington in 1995, *summa cum laude*, Order of the Barristers, and Order of the Coif. For several years I have served on the Local Rules Advisory Committee for the United States District Court, Southern District of Indiana.

A current copy of my resume, including my qualifications and a list of publications which I have authored or co-authored, is attached hereto as Exhibit B. My hourly rate for expert witness work is \$330.00 per hour. I have not testified in the past four years as an expert witness at deposition or trial.

Opinions and Basis for Opinions:

1. Rule 26(a)(1)(A)(ii) Initial Disclosures and the 2008 Batdorf Consulting Agreement.

It is my opinion that Rule 26(a)(1)(A)(ii) of the Federal Rules of Civil Procedure did not require Cinergy to produce the 2008 Batdorf Consulting Agreement with its Initial Disclosures or Supplemental Initial Disclosures. The 2008 Batdorf Consulting Agreement would not be part of the evidence Cinergy would offer at trial to support its defenses (and no attempt was made by Cinergy to offer that document at trial).

Plaintiffs now argue that, had it been produced in discovery before trial, they would have used this document as impeachment evidence with Mr. Batdorf; however, Rule 26(a)(1)(A) specifically excludes impeachment materials from the mandatory disclosure requirements. The basis for this opinion includes Rule 26(a)(1)(A), the advisory committee notes from the 2000 amendments, and case law. See, *Crouse Cartage Co. v. National Warehouse Inv. Co.*, 2003 U.S. Dist. LEXIS 9066, *5 (S.D. Ind., Apr. 10, 2003) (citing Fed. R. Civ. P. 26(a)(1)(A), (B); Fed. R. Civ P. 26(a)(1) advisory committee's note (2000 amendments)).

2. Rule 26(a)(1)(A)(i) Initial Disclosures and the Relevance of Batdorf's Home Address.

Cinergy listed Mr. Batdorf as a witness on its Initial Disclosures and its Supplemental Initial Disclosures. Cinergy did not provide Mr. Batdorf's home address to opposing counsel prior to the liability trial. Cinergy did not update Mr. Batdorf's contact information through Supplemental Initial Disclosures after Mr. Batdorf's retirement date.

It is my opinion that Mr. Batdorf's home address was not relevant to any matters raised in Plaintiffs' complaint. Similarly, there is no reason to think that knowing the location of Mr. Batdorf's home would have led to the discovery of admissible evidence. Based upon my review of the transcripts of Mr. Batdorf's testimony, Mr. Batdorf was not asked for his home address at any of the several depositions at which he appeared.

In my opinion, based upon my experience as a practitioner, the listing of a witness's address or contact information on initial (or supplemental) disclosures is designed as a tool to facilitate counsel's effort to communicate with that witness. The provision of an address affords the opposing party a means to contact that witness for further discovery. In this case, the witness was deposed several times at length. Providing a post-retirement home address for Mr. Batdorf would not have led to any further deposition testimony from him.

3. Plaintiffs' Request for Production of Documents No. 17 and the Responsiveness of the 2008 Batdorf Consulting Agreement to this Request.

In their Memorandum in Support of Motion for New Trial, Plaintiffs argue that Defendants should have produced the 2008 Batdorf Consulting Agreement in response to Plaintiffs' First Request for Production No. 17, which was served on June 5, 2000. The Court found that this discovery request covered the Batdorf Agreement "because it is a

communication about Batdorf's expertise on the relevant subject matter of the law suit: the application of the NSR provisions to Cinergy's plants." Order on Plaintiffs' Motion for New Trial, p. 25.

The request at issue states:

Request No. 17: Produce all documents that relate in any way to Defendants' communications with any person, including any of Defendants' employees or consultants, regarding the following information pertaining to the Cinergy Plants:

- a. whether the Defendants should obtain, or had to obtain, a PSD or Non-attainment NSR permit;
- b. whether the Defendants should obtain, or had to obtain a construction permit pursuant to either Indiana Air Pollution Code (APC) Regulation 19 or 326 Indiana Administrative Code (IAC) 2-1, and whether Defendants would register a modification pursuant to either of these provisions;
- c. whether Defendants should obtain, or had to obtain, a permit to install, or construction permit, pursuant to Ohio Administrative Code (OAC) Chapters 3745-31-08; and
- d. whether NSPS was applicable to any boiler units.

Federal Rule of Civil Procedure 34(b)(1)(A) requires that the party requesting production of documents "must describe with reasonable particularity each item or category of items to be inspected." Plaintiffs' Request for Production No. 17 does describe with particularity delineated categories of documents sought containing "information pertaining to the Cinergy Plants." It is my opinion, based upon my background and experience, that the 2008 Batdorf Consulting Agreement was not

responsive to this document request. This request seeks the types of documents which apparently did not exist – a paper trail explaining the thought process behind the decisions not to seek regulatory approval or permits for various plant changes.

The 2008 Batdorf Consulting Agreement does not address the internal decisions at Cinergy which Plaintiffs challenged in this law suit. The content of the agreement is limited to the terms of engagement of a consultant – the method and manner of billing and payment, the independent contractor nature of the relationship, and the like.

At the liability phase trial, Ms. Himmelhoch asked Mr. Batdorf on cross-examination to agree that there are “no documents” showing that Cinergy had done baseline comparisons of operations in connection with the projects. *See e.g.*, Trial Transcript 9-1384 to 9-1385. Mr. Batdorf agreed that there were no such documents, and further testified that they were not required. Trial Transcript 9-1385. If Mr. Batdorf had responded to such questioning by pointing to his 2008 Consulting Agreement, I would expect that Ms. Himmelhoch would have established through further questioning that the Consulting Agreement provided no documentary support for Mr. Batdorf’s testimony that Cinergy “did do the mental evaluation. We did review. We did consider.” Trial Transcript 9-1385.

Ms. Himmelhoch’s final question to Mr. Batdorf reiterates this theme:

Q: And there are no written documents analyzing the question on whether a permit was required for any of the projects you’ve discussed today, are there?

A: No, there are not.

MS. HIMMELHOCH: Thank you. Nothing further.

Trial Transcript 9-1422.

Again, if Mr. Batdorf had responded to this question by pointing to his 2008 Consulting Agreement, Ms. Himmelhoch would have readily shown that this document lent no support to the claim that Cinergy analyzed the question of whether a permit was required for any of these projects.

4. Plaintiffs' Second Supplemental Request for Production No. 6 and the Responsiveness of the 2008 Batdorf Consulting Agreement to this Request.

In their Memorandum in Support of Motion for New Trial, Plaintiffs also argue that Defendants should have produced the 2008 Batdorf Consulting Agreement in response to Plaintiffs' Second Supplemental Request for Production No. 6, which was served on December 24, 2002. The Court did not cite to this discovery request in its Order on Plaintiffs' Motion for New Trial. Opinion, p. 25 (citing to Plaintiffs' First Request for Production, No. 17, but not to Second Supplemental Request No. 6).

The request at issue states:

Second Supplemental Request No. 6: Produce all Documents relating to communications (oral or written) between Defendants and their Contractors, Subcontractors, Consultants, agents or attorneys relating to the meaning and application of:

a. the routine maintenance, repair, and replacement provision of the PSD regulations (40 C.F.R. § 52.21(2)(b)(iii)(a)) or of the Nonattainment NSR regulations (40 C.F.R. § 52.24(f)(5)(iii)(a));

b. the routine maintenance, repair, and replacement provision of the NSPS regulations (40 C.F.R. § 60.14(e)(1));

c. the method by which emissions calculations must be performed under Nonattainment NSR (40 C.F.R. § 52.24(f)(6)) or PSD (40 C.F.R. § 52.21(b)(3)) regulations for determining whether there has been a “net emission increase” associated with a construction project;

d. the method by which emission calculations must be performed under NSPS for determining whether there has been “an increase in the emission rate to the atmosphere of any pollutant to which a standard applies . . .” (40 C.F.R. § 60.14(a)); or

e. the definitions of “modification” under the NSPS regulations and “major modification” under the Nonattainment NSR or PSD regulations.

Plaintiffs’ Second Supplemental Request for Production No. 6 describes with particularity delineated categories of documents sought “relating to the meaning and application of” specifically listed environmental regulations. It is my opinion, based upon my background and experience, that the 2008 Batdorf Consulting Agreement was not responsive to this document request. The 2008 Batdorf Consulting Agreement does not discuss in any way the “meaning and application” of any environmental regulation.

Conclusions: It is my opinion, to a reasonable degree of professional certainty, that Rule 26(a)(1)(A)(ii) of the Federal Rules of Civil Procedure did not require Cinergy to produce the 2008 Batdorf Consulting Agreement with its Initial Disclosures or Supplemental Initial Disclosures because that document would not be part of the evidence Cinergy would offer at trial to support its defenses. It is my opinion, to a reasonable degree of professional certainty, that Rule 26(a)(1)(A)(i) of the Federal Rules of Civil Procedure did not require Cinergy to provide Mr. Batdorf’s home address in its Initial Disclosures

or Supplemental Initial Disclosures because that information was not relevant, would not have led to further discovery, and was not inquired about at any of Mr. Batdorf's seven depositions.

It is also my opinion to a reasonable degree of professional certainty that the 2008 Batdorf Consulting Agreement was not responsive to Plaintiffs' Request for Production No. 17, in that it does not contain "information pertaining to the Cinergy Plants." Finally, it is my opinion to a reasonable degree of professional certainty that the 2008 Batdorf Consulting Agreement was not responsive to Plaintiffs' Second Supplemental Request for Production No. 6, because that document does not contain information or communications "relating to the meaning and application of" specifically listed environmental regulations.

Date: January 8, 2009

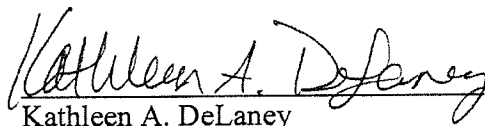

Kathleen A. DeLaney

EXHIBIT A

Materials Provided by Barnes & Thornburg LLP

Plaintiffs' Motion for New Trial

Memorandum in Support of Plaintiffs' Motion for New Trial, List of Exhibits, Proposed Order, Savage Declaration, and the following exhibits:

- 1 – Batdorf Agreement
- 2 – Letter from Thomson to Savage, Oct. 15, 2008
- 3 – Trial Transcript Excerpts
- 4 – Email from Volpe to Savage, Oct. 15, 2008
- 5 – Batdorf Deposition Excerpts
- 6 – Expert Report Excerpts
- 7 – Cinergy Witness List, Sept. 8, 2008
- 8 – Cinergy Witness List, Sept. 10, 2008
- 9 – Cinergy Witness List, Sept. 25, 2008
- 10 – Letter from Thomson to Savage, Sept. 18, 2008
- 11 – Plaintiffs' Second RFP to Cinergy, Remedy Phase
- 12 – Response to Second RFP, Remedy Phase, Sept. 18, 2008
- 13 – Email from Thomson to Benson, Sept. 10, 2008
- 14 – Letter from Savage to Thomson, Sept. 20, 2008
- 15 – Letter from Thomson to Savage, Sept. 22, 2008
- 16 – Letter from Savage to Thomson, Oct. 2, 2008
- 17 – Cinergy Revised List of Fact Witnesses, Oct. 2, 2008
- 18 – Email from Thomson to Savage, Oct. 2, 2008
- 19 – Email from Savage to Thomson, Oct. 2, 2008
- 20 – Email from Thomson to Savage, Oct. 2, 2008
- 21 – Email from Savage to Thomson, Oct. 2, 2008
- 22 – Email from Thomson to Savage, Oct. 2, 2008
- 23 – Letter from Thomson to Savage, Oct. 6, 2008
- 24 – Letter from Savage to Thomson, Oct. 14, 2008
- 25 – Email from Thomson to Savage, Oct. 16, 2008
- 26 – Email from Savage to Thomson, Oct. 16, 2008
- 27 – Email from Savage to Thomson, Oct. 14, 2008
- 28 – Plaintiffs' First RFP Liability
- 29 – Plaintiffs' Second Supplemental Request Liability

Defendants' Opposition to Plaintiffs' Motion for New Trial, Exhibit List, and the following exhibits:

- A – Batdorf Affidavit, November 10, 2008
- B – Moesser Affidavit, November 10, 2008
- B1 – Batdorf Deposition Excerpt, July 1, 2005
- B2 – Batdorf Consulting Agreement, July 1, 2005
- B3 – 2005 Batdorf Invoices

B4 – Batdorf Consulting Agreement, April 3, 2008
B5 – Batdorf 2008 Invoices
C – Affidavit of Kathryn B. Thomson
C1 – Excerpts from Trial Transcripts
C2 – Excerpts of Closing Arguments
C3 – Excerpts of Batdorf 30(b)(6) Deposition July 1, 2005
C4 – Wisconsin Bar Opinion
C5 – Arizona Bar Opinion
C6 – Massachusetts Bar Opinion
C7 – Washington Bar Opinion
C8 – Colorado Bar Opinion
C9 – Excerpts from Plaintiffs’ First RFP for Experts, June 22, 2005
C10 – Jury Verdict Form, May 22, 2008

Plaintiffs’ Reply in Support of Motion for New Trial, including exhibits:

30 – Trial Transcript Excerpts
31 – Ivkovic & Hans
32 – Disclosed Expert Reports
33 – Batdorf Deposition Excerpt, Sept. 17, 2004
34 – ABA Opinion
35 – Order on Motion to Exclude Philip Morris
36 – 5 BusComLit
37 – Oklahoma Bar Opinion

Order on Plaintiffs’ Motion for New Trial, December 18, 2008

Order to Show Cause, December 18, 2008

Defendants’ Responses to Plaintiffs’ First Request for Production of Documents,
September 15, 2000

Defendants’ Responses to Plaintiff USA’s Second Supplemental Request for Production
of Document and Defendants’ Responses to Plaintiff USA’s First Supplemental Request
for Production of Documents, January 21, 2003

Defendants’ Amended Rule 26 Disclosures, July 1, 2003

Deposition transcripts of Robert Batdorf, including:

September 17, 2004
June 24, 2005
June 27, 2005
June 30, 2005
July 1, 2005
July 5, 2005

July 6, 2005

Portions of the Trial Transcript, including:

May 19, 2008, Batdorf direct examination
May 20, 2008, Batdorf direct and cross-examinations
May 21, 2008, Closing arguments
May 22, 2008, announcement of verdict

Additional Materials Considered

Federal Rules of Civil Procedure, including comments.

Crouse Cartage Co. v. National Warehouse Inv. Co., 2003 U.S. Dist. LEXIS 9066 (S.D. Ind., Apr. 10, 2003) and Shepard's Report for same.

EXHIBIT B

EXPERIENCE

DeLANEY & DeLANEY LLC (January 2002 - Present) Indianapolis, IN
Managing Partner: Handled all aspects of litigation practice on behalf of business and individual clients, including several Fortune 500 Companies. Work includes litigation avoidance, negotiation, trial, arbitration, and appellate practice. Supervisory attorney primarily responsible for development and training of associate attorneys, business management of practice, and administrative functions related to the practice of law. Lexis-Nexis Martindale-Hubbell AV Peer Review Rated for ethical standards and legal ability. Recognized as an Indiana Superlawyer in 2006, 2007 and 2008, and a Top 25 Female Superlawyer in 2007 and 2008. Selected for Best Lawyers in America in 2007, 2008, and 2009.

ICE MILLER LLP (August 1997 – December 2001) Indianapolis, IN
Associate Attorney: Associate attorney assigned to litigation department at large law firm. Briefed dispositive motions, took depositions, participated in multiple jury trials in both state and federal courts in Indiana.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA
(January 1996 – August 1997) Indianapolis, IN
Law Clerk to the Honorable David F. Hamilton: Researched, drafted, discussed, and edited opinions addressing a variety of federal and state issues in civil law. Prepared draft jury instructions and observed court proceedings.

UNITED STATES DEPARTMENT OF STATE (Aug. 1991 – June 1993) London, U.K.
Foreign Service Officer: Presidentially commissioned foreign service officer working at the American Embassy in London, United Kingdom. Adjudicated thousands of non-immigrant visa cases and worked on cases of visa acquisition and loss of citizenship. Completed temporary duty assignment as Political/Economic Officer at the American Embassy in Dublin, Ireland.

BAR ADMISSIONS: Indiana, Southern and Northern Districts of Indiana (1995), United States Court of Appeals for the Seventh Judicial Circuit (1996).

PROFESSIONAL ACTIVITIES: Secretary, Local Rules Advisory Committee, United States District Court, Southern District of Indiana. Public Arbitrator through FINRA (formerly NASD). Chair, Labor & Employment Council, Indianapolis Bar Association. Member of Character and Fitness Committee, Indiana State Board of Law Examiners.

EDUCATION

INDIANA UNIVERSITY SCHOOL OF LAW Bloomington, IN
Doctor of Jurisprudence, *summa cum laude*, *Order of the Coif*, *Order of the Barristers*, member of *Indiana Law Journal*. J.D., May 1995.

GEORGETOWN UNIVERSITY Washington, DC
School of Foreign Service, Bachelor of Science in Foreign Service, *cum laude*, May 1990.

PUBLICATIONS

Highly Decorated 'Traffic Cop' to Retire from Federal Bench, by Kathleen A. DeLaney, RES GESTAE, September 2006, p. 11.

Requesting Counsel for Pro Se Litigants – The view from both sides of the bench, by the Hon. John Daniel Tinder and Kathleen A. DeLaney, *The Indiana Lawyer*, Nov. 7, 2001, p. 16-17.

Response to 'Nannygate': Untangling U.S. Immigration Law to Allow American Parents to Hire Foreign Child Care Providers, by Kathleen A. DeLaney, 70 INDIANA LAW JOURNAL 305, Winter 1994.