

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. IP99-1693 C-M/S
Plaintiff-Intervenors,)
)
v.)
)
CINERGY CORP., CINERGY SERVICES,)
INC., PSI ENERGY, INC., and THE)
CINCINNATI GAS & ELECTRIC)
COMPANY,)
)
Defendants.)

AFFIDAVIT OF JAMES A. KING, ESQ.

I, James A. King, being first duly sworn, hereby depose and state as follows:

1. I am an attorney and partner with the law firm of Porter, Wright, Morris & Arthur LLP (“Porter Wright”) in Columbus, Ohio. I am one of the attorneys of record for Defendants, having been admitted *pro hac vice* to practice before this Court and in this action in 2003. I am submitting this affidavit in compliance with this Court’s Order to Show Cause (Doc. #1508) regarding a consulting agreement dated April 7, 2008, between Defendants and Robert Batdorf (the “2008 Agreement”). This affidavit is based on my personal knowledge and belief.

2. As explained below, I did not have knowledge of and had not seen the 2008 Agreement before the liability-phase trial in this matter. The 2008 Agreement was not forwarded to me until after October 1, 2008.

Porter Wright's Responsibilities in the Litigation.

4. Porter Wright was engaged to represent the Defendants in this action in or around May 2003, more than three years after the lawsuit was originally filed. The firm's chief role was to provide support to and assist lead counsel at Sidley Austin LLP in defending the case.

5. Porter Wright's initial responsibility was to assist in collecting, reviewing, and producing documents in response to Plaintiffs' outstanding discovery requests. That work was very time consuming and complex. Our work required that we dispatch teams of lawyers to Defendants' plants in Indiana and Ohio, and to other facilities in Plainfield, Indiana, and Cincinnati, Ohio. The effort lasted from approximately summer 2003 to spring 2005. In total, several million pages of documents were produced as part of the effort.

6. Porter Wright maintains an electronic database of documents produced and exchanged in discovery prior to the liability phase trial. Co-counsel other than Porter Wright can gain access to the database through a secure website.

7. In addition to the document work described above, Porter Wright had other responsibilities during the liability phase of the case. Most of that work was performed in 2004 and 2005. For example, in 2004 and 2005, Porter Wright deposed certain of Plaintiffs' fact witnesses, and assisted with expert disclosures and discovery. Porter Wright assisted with preparing various briefs filed with the Court. Porter Wright

also was involved in defending depositions of Defendants' fact witnesses, primarily those who were located in Ohio or had some involvement with projects undertaken at the Ohio plants at issue in this litigation. Plaintiffs deposed Robert Batdorf as a fact witness in 2004 and as a Fed. R. Civ. P. 30(b)(6) representative in 2005. Porter Wright did not defend Mr. Batdorf at those depositions.

8. This case was stayed in 2006. After the stay was lifted in 2007 and a new scheduling order entered, Porter Wright's role in the litigation became more limited. Among other things, the firm continued to assist with expert disclosures and discovery; worked with Plaintiffs' counsel to develop fact stipulations; and carried out other tasks as requested by co-counsel and the client, such as searching for and retrieving certain documents from the electronic database of liability-phase documents we maintain.

Knowledge of Robert Batdorf's Consulting Agreements.

9. I had no knowledge of the 2008 Agreement either before or during the liability-phase jury trial in this matter. To the best of my knowledge and belief, and after reasonable inquiry, no one else at Porter Wright was aware of the 2008 Agreement before or during the liability-phase trial. We have searched our electronic database of liability-phase documents and did not find the 2008 Agreement within the database.

10. To the best of my knowledge and belief, I was first made known of the existence of the 2008 Agreement on October 2, 2008, when I was copied on an e-mail forwarding a copy to counsel for the Plaintiffs as an attachment. (A true and accurate copy of that e-mail is contained within the e-mail string attached as Exhibit 20 to Plaintiffs' Motion for New Trial.) I do not recall opening the attachment or reading the 2008 Agreement until on or about October 21, 2008, when I read Plaintiffs' Motion for

New Trial to which the 2008 Agreement was attached as an exhibit. To the best of my knowledge and belief, and after reasonable inquiry, no one else at Porter Wright was aware of the existence of the 2008 Agreement before October 2, 2008.

11. I learned from briefs filed in connection with Plaintiffs' Motion for New Trial that Mr. Batdorf also entered into a consulting agreement with Defendants in or around July 2005 (the "2005 Agreement"). I have no recollection of being aware of the 2005 Agreement at any time before the liability-phase jury trial. Nevertheless, on January 7, 2009, Barnes & Thornburg provided me with a copy of an e-mail string containing six e-mails dated August 19, 2005, that they uncovered during the course of their factual investigation. Of the last three e-mails in the string, I was the recipient of two and the author of one. The e-mails to and from me concern summary judgment and other substantive matters related to the case. One of my partners also was copied on the last three e-mails of the string. The first three e-mails of the string, which were forwarded to me and others, contain communications to and from Mr. Batdorf. Neither I nor anyone else at Porter Wright was directly copied on or a recipient of these latter e-mails. The e-mails with Mr. Batdorf that were forwarded to me and others make reference to a "Consulting Service Agreement" under which Mr. Batdorf may charge for any future time and expenses "required for the NSR litigation and/or other special assignments." Neither I nor my partner have any recollection of ever reading these e-mails involving Mr. Batdorf or of seeing any reference to a "Consulting Service Agreement."

12. To the best of my knowledge and belief, and after reasonable inquiry, no one at Porter Wright had ever seen the 2005 Agreement before or during the liability

phase trial. I first saw the 2005 Agreement after reading Cinergy's Opposition to Plaintiffs' Motion for New Trial filed on or about November 11, 2008, to which it was attached as an exhibit. We have searched our electronic database of liability-phase documents and did not find the 2005 Agreement within the database.

13. Porter Wright interviewed Mr. Batdorf in November 2003 when he was the Station Manager of Gibson Station for documents responsive to then-pending discovery requests. Neither the 2008 Agreement nor the 2005 Agreement existed at that time. Porter Wright did not seek additional documents from Mr. Batdorf after our interview in 2003 for several reasons, including: (a) after our interview with Mr. Batdorf in 2003, attorneys other than Porter Wright were responsible for interacting with him, including preparing him for and defending him at his various depositions and preparing him to testify at trial; and (b) we would not have expected any new responsive documents would be created by Mr. Batdorf after 2003 given that the litigation involved past events and projects that predated our interview.

14. Porter Wright never made any determination whether the 2008 Agreement was responsive to Plaintiffs' discovery requests because, as described above, no one at the firm was aware of that agreement until after the liability-phase jury trial in this matter.

15. I did not attend the liability-phase jury trial. I did not participate in preparing Mr. Batdorf for his direct examination or testimony at the trial.

FURTHER AFFIANT SAYETH NAUGHT.

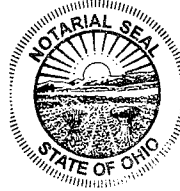
James A. King

James A. King

Sworn and subscribed to me this 8th day of January 2009.

Notary public.

Tammie S. Magley



TAMMIE S. MAGLEY
Notary Public
In and for the State of Ohio
My Commission Expires
April 18, 2010