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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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PUCO

In the Matter of the Complaints of S.G.)
Foods, Inc.; Miles Management Corp., et al.;)
Allianz US Global Risk Insurance Company,)
et al.; and Lexington Insurance Company, et)
al.,)

Complainants,)

Case Nos. 04-28-EL-CSS
05-803-EL-CSS
05-1011-EL-CSS
05-1012-EL-CSS

v.)

The Cleveland Electric Illuminating)
Company, Ohio Edison Company,)
Toledo Edison Company, and)
American Transmission Systems, Inc.,)

Respondents.)

RESPONDENTS' FIFTH MOTION TO COMPEL DISCOVERY FROM THE
LEXINGTON COMPLAINANTS

Respondents, pursuant to Rule 4901-1-21(F), Ohio Administrative Code, respectfully move for an Entry ordering the Complainant Insurers ("Complainants") to produce for deposition a representative of each such Complainant to testify regarding: 1) the identity and customer status of insureds to whom it paid outage-related claims; 2) the contents of the claim files produced by the Complainant and facts underlying those claims; and 3) the insurance policy providing coverage for each outage-related loss.

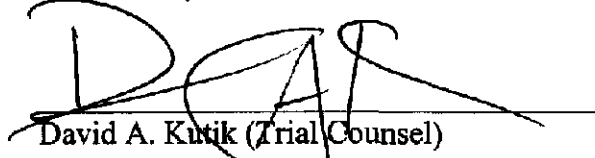
As demonstrated in the attached Memorandum in Support, these Complainants will have to establish their standing as subrogees at the hearing in this case. Further, to the extent they seek to introduce portions of claim files, they will have to authenticate those documents.

Complainants will need to call witnesses at hearing to accomplish both of these tasks.

Accordingly, Respondents have noticed the depositions of Complainants' representatives who can testify regarding those issues. Complainant Insurers, however, have refused to produce those representatives for deposition.

Efforts to resolve this discovery dispute are summarized in the Affidavit of Counsel, attached as Exhibit A to the accompanying Memorandum in Support.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'DAK', is written over a horizontal line.

David A. Kutik (Trial Counsel)

Lisa B. Gates

Meggan A. Rawlin

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Attorneys for Respondents

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaints of S.G.)
Foods, Inc.; Miles Management Corp., et al.;)
Allianz US Global Risk Insurance Company,)
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The Cleveland Electric Illuminating)
Company, Ohio Edison Company,)
Toledo Edison Company, and)
American Transmission Systems, Inc.,)

Respondents.)

**MEMORANDUM IN SUPPORT OF RESPONDENTS' FIFTH MOTION TO COMPEL
DISCOVERY FROM THE LEXINGTON COMPLAINANTS**

Under the Attorney Examiner's prior decisions, Complainants must show two things in order to have standing to bring these claims: 1) "they must have paid an insurance claim resulting from the alleged inadequate service"; and 2) the insureds to whom Complainants made payments must have been customers of one of Respondents. (See May 24, 2007 Entry at ¶ 4(a); Mar. 7, 2006 Entry at ¶¶ 51, 53.)

In connection with these requirements, Respondents noticed the depositions of representatives of each Complainant competent to testify to the following areas of examination:

1. The identity of each insured to whom the Complainant paid a claim for losses allegedly arising from the August 14, 2003 outage;

2. The terms of the insurance policy alleged to provide coverage for the loss allegedly sustained by each such insured;
3. The facts underlying the claim made by each such insured, including without limitation any investigation of any claim by each Complainant;
4. The contents of each claim file for each insured of each Complainant; and
5. The facts underlying each Complainant's claim that each of its insureds was a customer of a Respondent as of August 14, 2003.

(See Notice of Dep. dated June 26, 2007, attached as Exhibit DAK-1.) Complainants have refused to produce these individuals for deposition. (See Letter from C. Tuffley to M. Whitt, dated July 10, 2007, attached as Exhibit DAK-2.)

In order to proceed with this case, Complainants must first establish who they are and how they meet PUCO standing requirements, and they must do so through the presentation of competent evidence at hearing. (See May 24, 2007 Entry at ¶ 4(a).) Although Respondents have received the insurance claim files and policies for Complainants' insureds, those documents cannot introduce themselves into evidence. Rather, Complainants will have to call witnesses to discuss and authenticate them.

Indeed, Complainants' counsel has admitted that Complainants intend to introduce at hearing certain documents from their claim files. (See Letter from C. Tuffley to D. Kutik, dated July 24, 2007, attached as Exhibit DAK-4.) Complainants contend that they shouldn't have to produce witnesses to "identify a few documents." (*Id.*) But Complainants overlook the fact that they will have to offer documents about: (a) insurance; (b) claims made and paid; and (c) the assumption of their subrogation rights for each of the 64 insureds whose claims remain in this case. Thus, the issue is not the identification of a "few documents."

Moreover, Respondents are entitled to know before the hearing which documents Complainants believe establish Complainants' standing and why. Respondents are also entitled

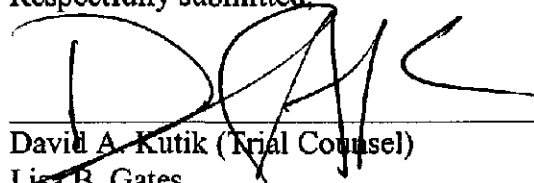
to know what Complainants have to say about such materials. This is all within the legitimate scope of discovery. That Complainants don't want to offer witnesses is not a good enough reason to resist having the noticed depositions go forward.

Respondents are entitled to take the depositions of Complainants' representative-witnesses, *before* they appear at hearing. To have standing, a Complainant must present at least one witness to show that it paid claims related to the August 14, 2003 outage to insureds who are customers of Respondents. Further, to use the claim files as evidence at hearing, Complainants must present at least one witness to authenticate them. Because the testimony of those representatives is relevant, and because Respondents are entitled to the depositions of potential witnesses, Complainants should be compelled to produce their designated representatives competent to testify on the above-listed topics.

CONCLUSION

For the foregoing reasons, Respondents' Motion to Compel should be granted.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'DAK', is written over a horizontal line.

David A. Kutik (Trial Counsel)

Lisa B. Gates

Meggan A. Rawlin

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Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Compel Discovery and Memorandum in Support of Motion to Compel Discovery was served by facsimile (without exhibits) and U.S. Mail (with exhibits) to the following persons this 27th day of July, 2007.

Edward F. Siegel, Esq.
27600 Chagrin Boulevard, Suite 340
Cleveland, OH 44122

W. Craig Bashein, Esq.
Bashein & Bashein Co., L.P.A.
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Cleveland, OH 44113

Francis E. Sweeney, Jr. Esq.
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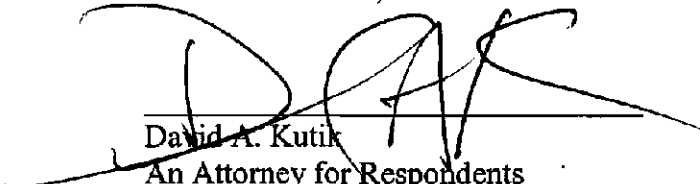
Joel Levin, Esq.
Aparesh Paul, Esq.
Levin & Associates Co., L.P.A.
The Tower at Erieview, Suite 1100
1301 East Ninth Street
Cleveland, OH 44114

Paul W. Flowers, Esq.
Paul W. Flowers Co., L.P.A.
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Leslie E. Wargo, Esq.
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105 West Adams Street, Suite 2300
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Charles R. Tuffley, Esq.
Melinda A. Davis, Esq.
Christina L. Pawlowski, Esq.
Matthew L. Friedman, Esq.
Denenberg Tuffley, PLLC
21 E. Long Lake Road, Suite 200
Bloomfield Hills, MI 48304



David A. Kutik
An Attorney for Respondents

EXHIBIT A

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaints of S.G.)	
Foods, Inc.; Miles Management Corp., et al.;)	
Allianz US Global Risk Insurance Company,)	
et al.; and Lexington Insurance Company, et)	
al.,)	
)	
Complainants,)	Case Nos. 04-28-EL-CSS
)	05-803-EL-CSS
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v.)	
)	
The Cleveland Electric Illuminating)	
Company, Ohio Edison Company,)	
Toledo Edison Company, and)	
American Transmission Systems, Inc.,)	
)	
Respondents.)	

AFFIDAVIT OF COUNSEL

STATE OF OHIO)
) ss:
COUNTY OF CUYAHOGA)

David A. Kutik, being first duly sworn, states as follows:

1. I am a partner in the law firm of Jones Day and one of the counsel for Respondents.
2. On June 26, 2007, Respondents served a Notice of Deposition requesting the depositions of representatives of each Complainant. The attached Exhibit DAK-1 is a true and correct copy of that notice.
3. Charles Tuffley, one of the counsel for Complainants, sent a letter dated July 10, 2007 to Mark Whitt, one of the counsel for Respondents, stating that Complainants would not

produce representative-witnesses in response to the Notice. The attached Exhibit DAK-2 is a true and correct copy of that letter.


4. Respondents sent a letter, dated July 17, 2007, to Mr. Tuffley proposing that if Complainants agreed not to "seek to introduce any documents from the claim files or any facts derived from the claim files," Respondents would withdraw the Notice. The attached Exhibit DAK-3 is a true and correct copy of that letter.

5. On July 24, 2007, Mr. Tuffley responded to Respondents' July 17, 2007 letter. In this letter he acknowledged the need for Complainants to offer documents from the claim files at hearing, but again refused to produce any witnesses regarding these documents. The attached Exhibit DAK-4 is a true and correct copy of that letter.


David A. Kutik

Sworn to before me

this 24th day of July, 2007.


Notary Public



PAMELA S. MOZOLA
NOTARY PUBLIC
STATE OF OHIO
My Comm. Exp. 8/29/09

EXHIBIT DAK-1

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaints of S.G.)
Foods, Inc.; Miles Management Corp., et al.;)
Allianz US Global Risk Insurance Company,)
et al.; and Lexington Insurance Company, et)
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The Cleveland Electric Illuminating)
Company, Ohio Edison Company,)
Toledo Edison Company, and)
American Transmission Systems, Inc.,)

Respondents.)

NOTICE OF DEPOSITION

PLEASE TAKE NOTICE that pursuant to Rule 4901-1-21(F) of the Ohio Administrative Code, Respondents will take depositions of representatives of the following:

- Allianz Global Risks U.S. Insurance Company;
- Lexington Insurance Company;
- Royal Indemnity Company;
- Frankenmuth Mutual Insurance Company;
- Charter Oak Fire Insurance Company;
- Automobile Insurance Company of Hartford;
- Standard Fire Insurance Company;
- Travelers Indemnity Company of America;

- Travelers Indemnity Company;
- Travelers Property Casualty Company of America;
- Phoenix Insurance Company;
- St. Paul Mercury Insurance Company;
- St. Paul Surplus Lines Insurance Company;
- United States Fidelity & Guaranty;
- Allied Mutual Insurance Company; and
- Nationwide Mutual Insurance Company.

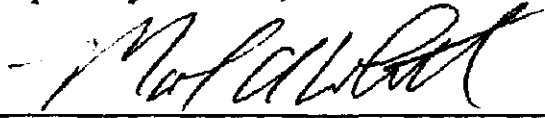
Each of the complainants listed above shall produce one or more representatives competent to give testimony on behalf of such complainant as to the following areas of examination:

1. The identity of each insured to whom the complainant paid a claim for losses allegedly arising from the August 14, 2003 outage.
2. The terms of the insurance policy alleged to provide coverage for the loss allegedly sustained by each such insured.
3. The facts underlying the claim made by each such insured, including without limitation any investigation of any claim by each complainant.
4. The contents of each claim file for each insured of each complainant.
5. The facts underlying each complainant's claim that each of its insureds was a customer of a Respondent as of August 14, 2003.

The depositions will be taken by a person authorized to administer oaths in the place where the depositions are taken. The depositions will commence during the week of July 9, 2007 at a time and place to be agreed upon by counsel, or such other date as the parties may agree, and will continue from day to day thereafter until completed.

June 26, 2007

Respectfully submitted,



David A. Kutik (Trial Counsel)

Lisa B. Gates

Meggan A. Rawlin

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Mark A. Whitt

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Facsimile: 614-461-4198

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Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Deposition was served by U.S.

Mail to the following persons this 26th day of June, 2007.

Edward F. Siegel, Esq.
27600 Chagrin Boulevard, Suite 340
Cleveland, OH 44122

W. Craig Bashein, Esq.
Bashein & Bashein Co., L.P.A.
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Cleveland, OH 44113

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Levin & Associates Co., L.P.A.
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Charles R. Tuffley, Esq.
Melinda A. Davis, Esq.
Christina L. Pawlowski, Esq.
Matthew L. Friedman, Esq.
Denenberg Tuffley, PLLC
21 E. Long Lake Road, Suite 200
Bloomfield Hills, MI 48304



Mark A. Whitt

An Attorney for Respondents

JONES DAY DOCKET
PLEADING NO.
ATTORNEY

EXHIBIT DAK-2

DENENBERG TUFFLEY, PL

Attorneys

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Facsimile: (248) 593-5808**

**Bloomfield Hills, MI
Los Angeles, CA**

**Charles R. Tuffley
Direct Dial (248) 203-27
Email: crt@gd-llc.com**

July 10, 2007

Via Email mawhitt@jonesday.com

Mark A. Whitt, Esq.
Jones Day
P.O. Box 165017
Columbus, Ohio 43216-5017

RE: S. G. Foods, Inc., et al. v The Cleveland Electric Illuminating Company, et al.
PUCO Case No. 04-28-EL-CSS, etc. (Consol.)

Dear Mr. Whitt:

We have now had an opportunity to review your Notice of Deposition of the Complainant Insurers in view of the ruling of the attorney examiner dated May 24, 2007, and the information provided by the Complainants to date.

In its Order, the attorney examiner wrote:

"The examiner agrees with the respondents insofar as they maintain that, for the insurance companies to be appropriate subrogees and represent the insureds in these matters, they must have paid an insurance claim resulting from the alleged inadequate service in the proceedings to the insureds. If the respondents are trying to discern whether the complainant insurance companies are appropriate subrogees, they should review the claim files to determine if the complainant insurance companies did, in fact, pay a claim to the insureds for the time period in question. (page 6)

* * *

DENENBERG TUFFLEY, PLLC

Mark A. Whitt, Esq.

Page 2

July 10, 2007

Again, these cases are not about damages and the Commission will not be addressing the issue of whether the insureds' claims were or were not appropriately paid. Rather, the Commission will be considering the allegations made by the insurance complainants, on behalf of the insureds to which claims were paid, that the respondents provided inadequate service. With that scope in mind, the underwriting files are not relevant in these proceedings. For purposes of these proceedings, the respondents should look to the policies which the insurance complainants state they have provided or will be providing for the information relevant to these cases." (page 7-8).

The Complainants have produced the claim files for their insureds and sample policies which provided coverage for each insured. The Respondents have identified those insureds who are not their customers, and claims relating to those insureds not identified as customers have been voluntarily dismissed.

By way of the proposed depositions, you now want to have an insurer representative identify each of its insureds for which it paid a claim arising out of the outage, the terms of the policies, the facts underlying each claim, the contents of the claims file, and facts supporting the claims that the Complainants' insureds were customers of the Respondents.

To our knowledge, the identification of customers as opposed to non-customers has been resolved. The Complainants have provided claims files and policies. Since the information has been provided, your notice of deposition of sixteen Complainant representatives is redundant.

The expense, including travel and time to conduct depositions to simply reiterate information already provided is unnecessary and will be unproductive, particularly in view of the limited relevance of such information in the present proceedings.

Therefore, unless the Respondents can demonstrate a compelling reason or reasons for the depositions consistent with the attorney-examiner's opinion, the Complainants will not be producing the insured's representatives for deposition.

Very truly yours,

DENENBERG TUFFLEY, PLLC

Charles R. Tuffley

CRT/vmk

PUCO_Letter Mark Whitt 7-10-07.DOC

EXHIBIT DAK-3

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JP296397:dag
034569-685046

July 17, 2007

VIA E-MAIL AND U.S. MAIL

Charles R. Tuffley
Denenberg Tuffley, PLLC
21 E. Long Lake Rd., Suite 200
Bloomfield Hills, MI 48304

Re: S.G. Foods, Inc. et al. v. The Cleveland Electric Illuminating Company, et al.

Dear Chuck:

This responds to your letters to me and to Mark Whitt, dated July 10, 2007.

In your letter to Mark, you refused to produce witnesses in response to a notice for a deposition for a corporate witness to testify about the Complainants' claim files. In your letter to me, you refused my request to exchange "federal style" expert disclosures. Both of these issues deal with Respondents' right to know the identity of Complainants' witnesses and the substance of their testimony in advance of the hearing in this case.

Regarding the deposition notice, as you know, documents from Complainants' claim file cannot simply appear by themselves in record evidence at the hearing in this case. We assume that, to the extent that you may seek to introduce any documents from those files, you will have a witness testify about them. The purpose of the deposition notice was to understand what facts Complainants might seek to introduce through testimony regarding the claim files. If you will represent to me that Complainants will not seek to introduce any documents from the claim files or any facts derived from the claim files, then we will withdraw our notice. Otherwise, we will insist that you produce a witness or witnesses responsive to the notice.

Regarding the expert disclosures, I note that your letter did not dispute what I told you in our telephone conversation: i.e., that the discussion of counsel at the October 2006 prehearing conference on expert disclosures envisioned disclosures similar to those provided in federal court litigation. As I also told you, the fact that this type of procedure is not normally done in litigation before the Commission led the Attorney Examiner to believe that the disclosures would be mere summaries.

In our conversation, I asked you to live up to the shared expectations of counsel regarding expert disclosures. You have now refused. In our conversation, you indicated that you might

Charles R. Tuffley
July 17, 2007
Page 2

not have time between now and when Complainants' expert summaries are due to prepare such disclosures. Frankly, I don't understand how that could be. This case is now almost two years old. You have taken over thirty depositions. You have thousands of documents from Respondents and (given the questioning in the depositions) from publicly available materials. If it is in fact true that you cannot provide expert reports by mid-August, my guess is that your ability to provide meaningful summaries of what your experts intend to say will be limited as well. If that's true, then Respondents will be forced to play "blind man's bluff" in attempting, inefficiently, to depose your experts and figure out what they'll say at the hearing and what they intend to rely on - all in thirty days (before Respondents' summaries are due).

If we are unable to determine what your experts will say, I have no confidence that we will be able to provide you with meaningful summaries of what Respondents' potential expert witnesses will say. And both sides will be left with little to go on.

Because our case is obviously responsive to yours, the less we know about your case, the less we will be able to disclose about ours. If you want to play "hide the ball," I guess that's your prerogative. But doing so ultimately hurts both sides.

Since the whole purpose of the expert phase of discovery was to make understanding expert testimony efficient (especially given the relatively tight timeframes involved), I propose that we delay expert discovery until the filing of testimony and that we accelerate the filing of testimony in a staggered manner. Under this proposal, you would file Complainants' testimony and simultaneously provide us with all materials that the witnesses relied upon. We would then take discovery of those experts. We would then file Respondents' testimony and give you similar materials. Following your discovery of Respondents' experts, you could then file any rebuttal testimony. We could then take discovery on that testimony. In this way, the testimony acts in lieu of the traditional expert report in civil litigation. (By the way, this is the more typical way that experts are handled before the Commission.)

Somewhere in this process, we should also set a date by which other witnesses (that is, those whose testimony will not be prefiled) will be disclosed. This should be done to allow sufficient time to take any discovery not already done regarding these witnesses.

Accordingly, I propose the following schedule:

Complainants file testimony and witness list	September 14, 2007
Respondents file testimony and witness list	November 1, 2007
Complainants file rebuttal testimony and rebuttal witness list	December 14, 2007

JONES DAY

Charles R. Tuffley
July 17, 2007
Page 3

In this way, both sides will be able to understand who will be testifying and what they will testifying about, with enough time to undertake efficient discovery to be able to prepare for hearing.

Let me know if you will agree to the proposals in this letter.

Very truly yours,



David A. Kutik

EXHIBIT DAK-4

DENENBERG TUFFLEY, PL

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July 24, 2007

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Columbus, Ohio 43216-5017

RE: S. G. Foods, Inc., et al. v The Cleveland Electric Illuminating Company, et al.
PUCO Case No. 04-28-EL-CSS, etc. (Consol.)

Dear Dave:

This will serve to respond to your letter of July 17, 2007 regarding discovery, expert summaries and scheduling.

Claim Files

The only exhibits which will be offered at the hearing will be the Declaration Page of the policy, Proof of Loss, Subrogation Receipt or other similar documents demonstrating coverage and payment of the claim for damages alleged to arise out of the outage. To conduct numerous depositions in order to have the deponent identify a few documents is not necessary for purposes of discovery when you have the existing documentation. We will not voluntarily produce witnesses for such purposes.

Expert Summaries

I have shown your letter to each of the persons from our firm who participated in the pre-hearing conference. I have also reviewed their notes. None of them (three) agree with your contention that it was discussed or envisioned that the expert summaries would follow the

DENENBERG TUFFLEY, PLLC

David A. Kutik, Esq.

Page 2

July 24, 2007

Federal Court Rules format. Therefore, they have assured me that there were no such "shared expectations" as described in your letter.

We believe our expert summaries will be "meaningful" and we do not intend "to hide the ball." The summaries will, in accordance with the letter and spirit of the Scheduling Order, provide you with sufficient information to enable you to not only depose the experts but for your experts to offer responsive opinions.

Revised Schedule

Since we do not agree with your premise regarding the adequacy of our expert summaries, we do not believe that the staggered schedule you propose is necessary. Further, the proposed revised schedule would require us to file testimony 60 days sooner than the present Scheduling Order which resulted from our Motion to extend the dates. Therefore, we will not agree to a revised staggered schedule to file testimony and witness lists.

Very truly yours,

DENENBERG TUFFLEY, PLLC

Charles R. Tuffley

CRT/vmk