

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

In the Matter of:)	
)	
August Mack Environmental, Inc.,)	Docket No. CERCLA-HQ-2017-0001
)	
Requestor.)	

**AUGUST MACK ENVIRONMENTAL, INC.'S MOTION TO STRIKE
EXHIBITS TO EPA'S MOTION FOR ACCELERATED DECISION**

August Mack Environmental, Inc. ("AME"), for its Motion to Strike Exhibits to EPA's Motion for Accelerated Decision ("MFAD"), states the following:

1. EPA attached three exhibits to its MFAD: (1) an affidavit of Eric Newman dated August 24, 2022; (2) an excerpt from what appears to be Mr. Newman's "rough" deposition transcript; and (3) a document titled, "Claims Asserted Against the Fund for Response Costs." (EPA MFAD, Exs. A-C.)
2. All three exhibits should be stricken.

Mr. Newman's Post-Deposition Affidavit

3. Mr. Newman's post-deposition affidavit should be stricken because it (a) is not part of EPA's prehearing exchange, (b) contains statements outside the scope of his anticipated testimony described in EPA's prehearing exchange, (c) conflicts with his deposition testimony, (d) contains improper legal conclusions, and (e) contains inadmissible statements for which he lacks personal knowledge.

*Mr. Newman's affidavit is not part of
EPA's prehearing exchange*

4. The Tribunal was clear that neither party can use documents outside the prehearing exchange as evidence:

Absent the permission of this Tribunal, any document not included in the prehearing exchange shall not be admitted into evidence, and any witness whose name and testimony summary are not included in the prehearing exchange shall not be allowed to testify. 40 C.F.R. § 305.26(b). Therefore, each party is advised to thoughtfully prepare its prehearing exchange.

(Sept. 8, 2021 Order, p. 4.)

5. The Tribunal reiterated this in its Order on AME's Motion to Compel:

With respect to discovery, the Rules provide for the prehearing exchange of witness lists and testimony summaries as well as all documents and exhibits that each party intends to introduce into evidence. Parties are limited in their ability to rely on any witnesses, documents, or exhibits that they do not exchange prior to a hearing.

(Order, p. 2.)

6. Mr. Newman's affidavit runs afoul of the Tribunal's Prehearing Order because it is not a part of the prehearing exchange, and EPA has not received permission from the Tribunal to add this document to the prehearing exchange. (EPA Preh'rg. Exch., pp. 3-4.)

7. Thus, Mr. Newman's affidavit must be stricken.

*Mr. Newman's affidavit discusses topics
outside the prehearing exchange*

8. In addition, Mr. Newman's affidavit contains statements outside the scope of his anticipated testimony described in the prehearing exchange and should be stricken.

9. In the prehearing exchange, EPA limited Mr. Newman's anticipated testimony to discussing the Removal Administrative Record, his oversight and enforcement of the CD, his review of documents submitted by Vertellus and AME, and acts he undertook to ensure compliance with the CD. (EPA Preh'rg. Exch., p. 2.)

10. However, Mr. Newman's affidavit goes far beyond this limited scope and includes an analysis of the contract between AME and Vertellus, a legal conclusion as to whether EPA has an obligation to reimburse AME, discussion of the costs incurred by AME, discussion of the preauthorization scheme, and discussion of whether he granted AME preauthorization. (Aff. Newman, ¶¶ 14-17.)

11. Unfortunately, this is yet another example of EPA's bad faith litigation tactics, which if allowed, would be unfair to AME, violate its due process rights, and violate the Prehearing Order.

12. EPA refused to respond to AME's written discovery requests, including interrogatory 4 of AME's first set of written discovery, which asked for a description of testimony for each fact witness. (AME Mot. Compel, Ex. A, p. 8.)

13. The Tribunal denied AME's motion to compel answers to the interrogatories.

14. Having successfully concealed the true scope of Mr. Newman's intended testimony, EPA now submits an affidavit far beyond the summary of his anticipated testimony in an effort to receive an accelerated decision.

15. The Tribunal should not allow such gamesmanship and improper litigation tactics.

Mr. Newman's affidavit contradicts his deposition testimony

16. Moreover, striking Mr. Newman's affidavit is warranted because it conflicts with his deposition testimony.

17. Affidavits that contradict deposition testimony are barred unless the affidavit clarifies confusing or unclear testimony, is based on new evidence, or if the original testimony "was 'the result of a memory lapse.'" *Kopplin v. Wisconsin Cent. Ltd.*, 914 F.3d 1099, 1102-1103 (7th Cir. 2019). None of these limited exceptions are met here.

18. "Preauthorization" was mentioned five times in Mr. Newman's deposition. (Dep. Newman, pp. 22, 23, 108-109.) His testimony regarding preauthorization was limited to stating preauthorization is "very rare," he does "not have a major role" or "authority" with regard to preauthorization, and there has only been one instance of preauthorization in Region 3 that he knows of and that was "like, 30 years ago" with all participants being PRPs. (*Id.*)

19. Additionally, Mr. Newman testified that he received a July 7, 2014 letter from Vertellus that contained AME invoices and a claim in the amount of \$244,731.56.

(Dep. Newman, pp. 99-103; RX 324.) Mr. Newman reviewed this document and just a day later said in an email to Vertellus, “EPA recommends that Vertellus withdraw its intention to file the attached BJS River Claim Certificate.” (RX 327, p. 1.) In that email, he acknowledged that Vertellus had previously “submitted a series of Trust Claim Certifications[.]” (*Id.*)

20. Also, Mr. Newman testified that he received AME’s claim for payment in January of 2017. (Dep. Newman, pp. 28-29.)

21. Now, having escaped cross examination, Mr. Newman states in his affidavit that AME did not provide him with costs “during the period that AME was working under contract for Vertellus,” he never told Vertellus or AME that he could provide preauthorization, and that he did not “purport” to grant AME preauthorization.

22. However, Mr. Newman clearly testified that he received AME invoices in 2014, and this is further proven by AME’s exhibits. (Dep. Newman, pp. 99-103; RX 324, 327.) Plus, he received AME’s claim and supporting cost documents in January 2017, and Mr. Newman has not established he has sufficient personal knowledge to state an opinion regarding AME’s contract with Vertellus. Fed. R. Civ. P. 56(c)(4) (“An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.”)

23. Likewise, Mr. Newman never testified that he did not “purport” to grant AME preauthorization and did not represent to Vertellus or AME that he could provide preauthorization, and this post-deposition affidavit to the contrary should be stricken.

Mr. Newman’s affidavit contains improper legal conclusions

24. Lastly, Mr. Newman’s affidavit contains improper legal conclusions.

25. A court should strike legal arguments and conclusions from a fact witness’s affidavit. *Duro Inc. v. Walton*, 2021 WL 4453741 at *10 (N.D. Ind. Sept. 29, 2021) (“The Court agrees that Mr. Henning makes legal arguments and conclusions throughout his declaration and strikes paragraphs 4 and 5, as well as the following paragraphs on that basis[.]”); *Greene v. Westfield Ins. Co.*, 963 F.3d 619, 627 (7th Cir. 2020) (“affidavits are for stating facts, not legal conclusions.”); *Pfeil v. Rogers*, 757 F.2d 850, 862 (7th Cir. 1985) (“Because legal argumentation is an expression of legal opinion and is not a recitation of a ‘fact’ to which an affiant is competent to testify, legal argument in an affidavit may be disregarded.”).

26. Here, Mr. Newman’s affidavit contains several legal arguments and conclusions, including that EPA has no obligation to reimburse AME from the Fund, he does not have authority to provide preauthorization, and he is not designated as a responsible Federal official. (Aff. Newman, ¶¶ 13, 15.)

27. These are improper legal arguments and conclusions from a lay person that must be stricken.

Excerpt of Mr. Newman's "Rough" Deposition Transcript

28. The excerpt from what appears to be Newman's "rough" deposition transcript should be stricken because it is a "rough" deposition transcript.

29. EPA requested a "rough" (i.e., a preliminary and not final) version of Newman's deposition transcript. (Ex. 1.)

30. However, AME has submitted Newman's final and complete deposition transcript into the record as RX 330. The Tribunal should refer to this version of Newman's deposition transcript and disregard the "rough" excerpt.

EPA's Unauthenticated Exhibit C

31. The document titled, "Claims Asserted Against the Fund for Response Costs" should be stricken because it (a) is not part of EPA's prehearing exchange and (b) unauthenticated.

32. For the reasons discussed above, striking this exhibit is appropriate because it is not part of EPA's prehearing exchange.

33. In addition, this document is unauthenticated and cannot be considered in deciding the MFAD. *Article II Gun Shop, Inc. v. Gonzales*, 441 F.3d 492, 496 (7th Cir. 2006) ("To be admissible, documents must be authenticated by and attached to an affidavit that meets the requirements of Rule 56(e) and the affiant must be a person through whom the exhibits could be admitted into evidence."); Fed. R. Evid. 901.

WHEREFORE, for all the reasons stated above, AME respectfully requests the Tribunal strike each of the exhibits to EPA's MFAD, refuse to consider EPA's improperly tendered evidence, and for all other relief that is just and proper.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "BR Sugarman", written over a horizontal line.

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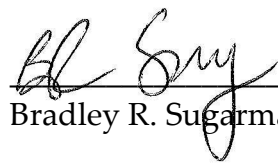
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Certificate of Service

I certify that the foregoing was filed and served on the Chief Administrative Law Judge Biro on October 28, 2022 through the Office of Administrative Law Judge's e-filing system, and that a copy of this document was also served on opposing counsel at the following e-mail addresses: cohan.benjamin@epa.gov and Berg.ElizabethG@epa.gov.


Bradley R. Sugarman

McFerrin, Kenya L.

From: Christine Obermeyer <christine.obermeyer@ccr.edu>
Sent: Tuesday, July 5, 2022 7:44 PM
To: McNeil, Andrew; Schroeder, Jackson L.
Subject: Deposition of Eric Newman taken 6-30-22

Hello Mr. McNeil and Mr. Schroeder,

I'm contacting you because I was notified today that Ms. Berg, one of the attorneys for the US EPA, has requested a rough draft of the transcript of Eric Newman that I was the court reporter for last week. Please let me know if you would also like to order a rough draft of this transcript, as I will be sending it out to Ms. Berg tomorrow.

Thank you,
Christine Obermeyer
Treasurer, Indiana Court Reporters Association
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