IN THE MATTER OF Aguakem Caribe, Inc. Respondent Proceeding under Section3008 of the Solid Waste Disposal Act, as amended, 42 USC § 6928	Docket No. RCRA-02-2009-7110

RESPONDENT'S OPPOSITION TO EPA'S MOTION IN LIMINE AND MOTION TO STRIKE, AND REQUEST FOR DISCOVERY AND RESCHEDULING OF HEARING

TO THE HONORABLE WILLIAM B. MORAN:

COMES NOW Respondent Aguakem Caribe, Inc. ("Aguakem"), though its undersigned counsel, and submits this opposition to the Motion to Dismiss and Motion to Strike, and Request for Rescheduling of Hearing and the setting of a discovery schedule.

INTRODUCTION

The EPA has moved to strike documents and defenses presented by Aguakem. The EPA recognizes that the relief it seeks is not only extraordinary, but that its requests are premature. Nonetheless, its plows forward.

The EPA acknowledges that a motion in limine in the context of an EPA proceeding "should only be granted only if the evidence sought to be excluded is clearly inadmissible for any purpose." EPA Brief at 5, citing November 6, 2008 ALJ decision in Dckt No.EPCRA-09-2007–0021 denying Motion in Limine and Motion to Strike prior to hearing. In addition, the EPA

acknowledges that "motions to strike are disfavored because they are a drastic sanction . . .[S]uch motions are contrary to the 'general policy that pleadings should be treated liberally , and that a party should be able to support its contentions at trial.'" EPA Br. At 13, quoting In the Matter of Bergen of County of Bergen, et al, Dckt. Nos. RCRA-02-2001-7110 and 7108.

It is extraordinary that the EPA is seeking to deny Aguakem an opportunity to put forth its defenses in a proceeding where the EPA requests the imposition of punishments that will almost certainly put Aguakem out of business, and put 10 people out of jobs in a period of extreme economic crisis. Indeed, among the evidence the EPA seeks to exempt is the audited financial statement of Aguakem which states that there is "substantial doubt about [Aguakem's] ability to continue as a going concern." Surely the procedural rules of EPA proceedings do not countenance this attempt to convoke a kangaroo court. Surely due process requires more than that.

As shown below, not only is the EPA's request extraordinary, it is wholly without merit. Each and every document that the EPA is challenging can and will be authenticated. Their relevance is patent. It was Aguakem's expectation that any issues regarding the admissibility of evidence was to be resolved at the pre-hearing conference to be held in late April prior to the hearing itself scheduled to commence on May 4, 2010. Given the EPA's pending motion, it appears that such conference will be useless as the EPA intends to challenge each and every fact and document that Aguakem will attempt to present to Your Honor, including e-mails and

correspondence that is in the EPA's possession.

Given the position taken by the EPA, Aguakem must request that the hearing in this matter be rescheduled and that a discovery schedule be set in order to provide Aguakem an opportunity to garner information that is in the EPA's possession. In addition, Aguakem will require discovery in order to discover information held by the Municipality of Ponce and the Ponce Port Authority.

It is certainly not in Aguakem's interest to engage in such a costly endeavor, but the EPA's position leaves Aguakem no choice but to seek discovery, pursuant to Section 22.19(e) of the Consolidated Rules of Practice. This request will not unreasonably delay the proceeding nor unduly burden the EPA, as it will merely require the EPA to produce documents in its possession and provide witnesses for deposition in San Juan, Puerto Rico.

Specifically, Aguakem will seek (1) all communication received by the EPA transmitted to it by Aguakem; (2) all communications received and transmitted by the EPA to the Municipio of Ponce and the Ponce Port Authority regarding the3 Site at issue in this proceeding; and (3) the depositions of Eduardo Gonzales, Angel Rodriguez, Lourdes Rodriguez and Raymond Basso (the recipients of communications from Aguakem regarding the Site at issue n this proceeding. This discovery is necessary because the EPA has chosen to challenge the admissibility and authenticity of the electronic communications sent to it by Aguakem that Aguakem seeks to admit as evidence

in this proceeding.

EPA's Motion To Strike

The E-mails

The EPA moves to strike the e-mails transmitted to it by Aguakem. The EPA argues that "these e-mails can not be authenticated." EPA Br. at 3. This is patently absurd. First and foremost, the EPA knows these e-mails are authentic as they were the recipients of the e-mails. Second, if the EPA insists on authenticating documents it knows to be genuine, Aguakem requests that it be permitted to authenticate the documents through the testimony of Jorge Unanue, who was also a recipient of the e-mails in question and kept copies as a business record in the ordinary course of business (see F.R.E. 803(6), *see, e.g. Alexian Brothers Health Providers Ass'n, Inc. v. Humana Health Plan, Inc.*, 608 F.Supp.2d 1018 (N.D. Ill. 2009)), or through the EPA's announced witnesses, who were also recipients of the e-mails. In the alternative, Aguakem could submit written testimony from the undersigned counsel solely stating that the e-mails were transmitted.

However, if these methods are not tenable, Aguakem respectfully requests discovery as described above.

The Aguakem Memos

The EPA also seeks the exclusion of 2 memos written contemporaneously by Jorge Unanue because the memos, according to the EPA, "represent a mere characterization of the facts

by Respondent." By this standard, no evidence could be submitted to Your Honor as all evidence is a "characterization of the facts." Tellingly, the EPA cites no support for its argument and instead launches an invective laden attack on Mr. Unanue's character. Perhapsl there will be a time and a place to attack Mr. Unanue's character, but it certainly is not the basis for excluding evidence at this stage of the proceedings. *See, e.g, Center For Biological Diversity v. Wagner*, Civ 08-302-CL, 2009 WL 2176049 (D.Or.,2009) ("The court finds that the extra-record evidence offered by defendants explains the gap in the administrative record and is admissible. A review of the administrative record indicates that the extra-record evidence is supported by contemporaneous documents in the record, and is consistent with the administrative record[.]")

The Audited Financial Statement

The EPA also seeks to exclude Aguakem's Audited Financial Statement, despite the fact that Your Honor's ordered Aguakem to present documents substantiating any claim that the proposed fine will threaten the viability of Aguakem. The EPA's stated objection is that the preparer of the Audited Financial Statement is not listed as a witness. If the Court requires, Mr. Eduardo Guzman can be called to testify that he in fact did prepare the Audited Financial Statements. However, the Federal Rules of Evidence do not requires it as, again, the document is a business record kept in the ordinary course of business and thus is admissible under F.R.E 803(6). *See, e.g., Beale v. Kurtz*, 381 B.R. 727 (S.D.Ind., 2008) ("though the documents may contain hearsay, there was no abuse in admitting them. Federal Rule of Evidence 803(6) provides an

exception to the hearsay rule for business records.") It is also worth noting that the EPA failed to glean that the Audited Financial Statement states on p. 8 that there is "substantial doubt about [Aguakem's] ability to continue as a going concern." This statement came BEFORE the initiation of this EPA proceeding. Obviously then the penalty proposed by the EPA will prove fatal to Aguakem.

The Lead Contamination Report

The EPA also objects to Aguakem's submission to a lead contamination report Aguakem received in December 2006. Again the EPA argues that no witness can authenticate the document. Yet again, F.R.E. 803(6) provides the answer to this objection as the report is a business record kept in the ordinary course of business. Nonetheless, the preparer of the report can be subpoenaed to testify that he indeed did prepare the report.

Aguakem believes that it is important to note that the admission of evidence in a proceeding occurs at the proceeding (unless as was expected to occur here, the parties can stipulate to facts and documents that are not in dispute. As noted earlier, it seems clear that such an exercise may be futile given the attitude exhibited by the EPA. Again, for that reason, Aguakem seeks an order allowing discovery.) The EPA is putting the cart before the horse in making a motion in limine at this time.

EPA's MOTION TO STRIKE

The EPA moves to strike certain affirmative defenses raised by Aguakem in its Answer to the Complaint. Again the EPA's motion is premature. As the EPA itself notes, motions to strike are generally disfavored because they are a drastic sanction . . .[S]uch motions are contrary to the

'general policy that pleadings should be treated liberally , and that a party should be able to support its contentions at trial.'" The key phrase here is "at trial." however, if the Court takes the view that the presentation of the defenses must be done before trial, Aguakem again respectfully requests that discovery be permitted so that Aguakem can take discovery from the EPA on matters related to its affirmative defenses. In any event, the EPA's arguments fall of their own weight.

The Affirmative Defense of Release

The EPA argues that Aguakem's affirmative defense of release should be stricken based on their interpretation of the AOC in the proceeding CERCLA-02--2007-2017. This of course is a question of contract interpretation and the meaning of the release granted is subject to the presentation of evidence and legal argument, such as would occur in a post-trial brief as called for by Section 22.26 of the Consolidated Rules.[1] Aguakem's response to the arguments presented by the EPA would require an evidentiary record and would go well beyond the scope of a motion to strike a pleading. In short, the EPA is again jumping the gun.

The Lack Of An Indispensable Party and the Defense of Illegality

Aguakem believes that the indispensable party missing from this proceeding is the owner of the Site, who obtained an Order of Eviction against Aguakem and sent a marshal to eject Aguakem from the Site. The lack of this indispensable party is also related to Aguakem's defense of illegality. This was and is all known to the EPA. The lead contamination issue was and is known to the EPA. Its continued decision to ignore what it knows is baffling and requires

[1] If the EPA files a motion for accelerated decision, Aguakem would oppose it of course. Indeed, yet again, the EPA provides a basis for the scheduling of a period of discovery as requested herein.

explanation. Aguakem believed that these facts would be elucidated at the scheduled hearing. But in light of the posture of the EPA, Aguakem again respectfully requests that discovery be permitted in this action.

The critical nature of these issues is illustrated by the EPA's intemperate statement that "[i]t is outrageous to even think that a party can get away from its responsibility under RCRA by abandoning his facility and leaving behind hazardous waste, without proper disposal." EPA Br. At 10. Of course here is the issue -- Aguakem DID NOT abandon the facility. Aguakem stated in unequivocal terms its strong desire to reenter the facility and remove its products (it was not hazardous waste to Aguakem, it was product worth thousands of dollars.) But because of Aguakem's good faith belief, based on the express recommendation of a certified environmental inspector, Benjamin Cintron, that it must "seal [the area] and [post] warning signs . . . On all entries to prevent personnel to enter and be exposed to lead," Aguakem temporarily removed itself from the premises, immediately notified the Municipality of Ponce and the Ponce Port Authority of the situation and stated expressly that it would remove its products and materials as soon as the lead situation was resolved. Aguakem NEVER received a reply to its communications. As soon as Aguakem was contacted by the EPA, it provided this information to the EPA, and stated expressly that it was not abandoning the products in the facility and that the products were of value to Aguakem. The EPA ignored Aguakem's communications utterly.

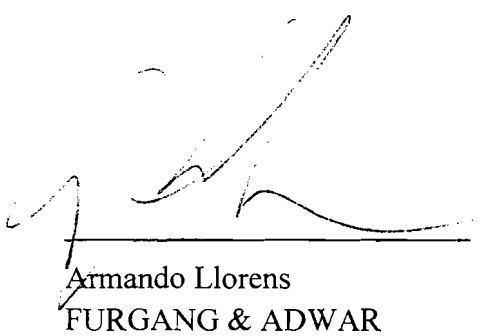
In the parlance the EPA uses in its motion, it is absurd of the EPA to try and sweep all of this under the rug as it now attempts to do. Indeed, the EPA's position is so absurd that it misunderstands what is being argued by Aguakem. The EPA writes that "{Aguakem's statement

in now way provides information as ro what EPA wanted him to do that constituted a violation of federal laws, and state laws." EPA Br. At 11. But that is not what Aguakem is arguing. Aguakem is not arguing that the EPA asked Aguakem to do anything. In fact, that is part of the problem with the EPA's actions at the time. The EPA did nothing regarding the lead issue - either stating it was unfounded or stating what steps were required to address it. It never told Aguakem to go forward and remove its products from the facility. Indeed. The EPA was completely nonresponsive to Aguakem in EVERY way.

The issue here is whether Aguakem abandoned the Facility. It did not. The EPA knows it did not. And yet this proceeding goes forward.

Clearly, to get to the bottom of this story, discovery is essential. And thuis a motion to strike is premature, at best.

Respectfully submitted, in New York, New York this 25th day of February, 2010.



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CERTIFICATE OF SERVICE

I certify that on this date a copy of this Preliminary Exchange was served upon:

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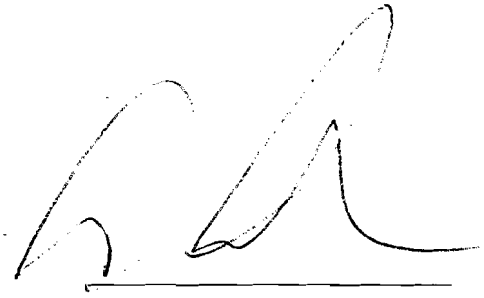

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