Message

From: Benjamin Yaus [BenjaminYaus@ongov.net]
Sent: 7/29/2021 3:21:50 PM
To: Ludmer, Margo [ludmer.margo@epa.gov]; Kevin Murphy [KMurphy@WladisLawFirm.Com]
CC: Doyle, James [Doyle.James@epa.gov]
Subject: Re: Lower Ley Creek / Syracuse China letter of credit

Absolutely Margo and we appreciate the opportunity to discuss this issue over the phone. Kevin is out of the office this week and I am off tomorrow, but I am generally available next week.

I am available 9-12 (8/2), all day (8/3), 9-12 (8/4), 12-5 (8/5), and 9-12 or 2-5 (8/6). Once Kevin gets back and reviews his emails he can let us know his availability and hopefully find a time that will work for all.
Thanks again,
Ben

ATTORNEY-CLIENT WORK PRODUCT

Benjamin Yaus
Senior Deputy County Attorney
Onondaga County Law Department
John H. Mulroy Civic Center
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Phone: (315) 435-2170
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From: Ludmer, Margo <ludmer.margo@epa.gov>
Sent: Thursday, July 29, 2021 11:11 AM
To: Benjamin Yaus <BenjaminYaus@ongov.net>; Kevin Murphy <KMurphy@WladisLawFirm.Com>
Cc: Doyle, James <Doyle.James@epa.gov>
Subject: RE: Lower Ley Creek / Syracuse China letter of credit

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Ben and Kevin,

Are you both available this week or next for a brief conference call on the LOC? Please propose a few timeslots for the call, and Jim and I will try to make one of them work.

Thank you,
Margo

Margo Ludmer
Assistant Regional Counsel
New York/Caribbean Superfund Branch
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 2
212.637.3187

From: Benjamin Yaus <BenjaminYaus@ongov.net>
Sent: Wednesday, July 14, 2021 12:08 PM
To: Ludmer, Margo <ludmer.margo@epa.gov>; Kevin Murphy <KMurphy@WladisLawFirm.Com>
Cc: Doyle, James <Doyle.James@epa.gov>
Subject: Re: Lower Ley Creek / Syracuse China letter of credit

Dear Margo,

The County agrees that this issue can, and will need to, be discussed in the context of upcoming RA consent decree discussions. However, we have yet to receive what would generally constitute an actual explanation, legal or otherwise, as to why EPA refuses to merely present a sight draft to J.P. Morgan Chase in accordance with the express and straightforward terms of the Letter of Credit (LOC). While I am not speaking on behalf of the PRP Group, it is safe to say based on regular group discussions that no member has deemed EPA's responses satisfactory.

The County and the PRP Group possess what we believe to be Syracuse China's LOC. Nevertheless, this email should be considered a Freedom of Information Act request for a copy of the subject Syracuse China Letter of Credit, any and all iterations of and any and all other documents associated with, concerning or regarding the Syracuse China Letter of Credit, including documents related to any decision not to present a sight draft.

As confirmed by EPA, payment pursuant to the terms of the LOC merely requires EPA to present a sight draft certifying an amount "payable pursuant to" the Lower Ley Creek Remedial Design Consent Order (Consent Order). Syracuse China owes $25,094 for its remaining share of the design work, which is payable pursuant to the Consent Order. EPA's unwillingness to simply present a sight draft, and your responses to date, are therefore confusing and troubling. What assurances will the County have that it will not be obligated to fund the entire cost of the remedial action were it to execute a RA consent order?

EPA's statements concerning the Consent Order being an "executory contract" have no apparent relevance. True, obligations remain; one such obligation being Syracuse China's final payment of $25,094. However, as you acknowledge and EPA guidance and case law makes clear, the LOC is not a bankruptcy asset and is a separate and distinct obligation that J.P. Morgan Chase owes to the EPA. In other words, and again, if letters of credit require a certification that an amount is "payable", and the fact that an amount is payable makes the contract executory, then a letter of credit would seemingly never be called upon by EPA in the very context for which it is required . . . bankruptcy/insolvency.

It appears that you have stated EPA's final position on the matter, and based on the content of your prior responses I am not confident the County or PRP Group will ever receive a sensible explanation on this matter. Nevertheless, EPA's refusal to even mail a one paragraph certification to J.P. Morgan Chase and unsatisfactory explanations to date pose a major and threshold issue which the County will surely raise again during, and which will likely complicate, RA consent order discussions.

Respectfully,

Ben

ATTORNEY-CLIENT WORK PRODUCT

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From: Ludmer, Margo <ludmer.margo@epa.gov>
Sent: Tuesday, July 13, 2021 2:34 PM
To: Kevin Murphy <KMurphy@WladisLawFirm.Com>
Cc: Doyle, James <Doyle.James@epa.gov>; Benjamin Yaus <BenjaminYaus@ongov.net>; Thomas J. Fucillo <tfucillo@hancocklaw.com>
Subject: RE: Lower Ley Creek / Syracuse China letter of credit

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Kevin,

Thank you for your letter. EPA is bound by the terms and conditions of the Syracuse China letter of credit. We disagree that our actions are inconsistent with EPA guidance or contrary to the purpose of the RD AOC financial assurance provisions (i.e., ensuring that respondents, not EPA, cover the full cost of the RD). However, we can certainly discuss the County and City's RA-related concerns during upcoming discussions of the draft RA consent decree.

Margo

Margo Ludmer
Assistant Regional Counsel
New York/Caribbean Superfund Branch
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 2
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From: Ludmer, Margo
Sent: Monday, July 12, 2021 2:41 PM
To: Kevin Murphy <KMurphy@WladisLawFirm.Com>

Cc: Doyle, James <Doyle.James@epa.gov>; Benjamin Yaus <BenjaminYaus@ongov.net>; Thomas J. Fucillo <tfucillo@hancocklaw.com>
Subject: RE: Lower Ley Creek / Syracuse China letter of credit

Kevin,

Confirming receipt of your letter.

Thank you,

Margo

Margo Ludmer
Assistant Regional Counsel
New York/Caribbean Superfund Branch
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 2
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From: Kevin Murphy <KMurphy@WladisLawFirm.Com>
Sent: Friday, July 9, 2021 9:40 AM
To: Ludmer, Margo <ludmer.margo@epa.gov>
Cc: Doyle, James <Doyle.James@epa.gov>; Benjamin Yaus <BenjaminYaus@ongov.net>; Thomas J. Fucillo <tfucillo@hancocklaw.com>
Subject: RE: Lower Ley Creek / Syracuse China letter of credit

Dear Attorney Ludmer:

Please see attached my correspondence on behalf of Onondaga County and the City of Syracuse in response to your June 29, 2011 email, which is set out below.

Counsel for the County and the City are available to discuss our clients' concerns with the Agency either at this time or during any discussions regarding the proposed remedial action order.

Thank you.

Kevin C. Murphy
The Wladis Law Firm, P.C.
P.O. Box 245, Syracuse, NY 13214
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From: Ludmer, Margo <ludmer.margo@epa.gov>
Sent: Tuesday, June 29, 2021 1:53 PM

To: Atriano, Vincent <vincent.atriano@squirepb.com>; Kevin Murphy <KMurphy@WladisLawFirm.Com>; Thomas J. Fucillo <tfucillo@hancocklaw.com>
Cc: Doyle, James <Doyle.James@epa.gov>; Benjamin Yaus <BenjaminYaus@ongov.net>
Subject: Lower Ley Creek / Syracuse China letter of credit

Mr. Atriano, Mr. Murphy, and Mr. Fucillo,

Thank you for your letters, on behalf of your respective clients, responding to EPA's Notice of Potential Liability and Request to Perform Remedial Activities for the Lower Ley Creek Operable Unit of the Onondaga Lake Superfund Site. I am writing to address a discrete issue mentioned in each of your response letters. Although there is some variation between your letters, generally speaking, each of you have requested that EPA draw on the Syracuse China letter of credit issued by J.P. Morgan Bank in the maximum amount of $185,714.29. This letter of credit was secured by Syracuse China as financial assurance pursuant to Section XXVI of the Lower Ley Creek Administrative Order on Consent for Remedial Design, Index No. CERCLA 02-2016-2014 (RD AOC). As stated in the RD AOC, such financial assurance is established for the benefit of EPA and serves "to secure the full and final completion of the [remedial design] Work by Respondents." Please note that the Syracuse China letter of credit does not entitle EPA to draw any funds in connection with the Lower Ley Creek remedial action.

After consulting with DOJ, EPA maintains that it will not be drawing on the Syracuse China letter of credit. This is *not* because EPA believes the letter of credit to be an asset of the estate. EPA has not reached this conclusion, nor, to EPA's knowledge, have Syracuse China or the bankruptcy court made such a determination. As noted in a couple of your letters, there is case law to support the position that letters of credit are not property of a debtor's bankruptcy estate because they are independent instruments that run from issuer (in this case, J.P. Morgan) to beneficiary (here, EPA). As noted by Onondaga County, EPA's financial assurance guidance recognizes that letters of credit secured before companies file for bankruptcy are generally considered to be an assets outside of bankruptcy estates.

However, as the court in the *ACE American Insurance Company* case (cited by the City of Syracuse) explains, a bank must look at whether the terms and conditions of a letter of credit have been met before acting on a request to draw the credit. *See* *4-5. The Syracuse China letter of credit expressly states that the United States is authorized to draw the maximum amount established by the letter of credit upon presentation of a sight draft and a signed and dated statement reading as follows:

> I certify that the amount of the draft is payable pursuant to that certain administrative order on consent, dated July 18, 2016, EPA docket number CERCLA 02-2016-2014, between the United States and Syracuse China Company, entered into by the parties thereto in accordance with the authority of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675, relating to the Onondaga Lake Superfund Site (Lower Ley Creek Operable Unit).

The RD AOC referenced in the above certification was rejected by Syracuse China as an executory contract as part of its Joint Plan of Reorganization. *See* Notice of Filing of Plan Supplement for the Joint Plan of Reorganization for Libbey Glass Inc. and its Affiliate Debtors Under Chapter 11 of the Bankruptcy Code, Exhibit 6 (Doc # 452). The Joint Plan of Reorganization was confirmed by the bankruptcy court on October 20, 2020. *See* Doc. # 598. There is, therefore, a credible legal argument that EPA cannot meet one of the requisite conditions for drawing on the Syracuse China letter of credit, namely the certification that the payment of the amount remains an executory obligation under the RD AOC.

Please note that, notwithstanding the agreement among the parties to the RD AOC that the obligations are joint and several, even if we were to conclude that the terms and conditions of the letter of credit were to have been satisfied, EPA would not be drawing the maximum amount of $185,714.29 to secure the full and final completion of the remedial design. Please also be aware that, notwithstanding our inability to draw on the Syracuse China letter of credit, EPA has filed a proof of claim in the Syracuse China bankruptcy, and we are zealously negotiating resolution of our claim for remedial design (as well as remedial action) response costs relating to Lower Ley Creek and the upstream Ley Creek Deferred Media operable unit.

Thank you,

Margo Ludmer
Assistant Regional Counsel
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