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January 14, 2009

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Honorable Jonathan W. Feldman
Magistrate Judge, U.S. District Court
Western District of New York
2120 U.S. Courthouse
100 State Street
Rochester, NY 14614

RE: Re-Source America, Inc. v. Corning Incorporated
Docket No.: 07-CV-6048
Our File: 45678-003

Dear Judge Feldman:

As Your Honor is aware, Resource America filed a motion to amend its previously amended complaint. Corning was directed to file its response by January 12, and did indeed do so. We are currently scheduled for an oral argument in your courtroom on February 27. There is no provision in the Court's notice for a Reply. Meanwhile, dispositive motions have been requested by Judge Siragusa by January 22. The purpose of this letter is to point out that the filing by Corning on January 12 invites usurpation of judicial authority at its worst, and duplication of judicial resources at its best. We respectfully request some guidance in the form of leave to file a Reply or a note from Your Honor that decision will be deferred until after a review of the forthcoming dispositive motions.

Corning's Opposition to RA's motion (ECF #73) ignores the fact that RA does not believe the amendment is necessary, but filed the Motion anyway to resolve the issue conclusively before we pick a jury. Corning does note the three other reasons why a court might refuse to allow the amendment: lateness, prejudice, and futility. However, Corning focuses almost exclusively on the last of the three reasons: futility. By doing so, it has tried to line up two bites at the apple. First, Corning hopes Your Honor will rule that the amendment is improper because it will not survive Corning's planned summary judgment argument to Judge Siragusa. Then, if Corning's argument (submitted without the confusion that might be caused by opposition from RA) fails to encourage Your Honor to read Judge Siragusa' mind favorably to Corning, Corning will nonetheless have a chance to convince Judge Siragusa that Your Honor was wrong.

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Corning writes at page 17 its Memorandum of Law in Opposition to RA's motion that, "once a case has progressed to summary judgment and discovery is complete, a newly proposed claim is futile 'when the evidence in support of the plaintiff's proposed new claim creates no triable issue of fact and the defendant would be entitled to judgment as a matter of law.'" Corning cites *Milenese v. Rust-Oleum Corp.*, F. 3d 104, 110 (2d Cir. 2001), to support its proposition. The application of that case is appropriate, but Corning's interpretation is wrong, because the 2d Circuit has, on the very pages Corning cites, made it clear that the only issue in a case like this is whether the proposed amendment could survive a Rule 12(b)6 motion. Looking at the issue from a Rule 56 perspective is only appropriate where, "the cross-motion [to amend] is made in response to a Fed.R.Civ.P. 56 motion for summary judgment, and the parties have fully briefed the issue whether the proposed amended complaint could raise a genuine issue of material fact and have presented all relevant evidence in support of their positions." *Id.* This case has not yet progressed to summary judgment. RA expected that Judge Siragusa was going to take care of that. Therefore, RA would like the consolation of knowing that the Court's analysis is currently limited to the Rule 12(b)6 context.

We respectfully request and suggest that Your Honor consider accepting a Reply to Corning's opposition memorandum, which we can submit a few days after the dispositive motions are submitted to Judge Siragusa, and/or that Your Honor decline to pass on the futility of the amendment in favor of Judge Siragusa's jurisdiction over that issue. Alternatively, we would like the opportunity to fully brief the futility issue, which brief would probably look a lot like the one we will file in response to Corning's anticipated Motion for Summary Judgment.¹

Please advise us as to the Court's pleasure in this regard.

Respectfully submitted,

/s/ STEPHEN P. PAZAN
Stephen P. Pazan

SPP:vgm

cc: Richard McGuirk, Esq. (Via Facsimile)

¹ We note that that Corning has already conceded the clarity of the Contract provision in RA's favor with regard to the European damages part of RA's claim in Corning's Memorandum at pages 17 & 20. The question of whether it clearly and unambiguously (or otherwise) provides a volume guarantee of 30,000 spools per week in Mebane, NC may be the only part that remains pending for Judge Siragusa and perhaps the jury.

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