

March 3, 2011

Derek S. Burrell
300 N. Indiana Avenue
Kankakee, IL 60901

US EPA Region 5
Office of the Regional Hearing Clerk
Attention: La Dawn Whitehead
77 W. Jackson Blvd.
Mailcode: E-19J
Chicago, IL 60604-3590

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REGIONAL HEARING CLERK
USEPA
REGION 5

Re: TSCA-05-2006-0012

Hearing Clerk:

Enclosed find an Original and two (2) copies of my Appearance, Motion to Dismiss, Motion Opposing Default Judgment, along with our Table of Contents and Authorities, Memorandum in Support of Opposition to Default Judgment and Motion to Dismiss, Affidavits of Derek S. Burrell and Willie P. Burrell and Motion for Oral Argument, in the above-referenced matter. Please provide me with a file-stamped copy of each which I may retain for my file. I enclose a self addressed stamped envelope for your convenience.

Respectfully,



Derek S. Burrell

Cc: Marcy Toney
Regional Judicial Officer
U.S. Environmental Protection Agency,
Region 5
77 West Jackson Boulevard
Chicago, IL 60604

Maria Gonzalez (C14-J)
Associate Regional Counsel
Regional Judicial Officer
U.S. Environmental Protection Agency, Region 5
77 West Jackson Boulevard
Chicago, IL 60604-3590

Dudley Burrell and the Dudley B. Burrell Trust
649 N. Rosewood
Kankakee, IL 60901

U.S. EPA
Region5
Joanna Bezerra (DT-8J)
77 West Jackson Blvd
Chicago, IL 60604

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

In the Matter of:) Docket No. TSCA-05-2006-0012
)
Willie P. Burrell) Proceeding to Assess a Civil
The Willie P. Burrell Trust,) Penalty under section 16(a) of
Dudley B. Burrell, and the) The Toxic Substances Control
Dudley B. Burrell Trust) Act, 15 U.S.C. § 2615(a)
Kankakee, Illinois,)
)
Respondents.)
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APPEARANCE OF REPRESENTATIVE

Derek S. Burrell, hereby enters his Appearance for Willie P. Burrell and the Willie P. Burrell Trust and pursuant to 40 C.F.R. § 22.10, hereby states:

Please direct all service, for **Willie P. Burrell and the Willie P. Burrell Trust**, to the following address:

**Derek S. Burrell
300 N. Indiana Avenue
Kankakee, IL 60901
815-933-6087
815-954-3296**

Respectfully submitted,



Derek S. Burrell

3-3-11
Date

CERTIFICATE OF SERVICE

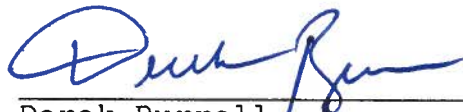
Derek S. Burrell hereby certifies that his Appearance in the above-captioned matter was served upon the Complainant and other Respondents, by U.S. Mail, postage pre-paid, this 3 day of March 2011 at:

United States Environmental Protection Agency
Region 5
Joana Bezerra (DT-8J)
77 West Jackson Boulevard
Chicago, Illinois 60604

US EPA Region 5
Office of the Regional Hearing Clerk
Attention: La Dawn Whitehead
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Mailcode: E-19J
Chicago, Illinois 60604-3590

Dudley B. Burrell
Dudley B. Burrell Trust
649 N. Rosewood
Kankakee, Il. 60901

Maria Gonzalez
US EPA - Region 5
Associate Regional Counsel
77 West Jackson Boulevard
Chicago, Illinois 60604-3590



Derek Burrell
300 N. Indiana Avenue
Kankakee, Il 60901
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MOTION TO DISMISS FOR DEFECTIVE PROOF OF SERVICE

Respondents Willie P. Burrell and the Willie P. Burrell Trust, by and through their Representative, pursuant to 40 C.F.R. § 22.16 and 40 C.F.R. § 22.20(a), hereby tender their Motion To Dismiss, and in support states:

1. Provision 40 C.F.R. § 22.20(a), provides, in pertinent part, that:

The Presiding Officer, upon motion of the respondent, may at any time dismiss a proceeding without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant.

2. Proof of Service was defective, a ground which shows no right to relief on the part of the complainant.

3. Here, Willie Burrell signed the certified mail receipt ("green cards") for all Respondents on July 10, 2006.

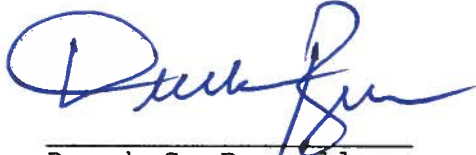
4. Irregularities with the green cards make proof of

service on Respondents defective.

5. It cannot be determined when the green cards were actually filed, proof of service in the case at bar is defective.

Wherefore, Respondents Willie P. Burrell and the Willie P. Burrell Trust hereby move to dismiss this cause, with prejudice, as a matter of law.

Respectfully submitted,



Derek S. Burrell
300 N. Indiana Avenue
Kankakee, IL 60901
815-933-6087
815-954-3296

3-3-11
Date

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CERTIFICATE OF SERVICE

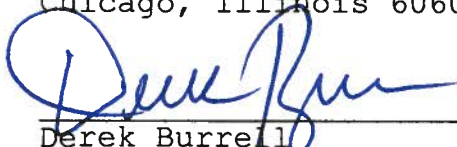
Respondents Willie P. Burrell and the Willie P. Burrell Trust hereby certify that their Motion to Dismiss in the above-captioned matter was served upon the Complainant and other Respondents, by U.S. Mail, postage pre-paid, this 3 day of March 2011 at:

United States Environmental Protection Agency
Region 5
Joana Bezerra (DT-8J)
77 West Jackson Boulevard
Chicago, Illinois 60604

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MOTION OPPOSING ORDER OF DEFAULT JUDGMENT

Respondents Willie P. Burrell and the Willie P. Burrell Trust (hereinafter, collectively "Respondents"), by and through their Representative, pursuant to 40 C.F.R. § 22.16, hereby tender their Motion Opposing Default Judgment, and in support states:

1. The Presiding Officer is not compelled to find Respondents in default.
2. Respondents can show good cause as to why a default judgment should not be entered in this case.
3. Respondents can also show meritorious defenses to liability in this cause.
4. Respondents request that their answer, filed on January 14, 2010, be deemed filed timely under the totality of the circumstances.

Wherefore, Respondents Willie P. Burrell and the Willie P. Burrell Trust hereby tender their Motion Opposing Default

Judgment and hereby requests all relief just and proper in the premises.

Respectfully submitted,



Derek S. Burrell
300 N. Indiana Avenue
Kankakee, IL 60901

3-3-11
Date

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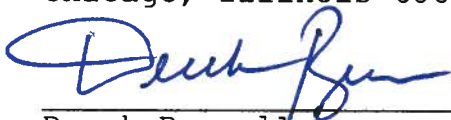
Respondents Willie P. Burrell and the Willie P. Burrell Trust hereby certify that their Motion Opposing Default Judgment in the above-captioned matter was served upon the Complainant and other Respondents, by U.S. Mail, postage pre-paid, this 3 day of March 2011 at:

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Dudley B. Burrell Trust) Act, 15 U.S.C. § 2615(b)
Kankakee, Illinois,)
)
Respondents.)
_____)

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**TABLE OF CONTENTS AND TABLE OF AUTHORITIES FOR RESPONDENTS'
MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS AND MOTION
OPPOSING DEFAULT JUDGMENT**

Respondents Willie P. Burrell and The Willie P. Burrell Trust, by and through their Representative, pursuant to 40 C.F.R. § 22.5, tender their Table of Contents and Table of Authorities for their Memorandum in Support of Respondents' Motion to Dismiss and Motion Opposing Default Judgment.

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40 C.F.R. § 22.5(C)(iii).6

Proof of service of the complaint shall be made by affidavit of the person making personal service, or by properly executed receipt. Such proof of service shall be filed immediately upon completion of service.

40 C.F.R. 22.15(a) 4

(a) *General.* Where respondent: Contests any material fact upon which the complaint is based; contends that the proposed penalty, compliance or corrective action order, or Permit Action, as the case may be, is inappropriate; or contends that it is entitled to judgment as a matter of law, it shall file an original and one copy of a written answer to the complaint with the Regional Hearing Clerk and shall serve copies of the answer on all other parties. Any such answer to the complaint must be filed with the Regional Hearing Clerk within 30 days after service of the complaint.

40 C.F.R. § 22.17(a) 8

(a) *Default.* A party may be found to be in default: after motion, upon failure to file a timely answer to the complaint; upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer; or upon failure to appear at a conference or hearing. Default by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations. Default by complainant constitutes a waiver of complainant's right to proceed on the merits of the action, and shall result in the dismissal of the complaint with prejudice.

40 C.F.R. § 22.17(c) 1

Default order. When the Presiding Officer finds that default has occurred, he shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued. If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision under these Consolidated Rules of Practice. The relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act. For good cause shown, the Presiding Officer may set aside a default order.

40 C.F.R. § 22.24 17

Burden of presentation; burden of persuasion; preponderance of the evidence standard.

(a) The complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint and that the relief sought is appropriate. Following complainant's establishment of a prima facie case, respondent shall have the burden of presenting any defense to the allegations set forth in the complaint and any response or evidence with respect to the appropriate relief. The respondent has the burdens of presentation and persuasion for any affirmative defenses.

(b) Each matter of controversy shall be decided by the Presiding Officer upon a preponderance of the evidence.

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40 C.F.R. § 745.103 3

* * *

Inspection means:

(1) A surface-by-surface investigation to determine the presence of lead-based paint as provided in section 302(c) of the Lead-Based Paint Poisoning and Prevention Act [42 U.S.C. 4822], and

(2) The provision of a report explaining the results of the investigation.

Lead-based paint means paint or other surface coatings that contain lead equal to or in excess of 1.0 milligram per square centimeter or 0.5 percent by weight.

* * *

Federal Rule of Civil Procedure 60(b)(6). 10

Relief from Judgment or Order

* * *

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief.

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CERTIFICATE OF SERVICE


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