UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

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

MEMORANDUM IN SUPPORT OF RESPONDENTS' MOTION OPPOSING MOTION FOR DEFAULT JUDGMENT AND RESPONDENTS' MOTION TO DISMISS

Respondents Willie P. Burrell and The Willie P. Burrell Trust (hereinafter, referred to as, "Burrell" or "Respondents"), by and through their Representative, pursuant to 40 C.F.R. § 22.17(c), tender their Memorandum in Support of Respondents' Motion Opposing Default Judgment and Motion to Dismiss:

I. FACTUAL BACKGROUND

Burrell is engaged in the business of leasing residential apartment units. (Willie Burrell Affidavit, ¶ 2). Attorney Edward Lee ("Lee" or "Respondents' attorney") was first retained, on or about March of 2004, by Burrell, to handle a variety of legal matters regarding B & D Management, Inc., Burrell Property Management, L.L.C., Willie P. Burrell, and The Willie P. Burrell Trust. (Willie

Burrell Affidavit, ¶ 3).

On March 25, 2005, the United States Environmental Protection Agency - Region 5 (hereinafter, "EPA" or "government") advised Lee that it was planning to file a civil administrative complaint against Burrell. (Willie Burrell Affidavit, ¶ 7, Exhibit A, attached hereto). The March EPA letter requested that Burrell provide the EPA with any evidence she had regarding notice compliance with the Toxic Substance Control Act ("TSCA"), 15 U.S.C. § 2601 et seq. (1976), including but not limited to, any evidence of lead based paint warnings to Burrell's tenants and/or tests showing no lead based paint existed in the Burrell apartment units. (Willie Burrell Affidavit, ¶ 8). The EPA requested specific documents to show that Burrell had an "inability to pay" or "continue in business" which are mitigating factors for the proposed civil penalties sought by the EPA. (Willie Burrell Affidavit, ¶ 9). The EPA requested Lee provide it with the requested compliance records, lead paint test results, and mitigation documentation within ten (10) days. (Willie Burrell Affidavit, ¶ 10).

Six (6) months later, Lee responded to the EPA by letter dated September 16, 2005. (Willie Burrell Affidavit, ¶ 11, Exhibit B, attached hereto). At that time, Lee provided the EPA with the Kankakee County Health Department

(hereinafter, "KCHD") Certificates of Lead Free Home (hereinafter, "certificates"). (Willie Burrell Affidavit, ¶ 12). However, Lee failed to request the underlying test results for the certificates from the KCHD. Moreover, Lee never provided the EPA with other evidence of Burrell's compliance with the TSCA, nor did he provide evidence required for Burrell to assert any mitigating factors to the civil penalties sought by the EPA. (Willie Burrell Affidavit, ¶ 12).

The EPA responded to Lee's September 2005 letter, on December 28, 2005. (Willie P. Burrell Affidavit, ¶ 13). At that time, the EPA specifically informed Lee that it believed the certificates were legally inadequate under 40 C.F.R. § 745.103. (Willie Burrell Affidavit, ¶ 13). Lee was also informed that documentation showing the apartment units were lead-free were required by January 31, 2006.[1] (Willie Burrell Affidavit, ¶ 14). Lee failed to further respond to the EPA. (Willie P. Burrell Affidavit, ¶ 14).

On June 22, 2006, the EPA filed a complaint against Burrell for alleged violations of the TSCA, requesting a civil penalty in excess of $89,000. (Willie Burrell Affidavit, ¶ 15). Lee was required to file an answer within

[1] On January 13, 2011, we obtained a copy of the state license for the inspector who performed the lead tests, as well as the underlying test results, which Respondents believe meet the requirements of 40 C.F.R. § 745.103. We obtained these results by making one phone call to the KCHD.

thirty (30) days.[2] (Willie Burrell Affidavit, ¶ 16). To date, Lee: never entered an appearance; never filed an answer; never advised Burrell that she was required to file an answer; never informed Burrell a complaint had been filed by the EPA. (Willie Burrell Affidavit, ¶ 16).

On December 17, 2010, almost, five (5) years after the filing of the original complaint, the EPA filed a Motion for Default Judgment. (Willie Burrell Affidavit, ¶ 17). The basis for the default judgment was Respondents' failure to answer the EPA's complaint, filed on June 22, 2006. (Willie Burrell Affidavit, ¶ 17).

To date, we know of no action Lee has taken since his September 16, 2005 letter to the EPA. Lee never requested that Burrell provide him with information that would have satisfied the requests of the EPA. Lee never informed Burrell that it might be liable for a $89,000 penalty. (Willie Burrell Affidavit, ¶ 18).

On January 11, 2011, Burrell fired Lee, via certified mail. The firing of Lee was performed on the same day, Respondents received the EPA's Motion for Default Judgment, filed on January 3, 2010, and received by Burrell January 11, 2011. (Willie Burrell Affidavit, ¶ 19)

In summary, Respondents' attorney failed to make

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[2] See 40 C.F.R. 22.15(a)

initial inquiries regarding Respondents potential liability, never engaged in any pre-trial motions or negotiations, failed to contact the EPA for preliminary settlement discussions, failed to request a hearing, failed to file an answer or assert any mitigating factors or defenses. Lee has since failed to meet or communicate with Burrell. (Willie Burrell Affidavit, ¶ 3-21).

Prior to September 2010, Lee communicated that all of Burrell's affairs "were in order" and that he "was on top of it." (Willie Burrell Affidavit, ¶ 4). Since September 2010, Burrell has attempted to communicate with Lee, by telephone, on numerous occasions. (Willie Burrell Affidavit, ¶ 4). In September of 2010, Burrell attempted to meet with Lee at his office. (Willie Burrell Affidavit, ¶ 4). However, Lee was not willing to meet with Burrell at that time. (Willie Burrell Affidavit, ¶ 5). Since September 2010, Lee has failed to meet with or communicate with Burrell. (Willie Burrell Affidavit, ¶ 6). On January 11, 2011, Respondents sent Lee a certified letter, No. 7005 3110 0002 7480 5883, regarding this matter. The letter came back "UNCLAIMED" on February 4, 2011. (Willie Burrell Affidavit, ¶ 21). Lee has, in essence, disappeared. (Willie Burrell Affidavit, ¶ 22). As a result, Respondents move to dismiss the

government's complaint and opposes the government's motion seeking a default judgment, pursuant to the Consolidated Rules of Practice ("CROP").[3]

II. Proof of Service Process Was Defective

Proof of service of the complaint is governed by CROP. 40 C.F.R. § 22.5(C)(iii) provides, in relevant part:

> 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 with the Regional Hearing Clerk immediately upon completion of service.

Here, the record reveals that the government filed its complaint against the Respondents on June 22, 2006. Willie P. Burrell purportedly signed the certified mail receipt ("green cards") for all Respondents on July 10, 2011. Purportedly, the government filed the "proof of service" with the Regional Hearing Clerk ("RHC") on July 17, 2006 and July 18, 2006.

Irregularities with the green cards make proof of service on Respondents defective. First, it is the customary practice of the government to "date stamp" the green cards on the same side as the purported signature. (Derek Burrell Affidavit, ¶ 5-6). This was not done. Secondly, a Region 5

[3] Additional facts are presented herein and are referenced in Willie Burrell's Affidavit.

employee, LaDawn Whitehead, indicated that she altered (or added to) the green cards by writing "July 17, 2006" and "July 18, 2006" on the front of the green cards. (Derek Burrell Affidavit, ¶ 10). Ms. Whitehead indicated that she made the alterations, not contemporaneous with the time that the green cards were purportedly originally stamped, but at a much later time after her employment began with the EPA. (Derek Burrell Affidavit, ¶ 10-12). The date Ms. Whitehead wrote on the green cards had to be after April 2009, as this was the date Ms. Whitehead began her duties as a RHC. (Derek Burrell Affidavit, ¶ 13). Moreover, at least one of the four green cards had been altered with whiteout. (Derek Burrell Affidavit, ¶ 11). The handwritten dates purport to match those that are stamped on the non-signature side of the green cards. (Derek Burrell Affidavit, ¶ 14).

As a result, a cloud exists over the true date the green cards were actually filed by the government with the RHC. The burden of proof as to the timeliness of the "proof of service" rests with the government. Since it cannot be determined when the green cards were actually filed, proof of service is defective against Respondents, and therefore, the government's complaint should be dismissed, with prejudice, as a matter of law.

III. Standard of Review for Default Judgments

The following issue is presented prior to an initial decision, therefore review is de novo. See e.g., In Re Chempace Corporation, FIFRA Appeal Nos. 99-2 & 99-3 (May 18, 2000). 40 C.F.R. § 22.17(a) provides when a party may be found to be in default.[4] For comparison, the appeal of a Default Order, which constitutes an Initial Decision, is also governed by 40 C.F.R. Part 22. When determining whether or not a Default Order should be reversed, the Board will "consider the totality of the circumstances presented." In re Rybond, 6 E.A.D. 614, 616 (EAB 1996). See also In re Thermal Reduction Co., Inc., 4 E.A.D. 128, 131 (EAB 1992) ("When fairness and a balance of the equities so dictate, a default order will be set aside"). The Board may also take into consideration "the likelihood that the action would have had a different outcome had there been a hearing." See In Re Rybond, 6 E.A.D. at 625. In assessing the likelihood of a different outcome, we have considered whether the Respondent would likely prevail on any defenses to liability raised by the Respondent. See Id. at 628-38.

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[4] Following In Re: Pyramid Chemical Company, RCRA (3008) Appeal No. 03-03 (September 16, 2004) at p.682 and f.n.4, Respondents filed their answer on January 14, 2011. Respondents attempted to cure the procedural defect immediately after receiving the government's Motion for Default Judgment. Respondents note there is no provision under CROP that provides for a party to seek "permission" to file a late answer.

As a default order is a harsh sanction, such actions are not favored by courts and are used only in extreme situations. "Doubts are usually resolved in favor of the defaulting party." In Re Rybond, at 616. Thus, every reasonable opportunity should be given to provide Respondents their day in court.

III. Respondent Can Show "Good Cause"

1. An Attorney's Gross Negligence or Disappearance Justifies Setting Aside a Default Judgment

A. Board Case Law

Under the Board's current case law, the neglect of a party's attorney does not excuse an untimely filing, nor does lack of willfulness affect the determination. In Re: Pyramid Chemical Company, RCRA Appeal No. 03-03 (Sept. 16, 2004). Under Board precedent an attorney stands in the shoes of his or her client, and ultimately, the client takes responsibility for the attorney's failings. Id. citing Jiffy Builders, 8 E.A.D. at 321; accord Detroit Plastic, 3 E.A.D. at 106, also citing Link v. Wabash R.R. Co., 370 U.S. 626, 633-34 (1962). However, under the Consolidated Rules of Practice, "[i]t is appropriate to examine whether fairness and a balance of the equities dictate that a default order

be set aside."[5] Id.

The Board, in dicta, recognized such equities when it recognized an exception to excuse an untimely filing, where a party's attorney is so ill as to be incapacitated and does not have the opportunity to notify the adjudicator, the appropriate hearing clerk, or the client of his or her disabling condition). In re B & L Plating, 11 E.A.D. 182, 191, f.n. 15 (2002). Moreover, the Board has not yet determined whether relief from a default judgment is proper when it results from the "gross negligence" or "disappearance" of a party's attorney.

b. Federal Case Law

In the absence of applicable Board or E.A.D. case law, the Board has looked to federal case law for guidance.[6] For comparison, Federal Rule of Civil Procedure 60(b)(6)[7] provides a default judgment may be set aside when there is any reason not previously considered in the rule that justifies granting relief. A party merits relief under Rule

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[5] Issuance of a default order is not a matter of right, even when an "unresponsive party is technically in default." Donald L. Lee and Pied Piper Pest Control, Inc., FIFRA 09-0796-92-13, November 9, 1992, 1992 WL 340775 (E.P.A.). Thus, the Presiding Officer need not enter a default judgment against Respondents, in the first instance.

[6] The Federal Rules of Civil Procedure are not applicable to these proceedings, See Midwest Bank & Trust Co., Inc., RCRA (3008) Appeal No. 90-4, 3 E.A.D. 696, 699 & n. 7 (CJO October 23, 1991).

[7] Rule 60(b)(6) states: 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: * * * (6) any other reason that justifies relief.

60(b)(6) if he demonstrates "extraordinary circumstances which prevented or rendered him unable to prosecute [his case]." Martella v. Marine Cooks and Stewards Union, 448 F.2d 729, 730 (9th Cir.1971) (per curiam); see also Pioneer Investment Servs. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 393, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993). Rule 60(b) is remedial in nature and thus must be liberally applied. See Falk v. Allen, 739 F.2d 461, 463 (9th Cir.1984) (per curiam).

In Link, the U.S. Supreme Court held that a client chooses its attorney as its representative in an action and thus cannot avoid the consequences of the acts or omissions of its freely selected agent: "Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'" 370 U.S. 626, 633-34. However, the Link court expressly declined to state whether it would have held that the district court abused its discretion if the issue had arisen in the context of a motion under Rule 60(b)[8]. Id. at 635-6. Thus Link alone, is not a barrier to establishing the rule that gross negligence by a party's counsel constitutes

[8] Link was decided within the context of a failure to prosecute under FRCP 41(b).

"extraordinary circumstances."

As a result of Link, there has been a split of authority in the federal circuit and district courts as to when it is appropriate, if ever, to relieve a party from a default judgment under Rule 60(b)(6). The majority and more reasoned view has been articulated by the Third, Sixth, and Ninth Circuit Courts that have concluded that a client should not be held liable on a default judgment resulting from an attorney's grossly negligent conduct.[9] "Gross negligence" is defined as "neglect so gross that it is inexcusable." Lal v. California,[10] 610 F.3d 518 (9th Cir. 2010).

In Carter v. Albert Einstein Medical Center, the plaintiff's attorney failed to submit answers to interrogatories, to appear at a pretrial conference, and failed to comply with a discovery order. The court found the attorney's conduct to be "inexcusable." 804 F.2nd 805, 806 (3rd Cir. 1986).

In Community Dental Services v. Tani, D.D.S., the

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[9] The 1st and 4th Circuits concur, albeit in dicta. In re Virginia Info. Sys. Corp., 932 F.2d 338, 342 (4th Cir.1991)[(malfeasance which actively misleads a client might ground a Rule 60(b) motion.")(overruled on other grounds)]; Greenspun v. Bogan, 492 F.2d 375 (1st Cir.1974)(60(b) is a remedial rule which receives a liberal construction from courts concerned that cases not be decided in default against parties who are inadvertently absent. See Silas v. Sears, Roebuck & Co., 586 F.2d 382, 385-86 (5th Cir.1978)(dismissal of action to sanction attorney's failure to appear, was error).

[10] The district court dismissed plaintiff's case with prejudice under Federal Rule of Civil Procedure 41(b) for failure to prosecute. This is distinguishable from Respondents who did not choose to be a party to litigation.

attorney ignored critical deadlines and court orders, neglected motions, missed hearings and other court appearances, failed to file pleadings or serve them on opposing counsel, and otherwise abandoned his client by failing to commence with his client's defense. 282 F.3d at 1170-71. The Tani court held that such conduct resulted in the client receiving "virtually" no representation at all. Id. at 1171. The court held that the attorney's conduct constituted gross negligence. Id.

Likewise in Lal, the attorney virtually abandoned his client. 610 F.3d at 529. He failed to make initial disclosures; failed to meet, confer and participate in a joint case management conference and failed to attend hearings. Id. The court held the attorneys' conduct was obviously grossly negligent. Id.

The conduct of the attorneys in Tani and Lal, is identical to the conduct of Respondents' attorney here. Respondents' attorney failed to make inquiries regarding Respondents' liability, never engaged in any pre-trial motions or negotiations, failed to engage in any preliminary settlement discussions, failed to timely request a hearing, failed to timely file an answer or assert any affirmative defenses or mitigating factors. Similar to the attorneys' in Tani and Lal, Respondents' attorney provided Respondents with virtually no legal representation at all. (Willie

Burrell Affidavit, ¶ 2-22).

Moreover, in Tani and Lal, the attorneys mislead clients to believe their cases were progressing. Tani 282 F.3d at 1170-71; Lal, 610 F.3d at 525. Here, Respondents' attorney misled them by telling them that their case was "being taken care of" and that he was "on top of everything." (Willie Burrell Affidavit, ¶ 4).

Of course, even if the Respondents' attorney was grossly negligent, in the Seventh and Eighth Circuits, no relief would be available under Rule 60(b)(6), under any circumstances. U.S. v. 7108 West Grand Avenue, Chicago, Illinois, 15 F.3d. 632 (7th Cir. 1994) ("gross negligence" of attorney not sufficient); BMFI v. Traditional Baking, Inc., No. 08-1967 [(7th Cir. 2009)(lack of malpractice insurance is not an "exceptional circumstance" under Rule 60(b)(6))]. Heim v. Commissioner, 872 F.2d 245, 248 (8th Cir. 1989) (gross negligence not exceptional circumstances).

The Board, by utilizing the "good cause" and "totality of the circumstances" test, in determining whether to set aside a judgment of default, along with dicta, in In re B & L Plating, 11 E.A.D. 182, 191, f.n. 15., has implicitly rejected the Seventh and Eighth Circuit's harsh and inequitable approach. This approach would yield no set of circumstances which would allow a default judgment to be set aside based on either illness, gross or willful conduct, or

even the disappearance of a party's attorney.

Even, the Second Circuit has granted relief from a default judgment when the attorney has disappeared or constructively disappeared. Vindigni v. Meyer, 441 F.2d. 376, 377 (2nd Cir. 1971); U.S. v. Cerami, 563 F.2d 563 (2nd Cir. 1977)(relief from a default judgment where the attorney "constructively disappeared"). In Vindigni, the attorney and Plaintiff failed to appear for a deposition and the complaint was ultimately dismissed on defendant's unopposed motion. Id. at 377. The court found that the attorney had essentially disappeared. Id. The court reversed the default judgment. Id. at 376. Here, Respondents' attorney has "disappeared." (Willie Burrell Affidavit, ¶ 20-22). A default judgment should not be entered against Respondents solely because of the "gross negligence" or "disappearance" of their attorney.

The minority view contends the proper remedy for Respondents is to sue their attorney in a malpractice suit.[11] Link at 370 U.S. at 634, f.n. 10; See also U.S. v. 7108 West Grand, 15 F.3rd at 633. However, a malpractice suit is an inadequate remedy. Tani at 282 F.3rd at 1171. The appropriate remedy for grossly negligent conduct would be to sanction the attorney and let the case proceed on the

[11] Respondents discovered their attorney had no malpractice insurance.

merits.[12] See Carter, 804 F.2d at 807; L.P. Steuart, Inc. v. Matthews, 329 F.2d 234, 235 (D.C.Cir.1964). Likewise, Respondents' case should be allowed to proceed on the merits. It is Respondents' former attorney who should be sanctioned.

The adjudicator should adopt the rule announced in Tani, 282 F.3d at 1164, in so doing, hold that Respondents' attorney's disappearance and grossly negligent conduct was inexcusable. Moreover, the conduct of Respondents' attorney, is an "exceptional circumstance" under Federal Rule of Civil Procedure 60(b)(6) and is akin to "good cause" under CROP justifying relief from a default judgment.

IV. The Action would Have Had A Different Outcome

The adjudicator may take into consideration "the likelihood that the action would have had a different outcome had there been a hearing." See In Re Rybond, 6 E.A.D. at 625. In assessing the likelihood of a different outcome, we have [also] considered whether the Respondent would likely prevail on any defenses to liability. Id. at 628-38. There is a strong probability that the following defenses would be successful, if Respondents had a hearing.

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[12] (1) This would reduce litigation; (2) the innocent and financially disadvantaged would not have to bare the financial burden of a second suit in malpractice; (3) parties suffer no further delay; and (4) the judicial prestige of the courts is upheld when the attorney is held to blame rather than innocent parties to the litigation.

A. Selective Enforcement[13]

Respondents assert that they have been singled out by the EPA. (Willie Burrell Affidavit, ¶ 23). Several apartment rental companies in Kankakee county are: (1) Crestview Village Apartments; (2) East Court Village; (3) Hidden Glenn Apartments; (4) Preferred Property Group, L.L.C.; (5) Property Management, Ltd.; (6) Sherwood Forest Apartments; and (7) Stafford Apartments. (Willie Burrell Affidavit, ¶ 24).

The government has selected the Respondents for enforcement action "invidiously or in bad faith, *i.e.*, based upon the impermissible consideration of their race as Afro-Americans and their well known political views." (Willie Burrell Affidavit, ¶ 25). The government has a desire to prevent the exercise of Respondents' constitutional rights, while other similarly situated violators named above were left untouched. (Willie Burrell Affidavit, ¶ 26).

B. Ability to Pay/ Continue in Business

Pursuant to 40 C.F.R. § 22.24, the Region bears the initial burden of proof (i.e., the burden of going forward) that the proposed penalty is appropriate, after which the burden of going forward shifts to the Respondents to rebut

[13] This defense was not raised in Respondents' answer, but Respondents will move to amend their answer in accordance with CROP, when, and if, appropriate.

the Region's prima facie case. In re New Waterbury, Ltd., 5 E.A.D. 529, 538-39 (EAB 1994). The ultimate burden of persuasion, however, rests with the Region as the proponent of the penalty. Id. at 538.

The EPA proposes a fine of $89,430. (Government's complaint, p. 14). Respondents, if fined as proposed by the government would essentially put Respondents out of business or severely hamper Respondents' ability to continue in business. (Willie Burrell Affidavit, ¶ 27). Moreover, such a fine would not only hurt Respondents, but the employees of her company as well. (Willie Burrell Affidavit, ¶ 28). Finally, some of the costs may have to be passed onto Respondents tenants, many of which are low-income. (Willie Burrell Affidavit, ¶ 29). Respondents submit their financial information under Confidential Business Information, in accordance with 40 C.F.R. part 2, which is privileged and filed accordingly as Exhibit C, attached hereto. (Willie Burrell Affidavit, ¶ 30).

C. No Known Risk of Exposure

The proposed penalty should be reduced by 80%, because the units identified by the government were in fact lead-free. (Willie Burrell Affidavit, ¶ 31). Respondents submit the Lead-Free Certificate of Home, the Illinois license of the inspector who actually performed the tests, and the underlying test results. (Willie Burrell Affidavit, ¶ 32,

Exhibit E, attached thereto).

D. Attitude

Respondents contend they were willing to cooperate with the governments' enforcement action of the TCSA. (Willie Burrell Affidavit, ¶ 33). Any lack of cooperation thus far, has been the result of their prior attorney's gross negligence. (Willie P. Burrell Affidavit, ¶ 34). Respondents requested a settlement conference with the government. (Willie Burrell Affidavit, ¶ 35, Exhibit D attached hereto).

E. Cooperation

Respondents agreed to a site inspection without being compelled. (Willie Burrell Affidavit, ¶ 36). The only reason Respondents failed to further cooperate was a result of their grossly negligent attorney who failed to provide the government with information that would have shown Respondents' belief that the units were lead free. (Willie Burrell Affidavit, ¶ 37). Respondents were willing to cooperate as they believed they were in compliance with the TSCA. (Willie Burrell Affidavit, ¶ 38). Thus, the proposed penalty should be reduced by 10%.

F. Compliance

Respondents came into compliance with the TSCA after realizing that strict written compliance with the TSCA was required. (Willie Burrell Affidavit, ¶ 39). Thus, the proposed penalty should be reduced by 10%.

G. Early Settlement

Respondents are willing to settle this matter prior to any pre-hearing exchange document. (Willie Burrell Affidavit, ¶ 40). Thus, the proposed penalty should be reduced by 10%.

H. Size of Business

The Respondents are a closely held family company which employs a total of 6 employees, five of which are related by kinship. (Willie Burrell Affidavit, ¶ 41). The Respondents' business is eligible for the elimination of the entire proposed penalty since: Respondents have made good-faith effort to immediately comply with the disclosure rules of the TSCA; the governments' allegations, if true, would mean this is Respondents' first offense; Respondents immediately, upon notice of violating the TSCA, came into full compliance with the TSCA in 2003; the alleged violations do not constitute a significant health or environmental threat, because the units were, in fact, lead-free. (Willie Burrell Affidavit, ¶ 42, Exhibit E, attached hereto).

I. No Target Occupants

No child under the age of 18 nor pregnant women lived in 575 E. Oak during all relevant times alleged in the government's complaint. (See Willie Burrell Affidavit ¶ 44). Therefore, Respondents are entitled to a further reduction in the proposed civil penalty. (See Disclosure Rule

Enforcement Response Policy, page 11 (December 1999).

J. Culpability

The two principal criteria for assessing culpability are: (1) the violator's knowledge of the Disclosure Rule, and (2) the violators control over the violative condition. Respondent contends that she was unaware of the Disclosure Rule in 2003. (Willie Burrell Affidavit, ¶ 45). Respondents admit that they had sole control over the conditions that led up to the violations for 257 N. Chicago #1; 257 N. Chicago #5; 575 E. Oak and 993 N. Schuyler. (Willie Burrell Affidavit, ¶ 46). Respondents did not willfully violate the TSCA. (Willie Burrell Affidavit, ¶ 47). Moreover, the government has not alleged willful conduct. (See government's complaint). Thus, the penalty should be decreased since all of the alleged violations were unintentional.

K. GROSS RENTS

Respondents' gross rents averaged $651,825.00 for the last tax years 2007, 2008, and 2009. (Willie Burrell Affidavit, ¶ 48). Applying the four percent (4%) rule announced in In re: Chempace Corporation, FIFRA Appeal Nos. 99-2 & 99-3 (May 18, 2000), the maximum penalty should be twenty-six thousand seventy-three dollars ($26,073.00) before applying any mitigating factors which would further decrease the penalty.

Wherefore, Respondents Willie P. Burrell and The Willie P. Burrell Trust hereby tender their Memorandum in Support of their Motion to Dismiss and Motion Opposing Default Judgment, hereby requests all relief just and proper in the premises.

Respectfully submitted,

Derek S. Burrell

3-3-11
Date

CERTIFICATE OF SERVICE

Respondents Willie. P. Burrell and The Willie P. Burrell Trust hereby certify that its Memorandum in Support of their Motion to Dismiss and Opposition to Motion for Default Judgment 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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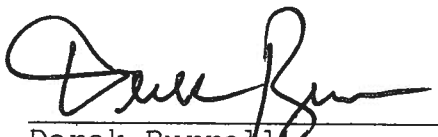

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