U. S. ENVIRONMENTAL PROTECTION AGENCY
REGION 7
11201 RENNER BOULEVARD
LENEXA, KANSAS

BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
THE ASKINS DEVELOPMENT GROUP, LLC,	)	**Docket No.** TSCA-07-2019-0280
	)	
	)	
Respondent.	)	

COMPLAINANT'S REPLY IN SUPPORT OF ITS MOTION FOR DEFAULT ORDER

Respondent's Opposition ("Opp") advances three arguments in support of its attempt to avoid default, none of which have merit.

I. ARGUMENT

A. The Complaint Was Properly Served on Respondent's Registered Agent by Certified Mail with Return Receipt Requested Pursuant to 40 C.F.R. § 22.5(b)(1)(i).

40 C.F.R. § 22.5(b)(1)(i) requires that service of a complaint "shall be made personally, by certified mail with return receipt requested . . ." "Certified Mail" simply means that the U.S. Postal Service ("USPS") "provides the sender with a mailing receipt and electronic verification that an article was delivered or that a delivery attempt was made." **Exh. A**, Screenshot of USPS website.[1] To the extent that the sender seeks proof of such receipt, as did Complainant in this case, it can purchase return receipt service that requires signature by the recipient upon delivery. *Id.* ("Signature proof can be requested at the time of mailing by purchasing Return Receipt Service. Customers have the option of receiving the return receipt by mail or electronically.").

[1] https://faq.usps.com/s/article/What-is-Certified-Mail (last visited on March 24, 2021).

Here, Respondent does not dispute that its designated registered agent received the Complaint on October 4, 2019, and acknowledged delivery by signing and dating the USPS Return Receipt form, and that the Return Receipt form was then provided in hard copy and electronically to Complainant by the USPS. Nonetheless, Respondent contends that because a box labelled "certified mail" on the Return Receipt form ("green card") was unchecked, the Court "can only speculate how the U.S. Postal Service actually delivered to Respondent's Registered Agent the Complaint" such that valid service did not occur. Opp at 5. Respondent further argues that "speculation of the method of delivery by the U.S. Postal Service" does not comply with 40 C.F.R. § 22.5(b)(1)(i) or the requirements of due process and therefore Complainant's Motion should be denied. *Id*.

Respondent's argument, however, is based on a fundamentally incorrect assumption that a check box on the green card dictates the method of USPS delivery. Whether the "certified mail" box was checked on the green card has no bearing on the fact of which method of delivery was used and is unnecessary to determine whether service was effectuated. As set forth more fully below, Complainant has clearly documented that the Complaint was delivered through the USPS by certified mail with return receipt requested, to Respondent's registered agent, and Respondent was therefore properly served, in accordance with 40 C.F.R. § 22.5(b)(1)(i).

i. The Complaint was mailed to Respondent's registered agent by certified mail, with return receipt requested.

As explained in the sworn declaration of Milady Peters of EPA Region 7,[2] Complainant sent the Complaint to Respondent's designated registered agent by certified mail, return receipt requested on September 30, 2019. **Exh. B**, Peters Declaration.

[2] Ms. Peters mailed the Complaint at issue and signed the Certificate of Service for the Complaint.

First, Ms. Peters used the perforated USPS PS Form 3800 ("Certified Mail Receipt") to begin the process of preparing the envelope containing the Complaint. *Id.* at ¶ 6. As shown in the exemplar below, the front of the Certified Mail Receipt consists of two parts: (1) the actual Certified Mail Receipt (right side of the picture below), and (2) the Certified Mail sticker (left side of the picture below).[3]

EXEMPLAR BLANK CERTIFIED MAIL RECEIPT

The sender then removes and affixes the left portion of the Certified Mail Receipt—the Certified Mail Sticker—to the front of the envelope, while retaining the right-hand side portion of the document—the Certified Mail Receipt. In doing so, the sender retains a receipt bearing the same article tracking number as appears on the Certified Mail Sticker that is affixed to the envelope.

An exemplar (blank) envelope with a Certified Mail Sticker is pictured below.

[3] As shown in the exemplar, the Certified Mail Receipt bears the same article number in 3 locations. The first is on the Certified Mail Receipt itself to the right of the perforation. The second is on the Certified Mail sticker to the left of the perforation. The third is a sticker in and of itself ("article number sticker") located on the far left, which can be removed to be affixed to a green card. **Exh. B** at ¶ 6.

Here, Ms. Peters affirmed that the front of the envelope containing the Complaint was conspicuously marked with the Certified Mail Sticker, which bore article number 7014 1200 0000 6118 7303. *Id.* at ¶ 6. After applying the Certified Mail Sticker to the front of the envelope, Ms. Peters retained the Certified Mail Receipt, which contained the identical article tracking number as the Certified Mail Sticker. The Certified Mail Receipt retained by Complainant after mailing the Complaint is pictured below.

CERTIFIED MAIL RECEIPT FOR ASKINS DEVELOPMENT GROUP COMPLAINT

Exh. C, Certified Mail Receipt for Askins Development Group Complaint.[4]

If a sender desires a return receipt, the USPS provides for the use of PS Form 3811 ("Return Receipt" also known as a "green card"). In this case, Ms. Peters obtained a green card and typed in the correct address for Respondent's registered agent. **Exh. B** at ¶ 6. She then transferred the article number sticker from the Certified Mail sticker and affixed it to the green card. *Id*. She then typed the correct address for the undersigned counsel on the reverse side of the green card. *Id*. She then affixed the green card to the back of the envelope, placed the Complaint and all attachments inside the envelope, and sealed it. *Id*. Ms. Peters then delivered the envelope to the EPA Region 7 mailroom to be mailed. *Id*.

That return receipt was requested, and obtained, is evidenced by the fact that the green card was signed by Respondent's registered agent on October 4, 2019 and returned by the USPS to Complainant thereafter.[5]

FRONT OF ASKINS DEVELOPMENT GROUP GREEN CARD SIGNED BY REGISTERED AGENT ON 10/4/2019 AND RETURNED BY USPS TO COMPLAINANT

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

National Registered Agents, Inc.
Registered Agent for
The Askins Development Group, LLC
120 S Central Ave., Ste. 400
Clayton, MO 63105

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X
☒ Agent
☐ Addressee

B. Received by (Printed Name) L. Walters
C. Date of Delivery 10.4.19

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☐ Certified Mail® ☐ Priority Mail Express™
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ Collect on Delivery

4. Restricted Delivery? (Extra Fee) ☐ Yes

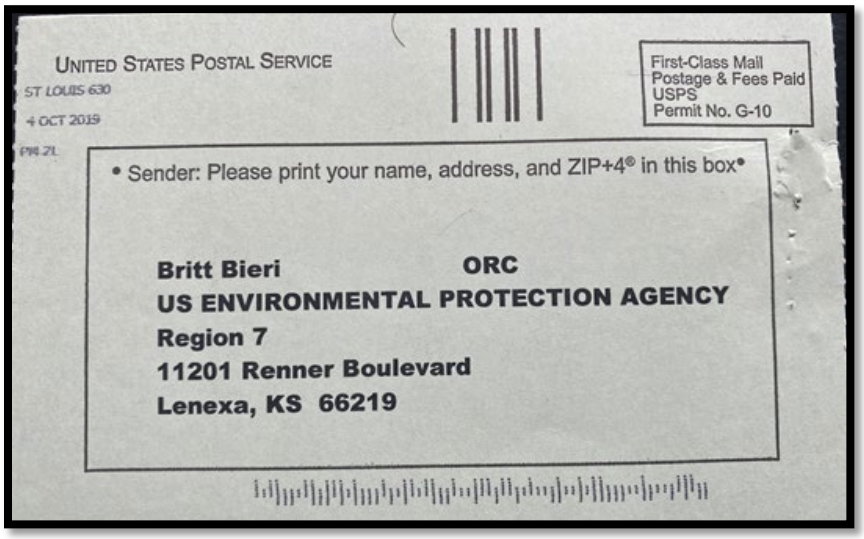
2. Article Number (Transfer from service label) 7014 1200 0000 6118 7303

PS Form 3811, July 2013 Domestic Return Receipt

[4] A black and white copy of the Certified Mail Receipt is attached to Complainant's Proof of Service which was attached to Complainant's Motion for Default as Exh. E.
[5] The physical original Green Card and Certified Mail Receipt are in the possession of the undersigned counsel.

Exh. D, front of green card evidencing delivery to Respondent's registered agent.[6]

REVERSE OF ASKINS DEVELOPMENT GROUP GREEN CARD RETURNED BY THE USPS TO COMPLAINANT



Exh. D, back of green card.

Ms. Peters affirms that the transmittal letter, the front of the envelope, the green card, and the Certified Mail Receipt all bore the same article number 7014 1200 0000 6118 7303. **Exh. B** at ¶ 6. The foregoing demonstrates that Complainant properly mailed the Complaint by certified mail, with return receipt requested (and delivery signature obtained). Respondent's argument that the USPS did not know the Complaint was to be delivered by certified mail, with return receipt requested, is entirely without merit.

Further, beyond that the Return Receipt provided by USPS to Complainant conclusively establishes delivery by certified mail with return receipt requested to Respondent's registered agent, the following all attest to the invalidity of Respondent's argument:

- **Certificate of Service:** The Certificate of Service attached to the Complaint represents that a true and correct copy of the Complaint and attachments were sent

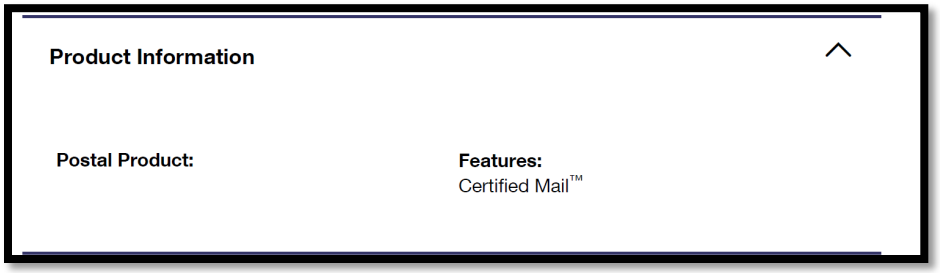
[6] A black and white copy of the front of the green card is attached to Complainant's Proof of Service which was attached to Complainant's Motion for Default as Exh. E.

to Respondent's registered agent "by certified mail, return receipt requested, on September 30, 2019." **Exh. E,** Certificate of Service.

- **Transmittal Letter:** The letter transmitting the Complaint also represents that it was mailed by certified mail, return receipt requested and identifies the same unique article tracking number: 7014 1200 0000 6118 7303.[7]
- **Proof of Service:** The Proof of Service of Complaint and Notice of Opportunity for Hearing filed by undersigned counsel also affirms that on September 30, 2019, the Complaint was filed and sent "by U.S. Postal Service certified mail, with return receipt requested, to Respondent's registered agent." The undersigned counsel attached the Return Receipt/green card to the Proof of Service. *Id*.[8]
- **Peters Declaration.** *See* **Exh. B**.

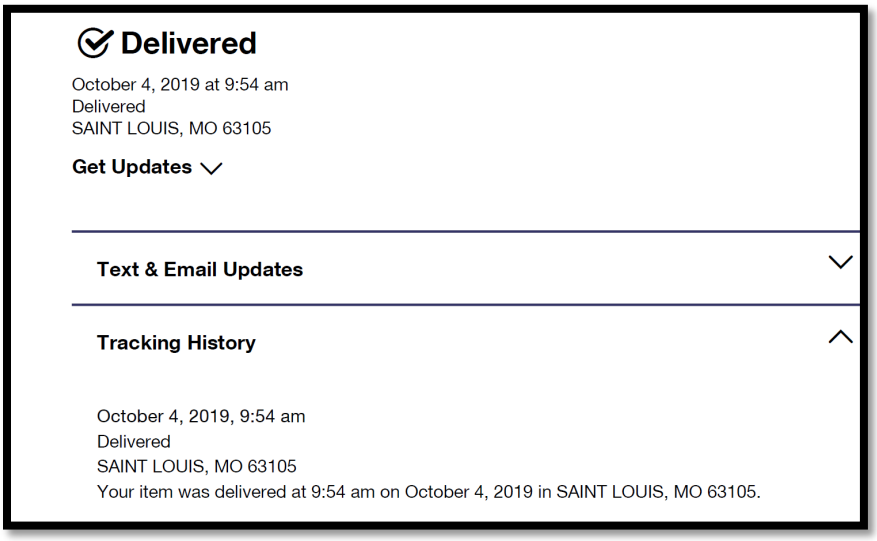
ii. The USPS website confirms the Complaint was delivered to Respondent's registered agent on October 4, 2019.

In addition to the above Return Receipt, the USPS website confirms the Complaint was delivered by the USPS to Respondent's registered agent by certified mail. Specifically, the USPS website "provides electronic verification that an article was delivered . . . at www.usps.com by entering the USPS Tracking® number shown on the mailing receipt." **Exh A**. By entering in the article tracking number for the Complaint package (7014 1200 0000 6118 7303) into www.usps.com, the "Product Information" tab verifies that the postal product used to send the Complaint package was "Certified Mail™."



[7] The Complaint transmittal letter is attached to Complainant's Motion for Default as Exh. D.
[8] The Proof of Service is attached to Complainant's Motion for Default as Exh. E.

See **Exh. F**, copy of website printout from https://www.usps.com (last visited on March 23, 2021). The printout further confirms that the Complaint package was delivered at 9:54 am on October 4, 2019 to Respondent's registered agent.



Id. The date of delivery on the USPS website matches the date of delivery shown on the green card. *See* **Exh. D**.

The confirmation on the USPS website, along with the return receipt / green card and other filings and declarations confirming same, removes any doubt that: (1) on September 30, 2019, the Complaint was sent to Respondent's registered agent by certified mail with return receipt requested; (2) on October 4, 2019, the Complaint was delivered to Respondent's registered agent; (3) Respondent's agent signed the Return Receipt /green card which was subsequently returned to the undersigned counsel; and (4) Respondent was therefore properly served pursuant to 40 C.F.R. § 22.5(b)(1)(i). As such, Respondent's argument is wholly without merit.

iii. EPA case law supports that service was proper.

In the case of *In the Matter of Tower Exterminating, Corp, AKA Tower & Son Exterminating Corp. and Wilson J. Torres Rivera, P.O. Box 1045, Bayamon, Puerto Rico 00960*, the Regional Judicial Officer for EPA Region 2 was faced with the issue of whether to enter a

default order where **the green card was signed by the recipient, <u>but undated</u>**. 2017 WL 11467997 (E.P.A.), Docket No. FIFRA-02-2016-5306 (August 10, 2017) (emphasis added). In finding that service was valid and entering default, the Regional Judicial Officer analyzed 40 C.F.R § 22.5(b) and ruled that the green card constituted properly executed receipt and the fact that there was no date on the green card was "of no significance." *Id*. at *37 (Westlaw citation), 28 (page number of the Initial Decision and Default Order). The Court reasoned that "[n]othing in the Rules specifies that, for service to be effective, the return receipt must be dated." *Id*. (citing *In the Matter of A.B.E.F. Development Corp. and Herminio Cotto Construction, Inc.* Docket No. CWA-02-2010-3465. at 9 (RJO Feb 15. 2012)). The Court further noted that other information demonstrated that Respondent's deadline to answer had already passed, including that the U.S. Postal Service Product and Tracking Information indicated that the Complaint was delivered to Respondent on a date certain. *Id*. The EAB issued an order declining to exercise *sua sponte* review of the case on November 25, 2019.

In the instant matter, the "unchecked box" on the green card is far less consequential than a missing date on the green card. Further, 40 C.F.R. Part 22 does not require the "certified mail" box to be checked on the green card for service to effective. Regardless, in this case, like in *Tower Exterminating*, there is ample evidence described above that the Complaint was delivered via certified mail with return receipt requested, that service was therefore proper, and that the deadline for Respondent to answer has long passed.

iv. Service of the Complaint on Respondent's designated registered agent comports with due process.

Respondent's argument that it was denied due process should similarly be rejected as it is undisputed that the Complaint was delivered to (and received by) Respondent's designated registered agent in accordance with 40 C.F.R. § 22.5(b)(1)(i). Indeed, nowhere in Respondent's

Opposition does Respondent argue that it did not actually receive notice of the Complaint. Nor could it. To the contrary, the Opposition tacitly admits it received the Complaint in stating "Respondent justifiably and mistakenly believed that it did not have to engage in legal counsel regarding this pending Complaint." Opp. at 9.[9]

B. Respondent Has Not Provided Valid Excuse or Justification For Its Failure to File an Answer.

The Environmental Appeals Board considers the "totality of circumstances" when evaluating default orders. *In Re Willie P. Burrell & the Willie P. Burrell Trust*, 15 E.A.D. 679, *7 (EAB 2012) (citing *In re Four Strong Builders, Inc.*, 12 E.A.D. 762, 766 (EAB 2006)). In the *Four Strong Builders* matter, the EAB used a test that considers: (1) whether the party violated a procedural requirement; (2) whether that particular procedural violation constitutes proper grounds for a default order; and (3) whether the party has demonstrated a valid excuse or justification for noncompliance with that procedural requirement. *Id*. In this case, if the Complaint was properly served, which Complainant asserts it has shown, there is no doubt Respondent failed to timely file an answer and is therefore subject to default.

As to the first two prongs, failure to timely file an answer is "a procedural violation that leads to default." *Id*. (a party "may be found in default: after motion, upon failure to file a timely answer to the complaint." 40 C.F.R. § 22.17(a)).

As to the third prong, Respondent strings together three interrelated justifications for its failure to file an answer. First, Respondent claims it was using its purported "limited time and

[9] Further, as admitted by Respondent (Opp at 8), and described in further detail below, Complainant made substantial efforts to contact Respondent regarding the matter before filing the Complaint. *See Katzson Bros., Inc. v. U.S. EPA,* 839 F.2d 1396, 1400 (10th Cir. 1988) ("The mails may be used to effectuate service of process if the notice reasonably conveys the required information and affords a reasonable time for response and appearance . . . EPA's service of the complaint by registered mail with return receipt requested, as well as its substantial efforts to contact Katzson over a sixteen-month period, satisfies these due process concerns.").

resources" to comply with Complainant's alleged resolution proposal. Opp. at 8. Second, Respondent claimed it:

> justifiably and mistakenly believed that it did not have to engage in legal counsel regarding this pending Complaint because it was working under a resolution proposal it believed was the relevant Complaint provided under "*Docket No. TSCA-**07-2018-0261** In the Matter of: The Askins Development Group, LLC, Respondent",* which Complainant served upon Respondent's Registered Agent on or about August 31, 2018. Only after Respondent was served with Complainant's Motion for Default Order under "*Docket No. TSCA-**07-2019-0280** In the Matter of: The Askins Development Group, LLC, Respondent,*" did Respondent realize it was working under a resolution proposal for the wrong complaint.

Id. at 9. Third, Respondent claims the Covid-19 pandemic constitutes a valid excuse or justification for its failure to file an answer. *Id*. at 9.

A timeline of the parties' interactions (or lack thereof) regarding this matter over the past two years undercuts Respondent's claims.

- **August 31, 2018:** Undersigned counsel sent to Respondent's registered agent a letter outlined the alleged violations and inviting Respondent to engage in settlement negotiations. Attached to the letter was an unsigned draft copy of a Complaint bearing the docket number TSCA-07-2018-0261.[10]
- **October 5, 2018:** Respondent's counsel's office sent a letter to the undersigned counsel advising that Respondent's counsel represented Respondent, had received the August 31, 2018 prefiling letter, but was out of town and would address the issues when he returned. **Exh. G**, Respondent's counsel's letter to Complainant

[10] The unsigned draft Complaint bearing the docket number TSCA-07-2018-0261 was never filed, nor purported to be filed. It was subsequently revised to adjust the allegations and the penalty downward based on additional information reviewed; the revised complaint was properly filed and served as TSCA-07-2019-0280.

dated October 5, 2018. The letter concluded by stating "[p]lease refrain from filing the complaint until we have an opportunity to respond." *Id*.[11]

- **November 29, 2018:** The parties participated in a conference call to discuss the violations and a potential resolution of the case. Opp. at 8.
- **November 30, 2018:** The undersigned counsel e-mailed Respondent's counsel memorializing the discussions during the conference call and outlining the information Respondent needed to submit to the EPA by the end of December 2018 to demonstrate compliance, allow the EPA to evaluate Respondent's ability to pay and the effect a penalty would have on Respondent's ability to continue to do business, and otherwise progress toward settlement. *Id*.
- **February-March, 2018:** The undersigned counsel contacted Respondent's counsel on at least four (4) separate occasions in an attempt to obtain financial documents and otherwise to progress toward settlement. *Id*.
- **April 17, 2019:** The undersigned counsel emailed Respondent's attorney regarding the status of the case and advising that EPA may file a complaint. *Id*.
- **September 30, 2019:** Complaint filed after no contact from Respondent or its counsel nor a response to the April 17, 2019 email.

Respondent specifically admits that it has not provided any of the information sought initially in EPA counsel's November 30, 2018 email, nor provided a response to EPA counsel's April 17, 2019 email. *Id*. Respondent further admits that it never made any contact with EPA between April 17, 2019 and February 18, 2021, the date Complainant filed its Motion. *Id*.

[11] It is unclear from Respondent's Opposition whether Respondent asserts that the unsigned draft complaint bearing the docket number TSCA-07-2018-0261 was filed on August 31, 2018. Regardless, the statement contained in the October 5, 2018 letter (asking Complainant to refrain from filing that Complaint) affirms that Respondent's counsel knew the Complaint was not filed. **Exh. G**.

i. Respondent's claim of limited time and resources is not a valid excuse for its failure to file an Answer.

Between November 29, 2018 (the date of the first conference call) and September 30, 2019 (the date the Complaint was filed), Respondent had 305 days to come into compliance by becoming lead certified pursuant to 40 C.F.R. § 745.81(a)(2)(ii), to provide the financial information Complainant needed to evaluate Respondent's ability to pay, or otherwise attempt to resolve the case. The information sought by the Agency was not onerous. A firm can apply for firm certification in minutes at https://www.epa.gov/lead/lead-renovationabatement-firm-certification-application-or-update and by paying $300.[12] **Exh. H at ¶** 2, Mance Declaration. Regulated entities are routinely able to provide the financial information sought within days or weeks of such a request. *Id*. at ¶ 3. Complainant contacted Respondent's counsel on five (5) occasions in February, March, and April 2019. Rather than provide the information sought or explain to Complainant why it was unable to provide the information, Respondent chose to not respond.

Respondent's Opposition baldly claims that limited time and resources hampered its efforts. Respondent has not provided even basic details, much less any evidence or proof, about why or how its time and resources were allegedly limited and neglects to offer any reasonable explanation for its failure to provide simple information for almost a year between November 29, 2018 and the filing of the Complaint. In short, other than participating in a conference call on November 29, 2018, Respondent appears to have literally done nothing whatsoever to advance this case to the present. Incredibly, as of the date of this filing, Respondent is still not firm certified and has not provided any of the financial information sought. *Id*. at ¶ 4.

[12] Respondent was provided this website by email on November 30, 2018. **Exh. H** at ¶ 2.

ii. Respondent's claim that it believed it did not need to hire counsel regarding the pending Complaint is not a valid excuse for its failure to file an Answer.

Respondent's claim that it "justifiably and mistakenly believed that it did not have to engage in legal counsel regarding this pending Complaint because it was working under a resolution proposal it believed was the relevant Complaint provided under '*Docket No. TSCA-**07-2018-0261** In the Matter of: The Askins Development Group, LLC, Respondent*" is not a valid justification for its failure to file an answer to the Complaint.

By arguing it made a mistake in believing it did not need to engage its legal counsel regarding the pending Complaint, Respondent necessarily admits it received the pending Complaint. Respondent's apparent belief it did not need to engage its counsel was unreasonable for multiple reasons, and is not grounds to evade default. First, the transmittal letter clearly stated that the Complaint was filed on September 30, 2019. *See* Exh. H to Complainant's Motion for Default. Second, as discussed in detail in Complainant's Motion, there are several paragraphs in the Complaint conspicuously describing: (1) how Respondent could resolve the proceeding by paying the proposed penalty (Complaint at ¶¶ 94-95); (2) that if Respondent did not pay the proposed penalty, it **must** file a written answer within thirty (30 days) (Complaint at ¶¶ 96-98)[13]; and (3) the consequences of default (Complaint at ¶ 99). Given these explicit instructions, Respondent's apparent belief that its did not need to engage its counsel was unreasonable.[14]

Likewise, Respondent's apparent belief that it was "working under a resolution proposal" under the wrong Complaint is unjustifiable and inexplicable. First, the unsigned draft Complaint

[13] Paragraphs 96-98 of the Complaint also included detailed instructions as to how to file an answer. If it thought it was still somehow "working under a settlement proposal," Paragraphs 100-102 of the Complaint described in detail how Respondent could request an informal settlement conference, but that it did not extend the thirty (30) day answer requirement.

[14] *See In re Rybond, Inc.*, 6 E.A.D. 614, 627 (EAB 1996) ("'The fact that [respondent], who apparently is not a lawyer, chooses to represent himself *** does not excuse respondent from the responsibility of complying with the applicable rules of procedure'") (quoting *In re House Analysis & Assocs. & Fred Powell*, 4 E.A.D. 501, 505 (EAB 1993)).

provided in October 2018 was never filed, nor purported to be filed; Respondent's counsel confirmed his knowledge that the Complaint was not filed in the letter to the undersigned counsel dated October 5, 2018 asking for the Agency to "refrain from filing the complaint until we have an opportunity to respond" 2018. *See* **Exh. G**.

Second, other than just vaguely repeating in its Opposition that it was attempting to comply with, or working under, "a resolution proposal" (Opp at 8, 9, and 10), Respondent does not attempt to explain, much less provide any proof of, what it actually did to advance the negotiations. In actuality, other than participating in the November 29, 2018 conference call, Respondent appears to have done nothing. Doing nothing to advance the case, including admittedly not responding to EPA's repeated contacts and admittedly not providing even basic information, cannot be reconciled with Respondent's claim to have been "working under a resolution proposal."

Respondent and its counsel could not have reasonably thought negotiations would continue indefinitely without any progress being made on their end. This is especially true given the repeated unanswered contacts by the undersigned counsel to Respondent's counsel in February and March 2019, and certainly after Respondent's counsel was informed in April 2019 that the Agency was considering filing a Complaint. The filing of the Complaint on September 30, 2019, and service of the Complaint on October 4, 2019 certainly should have disabused Respondent of any purported notion that settlement discussions were still ongoing. **This is particularly true as until the filing of the Opposition in March 2021, neither Respondent nor its counsel had made any effort to contact the Agency since April 2019.**

Likewise, it is irrelevant whether Respondent believed it was working under a resolution proposal for the wrong Complaint. The unsigned draft Complaint provided in 2018 included similar violations as the filed Complaint. As such, had Respondent provided any of the

information sought by the Agency, or otherwise made any effort to engage Respondent between November 29, 2018 and September 30, 2019, such information and effort would have applied equally to the Complaint that was filed. Instead, Respondent did nothing. Even if the conduct of Respondent or its counsel was not willful, it does not excuse its failures in this case. *See Pyramid*, 11 E.A.D. at 662 ("we have held that lack of willful intent to delay the proceedings, by itself, does not excuse noncompliance with EPA's procedural rules.")

iii. Respondent's claim that the COVID-19 pandemic justifies its failure to file an Answer is without merit.

Respondent's claim that the COVID-19 pandemic constitutes a valid excuse or justification for its failure to file an answer is even more dubious. While Complainant is certainly sympathetic to any hardship experienced by Respondent as a result of the pandemic, Respondent's claim is obviously invalid by virtue of the fact that the prefiling negotiations, the filing of the Complaint, and the due date for the answer, all occurred long before the beginning of the pandemic.

The Complaint was served on Respondent's registered agent on September 30, 2019. It was not until January 31, 2020, 119 days later, that Health and Human Services Secretary Alex M. Azar II declared a public health emergency for the entire United States regarding COVID-19.[15] On March 4, 2020, California Governor Gavin Newsome declared a state of emergency in California regarding COVID-19.[16] This declaration came 152 days after the Complaint was served. On March 13, 2020, Missouri Governor Mike Parsons declared a state of emergency in Missouri regarding COVID-19.[17] This declaration came 161 days after the Complaint was served. Due to

[15] https://www.hhs.gov/about/news/2020/01/31/secretary-azar-declares-public-health-emergency-us-2019-novel-coronavirus.html (last visited on March 19, 2021)
[16] https://www.gov.ca.gov/2020/03/04/governor-newsom-declares-state-of-emergency-to-help-state-prepare-for-broader-spread-of-covid-19/ (last visited on March 19, 2021)
[17] https://governor.mo.gov/press-releases/archive/governor-parson-signs-executive-order-20-02-declaring-state-emergency (last visited on March 19, 2021)

the timing of the service of the Complaint, the pandemic is not a valid excuse or justification for Respondent's failure to respond to EPA's repeated contacts nor file an answer.

iv. Despite claiming to have valid excuses for its failures to provide basic information to Complainant or to file an answer, Respondent appears to have continued to perform home renovations.

Respondent's claims that its time and resources were so limited, or that it was "working under a resolution proposal" such that it could not respond to any of Complainant's requests from November 30, 2018 to the present, nor even contact the Agency after April 2019, nor file an answer, are suspect on their own. However, they are even more so considering the information on its website https://askinsdevelopment.com/. According to the "About Us" section of its website, Respondent "is a community active Real Estate Development firm that specialize in repurposing and developing mainly historical renovations of dilapidated home[s] generally with the urban communities. Unlike most 'rehabbers' we take enormous pride and care in our work." **Exh. I**.[18]

In the "Recently Sold" section of its website, 3 properties are listed that appear to have been renovated by Respondent between 2018 through 2020, the time period Respondent claims its "limited time and resources" prevented it from responding to this action: 4220 Botanical Avenue, St. Louis, Missouri 63110 (**Exh. J**)[19]; 3952 Botanical Avenue, St. Louis, Missouri 63110 (**Exh. K**)[20]; and 2356 Virginia Avenue, St. Louis, Missouri 63110 (**Exh. L**).[21]

The City of St. Louis has a website that allows the public to search property information, including dates and types of permits (including building, electrical, mechanical, plumbing), by

[18] Screenshot from https://askinsdevelopment.com/?page_id=692 (last visited March 24, 2021).
[19] Screenshot of 4220 Botanical Avenue property from https://askinsdevelopment.com/?property=historical-new-construction (last visited on March 24, 2021).
[20] Screenshot of 3952 Botanical Avenue property from https://askinsdevelopment.com/?property=relaxing-apartment-bay-view (last visited on March 24, 2021).
[21] Screenshot of 2356 Virginia Avenue property from https://askinsdevelopment.com/?property=tower-grove-beauty (last visited on March 24, 2021).

property address. https://www.stlouis-mo.gov/data/address-search/index.cfm (last visited on March 24, 2021).

For the 4220 Botanical Avenue property, the City of St. Louis website shows permits issued as early as August 31, 2018 and a completion date as late as June 12, 2019. **Exh. M**.[22] The description for two of the permits is listed as "Orlando Askins" and another is listed as "Orlando." *Id*.

For the 3952 Botanical Avenue property, the City of St. Louis website shows permits issued as early as February 11, 2019 and a completion date as late as September 10, 2020. **Exh. N**.[23] The description for two of the permits is listed as "Orlando." *Id*. The City of St. Louis website lists this property as having been built in 1912, and therefore is likely subject to regulation under the TSCA RRP Rule. *Id*. For this property, the owner is listed as Shaw Holding Group, LLC. *Id*. According to the Missouri Secretary of State, Orlando Askins is the manager of Shaw Holding Group, LLC. **Exh. O**, Affidavit to Rescind Cancellation of Limited Liability Company/Limited Partnership.

For the 2356 Virginia Avenue property, the City of St. Louis website shows permits issued as early as October 8, 2019 and a completion date as late as April 15, 2020. **Exh. P**.[24] The

[22] Screenshots from City of St. Louis website for 4220 Botanical Avenue property from https://www.stlouis-mo.gov/data/address-search/index.cfm?parcelId=49300001700&lat=890072.08274&long=1010985.3892&stnum=4220&CategoryBy=form.start,form.RealEstatePropertyInfor,form.BoundaryGeography,form.TrashMaintenance&firstview=true#address-search (last visited on March 24, 2021).

[23] Screenshots from City of St. Louis website for 3952 Botanical Avenue property from https://www.stlouis-mo.gov/data/address-search/index.cfm?parcelId=49150000800&lat=892155.183795&long=1010741.06674&stnum=3952&CategoryBy=form.start,form.RealEstatePropertyInfor,form.BoundaryGeography,form.TrashMaintenance&firstview=true#address-search (last visited on March 24, 2021).

[24] Screenshots from City of St. Louis website for 2356 Virginia Avenue property from https://www.stlouis-mo.gov/data/address-search/index.cfm?parcelId=14350000200&lat=895912.967696&long=1010155.23955&stnum=2356&CategoryBy=form.start,form.RealEstatePropertyInfor,form.BoundaryGeography,form.TrashMaintenance&firstview=true#address-search (last visited on March 24, 2021).

description for one of the permits is listed as "Orlando Askins" and three are listed as "Orlando." *Id*. The City of St. Louis website lists this property as having been built in 1894, and therefore is likely subject to regulation under the TSCA RRP Rule. *Id*. The owner is again listed as Shaw Holding Group, LLC. *Id*.

During the time period Respondent claims in its Opposition that it had too limited time and resources to dedicate to this case, it appears Respondent was actively involved in renovating properties, at least two of which were likely regulated under TSCA RRP, still without firm certification. Likewise, despite citing the COVID-19 pandemic as justification for its non-responsiveness, it seems the renovations of at least two properties lasted well into the year 2020. That Respondent was apparently able to continue to renovate houses during the same time it claims it was unable to respond to EPA or file an answer, severely undermines the validity of Respondent's argument.

Respondent analyzes in its Opposition a test for "excusable neglect" outlined by the U.S. Supreme Court in *Pioneer Investments*. Opp at 10. Because that case involved how to construe the phrase as used in a bankruptcy rules, it arguably does not apply to this case. Nevertheless, Respondent has not proven excusable to neglect for failure to file answer.

First, Respondent cites the pandemic as not being within the reasonable control of Respondent. Complainant agrees. However, as described above, the pandemic had no impact on Respondent's repeated failures to participate in this case, nor file an answer. The delays in this case were within the reasonable control of Respondent.

Second, the length of delay in this case and the delay's impact on the proceedings is profound. Respondent's answer was due in early November 2020, almost 17 months ago. If Respondent is not found to be in default, the case may not be resolved for another year or more.

Third, regarding prejudice to Complainant, Respondent claims:

> that Complainant would be hard pressed to credibly argue that the delay caused prejudice to it; and as explained above, Respondent was acting in good faith when it was proceeding with its limited time and resources to comply with Complainant's resolution proposal to provide the above referenced matters and documents when it became subjected to COVID-19 emergency extant in those particular states.

Opp at 10. To the contrary, Respondent's inaction has caused substantial prejudice, and will certainly cause more, if Respondent evades default. Respondent's delays have caused Complainant to expend significant time and resources to attempt to engage Respondent, and to prepare the Complaint and Motion for Default. Further, Respondent's delay has diverted Agency resources which could have been dedicated to other efforts to protect human health and the environment. To the extent Respondent is continuing to perform renovations on target housing without firm certification, harm is being caused to the TSCA RRP Program, the environment, and other regulated entities that perform renovations in compliance with applicable regulations.

Lastly, Respondent claims it has acted in good faith. However, Respondent admits it did not respond to the Agency's repeated contacts in February, March, and April 2019. To that end, Respondent literally made no effort to contact the Agency between April 2019 and March 2021 (when the instant Motion was filed). Respondent's actions and inactions belie its bare claim of good faith.

C. Respondent Has Not Presented Any Meritorious Defenses to the Allegations in the Complaint

Respondent claims that it "has arguably meritorious defenses to the allegations in the Complaint, which are likely to have a material effect on the substantive result of this 40 CFR Part 22 case." Opp. at 11. As set forth below, none of Respondent's purported defenses have merit, much less "a strong probability that litigating the defense will produce a favorable result." *Jiffy Builders*, 8 E.A.D. at 322 ("Respondent would need to demonstrate not only that it has a defense

that, if proved, would avoid liability, but also that it would likely prevail on its defense were it litigated."). *See also In re Rybond, Inc.*, 6 E.A.D. 614 (EAB 1996) ("[I]t is Rybond's burden to establish that it clearly has a meritorious defense.").

i. Respondent's defense to Count 1 has no merit.

Count 1 of the Complaint alleges that Respondent failed to obtain firm certification pursuant to 40 C.F.R. § 745.89(a)(1). Complaint at ¶¶ 31-34.

Respondent's alleged defense to Count 1 is that:

> Complainant never inquired with Respondent as to rather [sic] one of its subcontractor laborers at 3429 Missouri Ave. had applied for or obtained certification from the EPA prior to performance of the renovation performance of the renovation of this Property.

Opp. at 11. This defense fails for multiple reasons. 40 C.F.R. § 745.89(a)(1) requires that "firms that perform renovations for compensation must apply to EPA for certification to perform renovations or dust sampling." The Complaint alleges that Respondent is a firm that performed the subject renovation for compensation. Complaint at 20, 25-27. The Complaint does not allege that any other firm performed the subject renovation for compensation. By its plain language, 40. C.F.R. § 745.89(a)(1) applies to all firms that perform renovations for compensation. As such, even if one of Respondent's subcontractors or laborers had applied for firm certification, it would not obviate Respondent's requirement to obtain firm certification.

ii. Respondent's "defenses" to Counts 2-8 have no merit. [25]

Respondent's alleged defenses to Counts 2-8 are stated in the Opposition at 11-14. With regard to Count 2, Respondent's alleged defense is that Complainant is "solely relying on hearsay unwritten statements from an unqualified purported neighbor providing non-authenticated

[25] The Complaint contained 9 Counts. Respondent's Opposition does not assert any alleged defense to Count 9.

extrinsic 'evidence.'" Opp. at 11. Respondent's alleged defenses to Counts 3-8 are largely duplicative and can be summarized as follows:

a. That Complainant is "solely relying" on hearsay photographs[26] and hearsay videos[27] without documenting what time the photographs/videos were taken and without providing authenticity of the photographs/videos.

b. That Complainant is relying on "hearsay samples of dust" [28] from a neighboring property suggesting to depict uncontained "waste" from undefined renovation activities without providing authenticity that such samples of dust generated from Respondent's renovation of the subject property.

Although Respondent calls them defenses, it appears that Respondent simply combed through the Complaint and made a series of premature evidentiary objections. The standard for the admissibility of evidence under the Consolidated Rules of Practice is broad. 40 C.F.R. § 22.22(a)(1) provides that "[t]he Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value ...." As the Board has previously stated, an ALJ "has broad discretion in determining what evidence is properly admissible * * *."[29]

"Hearsay evidence is clearly admissible under the liberal standards for admissibility in the [Consolidated Rules], which are not subject to the stricter Federal Rules of Evidence." *In re William E. Comley, Inc.*, FIFRA Appeal No. 03-01, slip op. at 26-27 (EAB, Jan. 14, 2004), 11 E.A.D. 247; 40 C.F.R. § 22.22(a). *See In re J.V. Peters & Co.*, 7 E.A.D. 77, 104 (EAB 1997) (holding that hearsay evidence is not excluded by the Part 22 rules); *accord In re Great Lakes Div.,*

[26] For Counts 3, 4, 7, and 8.
[27] For Counts 4, 5, and 7.
[28] For Counts 6 and 8.
[29] *In re J.V. Peters & Co.*, 7 E.A.D. 77, 99 (EAB 1997) ("[T]he admission of evidence is a matter particularly within the discretion of the administrative law judge * * *.") (quoting *In re Sandoz*, 2 E.A.D. 324, 332 (CJO 1987)), *aff'd sub nom. Shillman v. United States,* I:97-CV-1355 (N.D. Ohio Jan. 14, 1999), *cert. denied sub nom. J.V. Peters & Co. v. United States*, 69 U.S.L.W. 3269 (Jan. 8, 2001). Absent an abuse of discretion, the Board will give an ALJ's rulings in this regard substantial deference. *J.V. Peters*, 7 E.A.D. at 99.

Nat'l Steel Corp., 5 E.A.D. 355, 368-69 (EAB 1994). In the *Pyramid* case, the EAB noted that "hearsay is not to be excluded unless they are irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value. Significantly, Respondent does not specify what aspects of the challenged documents are irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value." *Pyramid Chemical Co.*, 11 E.A.D. 657, 675 (EAB 2004). "The hearsay rule is not applicable to administrative hearings so long as the evidence upon which a decision is ultimately based is both substantial and has probative value." *Cohen v. Perales*, 412 F.2d 44, 51 (1969).

Respondent's bare hearsay objections do not rise to the level of having "a strong probability that litigating the defense will produce a favorable result." *Jiffy Builders*, 8 E.A.D. at 322. Although Respondent does not explain how photographs, videos, and dust samples could be hearsay, it is clear that hearsay is admissible under the Consolidate Rules. Further, Respondent does not argue that the statements, photographs, videos, or lead dust samples cited in the Complaint are irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value. *Pyramid Chemical Co.*, 11 E.A.D. 657, 675 (EAB 2004).

Complainant did not cite all of its evidence in its Complaint, nor was it required to under 40 C.F.R. § 22.14. ("A concise statement of the factual basis for each violation alleged.") There is no requirement to state in the Complaint the time photographs or videos were taken. In this case, all of Complainant's evidence in support of Respondents' violations and the penalty, including but not limited to the statements, photographs, videos, and samples stated in the Complaint, is authentic,[30] relevant, material, reliable and probative pursuant to 40 C.F.R. § 22.22(a)(1).

[30] *United States v. Mulnelli-Navas*, 111 F.3d 983 (1st Cir. 1997) (authenticity of exhibit is established if enough evidence is introduced to show that the exhibit is what the proponent says it is); See also *Guam v. Ojeda*, 758 F.2d

Complainant was unable to find any case holding that evidentiary objections, raised in response to a Motion for Default, qualifies as a meritorious defense.[31] Respondent cites no authority in support of its position. If that was all that was required, any Respondent could avoid default simply by lodging evidentiary objections. However, there are numerous cases rejecting actual defenses as failed to show strong possibility of likelihood of success on the merits.[32] A classic example of a plausible meritorious defense can be found in the *Corbett* case under the Safe Drinking Water Act. *In the Matter of Mr. Harry Corbett, II*, 1994 WL 1048299 (EPA Region VI) (Initial Decision/Order Denying Second Motion for Default). In that case, the Court deemed meritorious Respondent's denial that it was providing water at the time alleged in the Complaint. *Id*.

Given the liberal standards for admissibility of evidence in administrative hearings, Respondent's generalized evidentiary objections cannot possibly clear the high hurdle of "a strong probability that litigating the defense will produce a favorable result." *Jiffy Builders*, 8 E.A.D. at 322.

403, 408 (9th Cir. 1985) ("the witness identifying the item in a photograph need only establish that the photograph is an accurate portrayal of the item in question.")

[31] Even in the context of Motions in Limine, Courts are loathe to exclude evidence until trial. *See In the Matter of Valimet, Inc.*, 2008 WL 4860831, EPCRA-09-2007-0021 (2008 Order on Complainant's Motion in Limine) citing *Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993). "Unless evidence meets this high standard, evideniary rulings should be deferred until trial so questions of foundation, relevancy, and potential prejudice may be resolved in proper context." *Id.* at 1400-1401.

[32] See e.*g., In re Rocking BS Ranch, Inc.*, CWA Appeal No. 09-04, at 13 (EAB Apr. 21, 2010) (Final Decision and Order) (affirming default finding where respondent lacked an excuse for failing to file a timely answer and did not show strong possibility of likelihood of success on the merits); *In re Four Strong Builders, Inc.*, 12 E.A.D. 762, 769-772 (EAB 2006) (affirming default finding where respondent lacked excuse for repeatedly failing to comply with administrative law judge's orders and failed to show strong possibility of likelihood of success on the merits); *In re B&L Plating, Inc.*, 11 E.A.D. 183, 191-92 (EAB 2003) (affirming default finding where respondent did not demonstrate "good faith" basis for failure to comply with presiding officer's prehearing exchange order); *In re Jiffy Builders, Inc.*, 8 E.A.D. 315, 320-21 (EAB 1999) (same); *In re Rybond, Inc.*, 6 E.A.D. 614, 625-28 (EAB 1996) (same); *In re House Analysis & Assocs.*, 4 E.A.D. 501, 506-08 (EAB 1993) (affirming default finding where respondent failed to comply with ALJ's prehearing exchange order); *Thermal Reduction*, 4 E.A.D. at 130-32 (affirming default finding where respondent failed to respond to motion for default order).

II. CONCLUSION

In conclusion, for the reasons stated in Complainant's Motion for Default and those herein, Respondent has failed to show good cause as to why default should not be entered. Complainant respectfully requests that this Court find Respondent in default for failure to file a timely answer to the Complaint. Furthermore, Complainant also respectfully requests that this Court issue a default order, in the form of an initial decision, finding Respondent liable for the TSCA violations alleged in Counts 1 through 9 of the Complaint and assessing a $42,003 civil penalty against Respondent.

Respectfully submitted,

PETER BIERI

Digitally signed by PETER BIERI
Date: 2021.03.25 14:35:26 -05'00'

Dated:_____

_____

Britt Bieri
Assistant Regional Counsel
U.S. Environmental Protection Agency, Region 7
Attorney for Complainant

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Complainant's Reply in Support of Its Motion for Default Order (with Exhibits A through P) was sent electronically on March 25, 2021 to the Regional Hearing Clerk of the U.S. Environmental Protection Agency, Region 7, at R7_Hearing_Clerk_Filings@epa.gov.

A true and correct copy of the foregoing document was also sent by certified mail, return receipt requested, and by e-mail, on March 25, 2021 to:

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