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.	)	

RESPONDENT SUGGESTIONS IN OPPOSITION TO COMPLAINANT'S MOTION FOR DEFAULT ORDER AND MEMORANDUM OF LAW IN SUPPORT THEREOF

COMES NOW Respondent The Askins Development Group, LLC, a Missouri limited liability company ("Respondent"), by and through the undersigned counsel, and with respect to Complainant, the Director of the Enforcement and Compliance Assurance Division, United States Environmental Protection Agency, Region 7's ("Complainant") Motion for Default Order and Complainant's associated pleadings thereto,[1] Respondent hereby respectfully submits to the Administrator, Respondent's Suggestions in Opposition to Complainant's Motion for Default Order and Respondent's Memorandum of Law in Support thereof. In support of its Suggestions in Opposition, Respondent states as follows:

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[1]

1. Complainant's Motion for Default Order;
2. Memorandum of Points and Authorities in Support of Complainant's Motion for Default Order;
3. Exhibits A through I to Memorandum of Points and Authorities in Support of Complainant's Motion for Default Order; and
4. Proposed Findings of Fact, Conclusions of Law, Default Order, and Initial Decision

I. BACKGROUND

Complainant filed on September 30, 2019 with the Regional Hearing Clerk for the United States Environmental Protection Agency, Region 7 ("Regional Hearing Clerk") its Complaint and Notice of Opportunity for Hearing ("Complaint"). The Complaint alleges that Respondent violated Section 409 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2689, by failing to comply with the regulatory requirements of 40 C.F.R. Part 745, Subpart E, Residential Property Renovation ("Renovation, Repair, and Painting Rule"), which the EPA promulgated pursuant to Sections 402(a), 402(c), 406(b), and 407 of TSCA, 15 U.S.C. §§ 2682(a), 2682(c), 2686(b), and 2687. Specifically, the Complaint alleges that:

(a) Respondent failed to obtain initial EPA firm certification (Count 1); and

(b) Respondent failed to ensure that Respondent's renovation of a property located at 3429 Missouri Avenue in St. Louis, Missouri ("3429 Missouri Ave.") was performed in accordance with the work practice standards contained in 40 C.F.R. §745.85, and therefore in violation of 40 C.F.R. §745.89(d)(3), on eight separate dates in February and March of 2016 (Counts 2, 3, 4, 5, 6, 7, 8, and 9).

Complainant alleges that on October 4, 2019, Respondent was served with the Complaint when purportedly Respondent's Registered Agent in the state of Missouri – National Registered Agents Inc. ("NRAI") – received a file-stamped copy of the Complaint with attachments, by U. S. Postal Service, certified mail, return receipt requested. Complainant further alleges that Respondent failed to provide a written answer to the Complaint with the Regional Hearing Clerk within 30 days after purported service of the Complaint upon Respondent's Registered Agent.

Consequently, Complainant further alleges that its Motion for Default Order that it filed on February 18, 2021 with the Regional Hearing Clerk should be Granted.

II. OVERVIEW OF RESPONDENT'S REPLY TO MOTION FOR DEFAULT ORDER

Respondent respectfully requests that the Regional Judicial/Presiding Officer in Region 7:

(1) Deny Complainant's Motion for Default Order for the reasons more fully stated hereinafter with respect to:

A. Service of Process of the Complaint was not properly effectuated; thus, such inadequacy vitiates the subsequent proceedings in this 40 Code of Federal Regulations (CFR) Part 22 case, including most importantly, the validity of Regional Hearing Clerk to grant Complainant's Motion for Default Order that it filed on February 18, 2021 with the Regional Hearing Clerk;

B. Respondent has valid excuse or justification for its failure to file a timely written answer to the Complaint, which was not intentionally or recklessly designed to impede the judicial process given the challenges the Respondent had within the last 12 months or so in managing its business affairs with its principal place of business in California and this pending Complaint pertaining to events that occurred in Missouri being subjected to COVID-19 emergency extant in those particular states; and

C. Respondent 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.

(2) Grant leave for Respondent to provide a formal written answer to the Complaint within 30 days after Complainant's Motion for Default Order is respectfully Denied; and

(3) Order that this 40 CFR Part 22 case be handled through the alternative dispute resolution process.

III. ARGUMENT IN OPPOSITION TO MOTION FOR DEFAULT ORDER

A. Service of Process of the Complaint was Not Properly Effectuated

The Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits 40 C.F.R. Pt. 22 ("CROP") state that service of process of a complaint shall be made upon either a respondent or a representative authorized to receive service on a respondent's behalf. 40 C.F.R. § 22.5(b)(1)(i). Under CROP, in order for a default judgment to enter in this 40 CFR Part 22 case, service of process on the Respondent must be valid *because defective service vitiates all subsequent proceedings*. See, e.g. *In the Matter of Medzam, Ltd.*, 4 E.A.D. 87, 92-93 (EAB 1992). Since the Complainant chose to attempt service of process of the Complaint upon Respondent's Registered Agent by U. S. Postal Service, then Complainant was required to fully comply with 40 C.F.R. §22.5(b)(1)(i) that specifically states that such service can only be accomplished "*by certified mail with return receipt requested.*" This rule establishes a unique identifier of having a paper trail verification to substantiate that a complaint is properly served by mail upon a respondent. After examining supplemental evidence offered by the Complainant with respect to purported service of process of the Complaint upon Respondent's Registered Agent, the only conclusion that can be made is that service of process was not properly effectuated within 40 CFR §22.05(b)(1)(ii).

Complainant's Exhibit F to Memorandum of Points and Authorities in Support of Complainant's Motion for Default Order purports to be a "green card" that is commonly used when a sender desires to deliver mail through the U.S. Postal Service under a process other than by ordinary mail. When serving the Complaint by mail, Complainant had control over how to instruct the U.S. Postal Service the service type by completing Item #3 of the reverse side of the green card for the type of mail service requested by the sender; that is, certified mail, or registered

mail, or insured mail, or priority mail express, or return receipt for merchandise, or collect on delivery, or a combination of one or more of these types of mail service.

In the instant case, Complainant fail to provide *any* written instructions to the U.S. Postal Service as to how Complainant's Complaint was to be delivered to Respondent's Registered Agent. Nowhere on Complainant's Exhibit F did Complainant instruct the U.S. Postal Service in Item #3 of the reverse side of the green card [that is, no box was checked] that Complainant's Complaint was to be delivered to Respondent's Registered Agent "*by certified mail with return receipt requested.*" We can only speculate how the U.S. Postal Service actually delivered to Respondent's Registered Agent the Complaint. Moreover, speculation of the method of delivery by the U.S. Postal Service of the Complaint is not satisfactory for compliance with 40 C.F.R. §22.5(b)(1)(i) under the CROP, nor is it in compliance with the requirements of due process; see, e.g., *Katzson Bros., Inc. v. U.S. EPA,* 839 F.2d 1396, 1399 (10th Cir. 1988) (CROP and the requirements of due process determine whether EPA's service is proper; for instance, EPA's service of a complaint by registered mail with return receipt requested, as well as, its substantial efforts to contact a respondent over a sixteen-month period, satisfies these due process concerns).

Additionally, in order for a default judgment to enter, service of process on a respondent must be valid. *In re Las Delicias Community*, 14 E.A.D. 382, 387 (EAB 2009); see also *In re Neman*, 5 E.A.D. 450, 454-60 (EAB 1994) (vacating default order where amended complaint was not properly served on defaulting party).

Consequently, because service of the Complaint upon Respondent's Registered Agent was defective, then such inadequacy vitiates the subsequent proceedings in this 40 CFR Part 22 case, including most importantly, the validity of Regional Hearing Clerk to grant Complainant's Motion for Default Order that it filed on February 18, 2021 with the Regional Hearing Clerk.

B. Respondent Has Valid Excuse or Justification for Its Failure to File an Answer

In the event the Regional Hearing Clerk decides that service of process of the Complaint upon Respondent's Registered Agent was not defective, then pursuant to 40 CFR §22.15, Respondent was requested to file a written answer to the Complaint with the Regional Hearing Clerk within 30 days after service of the Complaint; *except, however, Respondent can demonstrate "valid excuse or justification" for its failure to file a timely written answer to the Complaint.* In other words, Respondent's delay in answering the Complaint was not intentionally or recklessly designed to impede the judicial process given the challenges the Respondent had within the last 12 months or so in managing its business affairs with its principal place of business in California and this pending Complaint pertaining to events that occurred in Missouri being subjected to COVID-19 emergency extant in those particular states.

First, failure to file a timely answer to an administrative complaint constitutes a *procedural* violation leading to a possible default judgment. *In re Burrell, TSCA Appeal No. 11-05, 15 E.A.D. 679, 687 (EAB 2012).* Procedure "*is a means to an end, not an end in itself - the 'handmaid rather than the mistress' of justice."* Charles E. Clark, History, Systems and Functions of Pleading, 11 Va. L. Rev. 527, 542 (1925).

Second, a default judgment is generally disfavored as a means of resolving EPA enforcement proceedings. *In re JHNY, Inc*., 12 E.A.D. 372, 384 (EAB 2005) (stating principle); *In re Thermal Reduction Co*., 4 E.A.D. 128, 131 (EAB 1992) (same); see, e.g., *Enron Oil Corp. v. Diakuhara*, 10 F.3d 90, 95-97 (2nd Cir. 1993) (reversing trial court's finding of default where court failed to consider extenuating circumstances that mitigated litigant's procedural errors).

Third, doubts are typically resolved in favor of the defaulting party so that adjudication on the merits, the preferred option, can be pursued. *Thermal Reduction*, 4 E.A.D. at 131 (citing treatise on federal practice and procedure).

In light of the above discussion where a respondent fails to adhere to a procedural requirement, regional hearing clerks have traditionally applied a "*totality of the circumstances*" test to determine whether a default order should be entered. *See: In re JHNY, Inc.,* 12 E.A.D. 372, 384 (EAB 2005)*; In re Rybond, Inc.,* 6 E.A.D. 614, 625 (EAB 1996); *Thermal Reduction,* 4 E.A.D. at 131; *In re Pyramid Chem. Co.,* 11 E.A.D. 657, 661 (EAB 2004); *In re B&L Plating, Inc.,* CAA Appeal No. 02-08, 11 E.A.D. 183, [slip op.] at 12-13 (EAB 2003).

The "totality of the circumstances" is an examination of the procedural omission when evaluating what led to a motion for default order. This test is set forth in, *In re Four Strong Builders, Inc*., 12 E.A.D. 762, 766 (EAB 2006). Under this test, regional hearing clerks have considered:

- whether the party challenging the default order violated a procedural requirement;
- whether that particular procedural violation constitutes proper grounds for a default order; and
- whether the party challenging the default order has demonstrated a valid excuse or justification for noncompliance with that procedural requirement.

Four Strong Builders, 12 E.A.D. at 766-67; see also *In re Pyramid Chem. Co.*, 11 E.A.D. 657, 661 (EAB 2004) ("*When a party commits a procedural violation that can give rise to a default, such as an untimely answer, a significant factor in the good cause determination is whether the purported defaulting party has any valid excuse for the procedural violation.*") (footnote omitted).

In the instant case, Respondent does not dispute the statements contained in Complainant's Memorandum of Points and Authorities in Support of Compliance Motion for Default Order, beginning with the second full paragraph on page 6 and continuing with the concluding paragraph on the top of page 7, which reads as follows:

> *"On November 29, 2018, the EPA, Respondent, and Respondent's attorney participated in a conference call to discuss the violations and a potential resolution of the case. On November 30, 2018, the EPA 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. Respondent's counsel replied to that e-mail on November 30, 2018 thanking EPA's counsel.*
>
> *Despite EPA counsel's repeated attempts to engage Respondent's attorney thereafter (e.g., on February 4 and 13, 2019, and on March 1 and 7, 2019), Respondent failed to provide any of the information sought or initiate any other progress toward settlement. On April 17, 2019, EPA's counsel again emailed Respondent's counsel as to the status of the case and stating that EPA may file a complaint. To date, Respondent has not provided any of the information sought in EPA's counsel's November 30, 2018 email, nor any response to EPA counsel's April 17, 2019 email."*

In fact, the Respondent with the good faith intent to amicably resolve the matters Complainant set forth in its Complaint and Notice of Opportunity for Hearing 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, Respondent proceeding with its limited time and resources to comply with Complainant's resolution proposal to provide the following:

a) For Respondent to become lead certified;

b) For Respondent to assign certified renovators with training from an EPA-accredited training provider to each future TSCA regulated residential renovation project;

c) For Respondent to complete the EPA BUSINESS ORGANIZATION ABILITY TO PAY CLAIM (Financial Data Request Form);

d) For Respondent to complete the EPA INDIVIDUAL ABILITY TO PAY CLAIM (Financial Data Request Form);

e) For Respondent to engage with a certified financial/accounting/tax firm to restructure and amended prior income tax returns and financial statements since it was a disregarded entity for tax return purposes in order to determine if it should file with the taxing authorities and provide to the Complainant either amended IRS Forms 1040, or in the alternative, amended IRS Forms 1120, 1120S, 8832, or 1065 for the past 3 years of tax returns, and up to and including calendar year 2019.

Respondent during calendar year 2019 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 challenged within the last 12 months or so in managing its business affairs with its principal place of business in California and this pending Complaint pertaining to events that occurred in Missouri being subjected to COVID-19 emergency extant in those particular states.

Additionally, Respondent 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.

Furthermore, the United States Supreme Court in *Pioneer Investment Services Co. v. Brunswick Associates, Ltd, Partnership*, 507 U.S. 380, 395 (1992) enumerated four factors to use as guidance as to what constitutes *"valid excuse or justification"* [formally stated in the opinion as "excusable neglect"], which are as follows:

(1) Whether the delay in filing was within the reasonable control of the movant;

(2) The length of the delay and the delay's potential impact on judicial proceedings;

(3) The danger of prejudice to the non-moving party; and

(4) Whether the movant acted in good faith.

COVID-19 was not within the reasonable control of the Respondent which extended the delay for more than a year; the length of the delay Respondent respectfully states should have no potential impact, adverse or otherwise, upon this 40 CFR Part 22; Respondent respectfully states 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.

Consequently, because Respondent demonstrated "valid excuse or justification" for its failure to file a timely written answer to the Complaint, Respondent respectfully request that the Regional Hearing Clerk deny Complainant's Motion for Default Order that it filed on February 18, 2021.

C. Respondent also has arguably Meritorious Defenses to allegations in the Complaint

Respondent 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.

In addition to evaluating the procedural omission, regional hearing clerks have considered the defaulting party's likelihood of success on the merits of the underlying case; e.g., *Rybond*, 6 E.A.D. at 625. A respondent must demonstrate that there is more than the mere possibility of a defense, but rather a "strong probability" that litigating the defense will produce a favorable outcome; *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."). Several (but not all) of the arguably meritorious defenses to the allegations in the Complaint are as follows:

(i) With respect to Count 1 of the Complaint, Complainant never inquired with Respondent as to rather 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;

(ii) With respect to Count 2 of the Complaint, Complainant states in allegation Paragraph 21 of the Complaint that Complainant did not begin its investigation regarding the renovation activities at 3429 Missouri Ave. until "*early March 2016*;" yet, it is attempting to prove Respondent's alleged failure to ensure that the renovations performed at this Property was in accordance with the work practice standards in 40 C.F.R. §745.85 by solely relying on hearsay unwritten statements from an unqualified purported neighbor providing non-authenticated extrinsic "evidence;"

(iii) With respect to Count 3 of the Complaint, Complainant is attempting to prove Respondent's alleged failure to ensure that the renovations performed at 3429 Missouri Ave. was in accordance with the work practice standards in 40 C.F.R. §745.85 by solely relying on hearsay photographs purportedly taken by a City of St. Louis lead inspector on March 3, 2016 suggesting to depict open windows in the work area at this Property without documenting what time these photographs were taken and without providing authenticity of these photographs;

(iv) With respect to Count 4 of the Complaint, Complainant is attempting to prove Respondent's alleged failure to ensure that the renovations performed at 3429 Missouri Ave. was in accordance with the work practice standards in 40 C.F.R. §745.85 by relying on hearsay video and photographs purportedly taken by a unqualified purported neighbor on March 5, 2016 suggesting to depict releases of dust and debris from the work area at this Property without documenting what time this video and these photographs were taken and without providing authenticity of this video and these photographs;

(v) With respect to Count 5 of the Complaint, Complainant is attempting to prove Respondent's alleged failure to ensure that the renovations performed at 3429 Missouri Ave. was in accordance with the work practice standards in 40 C.F.R. §745.85 by solely relying on hearsay video taken by a unqualified purported neighbor on March 6, 2016 suggesting to depict releases of dust and debris from the work area at this Property without documenting what time this video was taken and without providing authenticity of this video;

(vi) With respect to Count 6 of the Complaint, Complainant is attempting to prove Respondent's alleged failure to ensure that the renovations performed at 3429 Missouri Ave. was in accordance with the work practice standards in 40 C.F.R. §745.85 by relying on hearsay samples of dust from a neighboring property purportedly taken by a City of St. Louis lead inspector on March 7, 2016 suggesting to depict uncontained "waste" from undefined renovation activities without providing authenticity that such samples of dust generated from the renovations of Respondent of 3429 Missouri Ave.;

(vii) With respect to Count 7 of the Complaint, Complainant is attempting to prove Respondent's alleged failure to ensure that the renovations performed at 3429 Missouri Ave. was in accordance with the work practice standards in 40 C.F.R. §745.85 by relying on hearsay videos and photographs purportedly taken by a unqualified purported neighbor on March 8, 2016 suggesting to depict releases of dust and debris from the work area of this Property, which also purported migrated to an adjacent property, without documenting what time these videos and photographs were taken and without providing authenticity of these videos and photographs;

(viii) With respect to Count 8 of the Complaint, Complainant is attempting to prove Respondent's alleged failure to ensure that the renovations performed at 3429 Missouri Ave. was in accordance with the work practice standards in 40 C.F.R. §745.85 by relying on hearsay samples of dust from a neighboring property purportedly taken by a City of St. Louis lead inspector on March 9, 2016 suggesting to depict uncontained "waste" from undefined renovation activities without

providing authenticity that such samples of dust generated from the renovations of Respondent of 3429 Missouri Ave., and hearsay photographs purportedly taken by a City of St. Louis lead inspector on March 9, 2016 suggesting to depict open windows in the work area at this Property without documenting what time these photographs were taken and without providing authenticity of these photographs.

In light of the above, Respondent 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. In addition to evaluating the procedural omission, Respondent respectfully request the Regional Hearing Clerk to considered Respondent 's likelihood of success on the merits of the underlying case, and accordingly deny Complainant's Motion for Default Order.

IV. CONCLUSION

For the foregoing reasons, Respondent The Askins Development Group, LLC respectfully request that the Regional Judicial and Presiding Officer in Region 7:

1) Deny Complainant, the Director of the Enforcement and Compliance Assurance Division, United States Environmental Protection Agency, Region 7's Motion for Default Order and Complainant's associated pleadings thereto, because: (a) Service of Process of the Complaint was not properly effectuated; thus, such inadequacy vitiates the subsequent proceedings in this 40 Code of Federal Regulations (CFR) Part 22 case; or in the alternative; (b) Respondent has valid excuse or justification for its failure to file a timely written answer to the Complaint, which was not intentionally or recklessly designed to impede the judicial process, and Respondent 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;

2) Grant leave for Respondent to provide a formal written answer to the Complaint within 30 days after Complainant's Motion for Default Order is respectfully Denied; and

3) Order that this 40 CFR Part 22 case be handled through the alternative dispute resolution process.

Dated: March 15, 2021

KAZANAS LC

By: */s/ Dan J. Kazanas*
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ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that an exact copy of the foregoing pleading was sent electronically on March 15, 2021 to the following:

Michele Drennen,
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