



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5  
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REPLY TO THE ATTENTION OF:

C-14J

**BY HAND DELIVERY**

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

Re: In the Matter of: Willie P. Burrell, the Willie P. Burrell Trust, Dudley B. Burrell, and the  
Dudley B. Burrell Trust, Docket No. TSCA-05-2006-0012

Dear Ms. Toney:

Enclosed please find a file-stamped copy of Complainant's Supplement Pursuant to July 26, 2011 Order on Motions and a Memorandum in Support of Complainant's Supplement along with a second version of the Memorandum in Support of Complainant's Supplement that excludes confidential information in the attachments. Complainant filed the original and one copy of these documents with the Regional Hearing Clerk.

Respectfully Submitted,

Maria Gonzalez  
Associate Regional Counsel

Enclosures

cc w/enclosures:

Willie P. Burrell  
The Willie P. Burrell Trust  
Derek Burrell

cc: w/redacted enclosures

Dudley B. Burrell  
The Dudley B. Burrell Trust

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5

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

COMPLAINANT'S SUPPLEMENT PURSUANT TO JULY 26, 2011 ORDER ON  
MOTIONS

Complainant, the Director of the Land and Chemicals Division, United States Environmental Protection Agency, Region 5, by and through her attorney, herewith submits this Supplement pursuant to the Presiding Officer's July 26, 2011 Order on Motions.

In her July 26, 2011 Order on Motions, the Presiding Officer requested Complainant to supplement the record with respect to the following issues:

1. Whether the Complaint against Mr. Burrell and the Dudley Burrell Trust should be dismissed with prejudice due to invalid service of process and the operation of the statute of limitations.
2. In the event the Complaint against Mr. Burrell and the Dudley Burrell Trust is dismissed with prejudice, what should be the appropriate penalty to be assessed against the remaining Respondents.

With respect to the first issue, Complainant will not pursue Mr. Burrell or the Dudley Burrell Trust; therefore, Complainant will not present additional facts, in the interest of judicial efficiency.

With respect to the second issue, the appropriate penalty should be \$89,430. As discussed in the enclosed Memorandum in Support of Complainant's Supplement, pursuing only Willie P. Burrell and the Willie P. Burrell Trust would not change the penalty calculation absent a determination on ability to pay, and Respondents have not satisfied their burden of production on ability to pay.

A Memorandum in Support of Complainant's Supplement is enclosed.

A Default Order should be issued against Willie P. Burrell and the Willie P. Burrell Trust that includes the following: 1) finding all of the facts in the Complaint admitted; and 2) assessing a civil penalty in the amount of \$ 89,430 as pled in the Complaint and based on the admitted facts.

Respectfully Submitted,



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Maria E. Gonzalez  
Associate Regional Counsel  
U.S. Environmental Protection Agency  
77 West Jackson Blvd.  
Chicago, Illinois 60604  
(312) 886-6630

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5

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

**INFORMATION CLAIMED CONFIDENTIAL IN THE ATTACHMENTS HAS BEEN DELETED AND A COMPLETE COPY OF THE DOCUMENT CONTAINING THE INFORMATION CLAIMED CONFIDENTIAL HAS BEEN FILED WITH THE REGIONAL HEARING CLERK THIS IS THE REDACTED, PUBLIC FILE, VERSION**

MEMORANDUM IN SUPPORT OF COMPLAINANT'S SUPPLEMENT

Complainant, the Director of the Land and Chemicals Division, United States Environmental Protection Agency, Region 5, by and through her attorney, herewith submits this memorandum in support of Complainant's Supplement pursuant to the Presiding Officer's July 26, 2011, Order on Motions.

In her July 26, 2011 Order on Motions, the Presiding Officer requested Complainant to supplement the record with respect to the following issues:

1. Whether the Complaint against Mr. Burrell and the Dudley Burrell Trust should be dismissed with prejudice due to invalid service of process and the operation of the statute of limitations.
2. In the event the Complaint against Mr. Burrell and the Dudley Burrell Trust is dismissed with prejudice, what should be the appropriate penalty to be assessed against the remaining Respondents.

Complainant is supplementing the record as follows.

1. Dismissal of Complaint against Mr. Burrell and the Dudley Burrell Trust

Complainant will not pursue Dudley B. Burrell or the Dudley B. Burrell Trust and will not present additional facts concerning these Respondents, in the interest of judicial efficiency.

2. Penalty Against the Remaining Respondents

As discussed in the attached Declaration of Julie Morris, pursuing only Willie P. Burrell and the Willie P. Burrell Trust would not change the penalty calculation, absent a determination on ability to pay. (See Attachment 1.) As discussed below, Willie P. Burrell and the Willie P. Burrell Trust were lessors on all of the leases cited in the Complaint. Since the type of violations in these leases, the age of children and presence of pregnant women in the target housing, and the economic benefit for the violations remains the same, the gravity-based penalty calculated under the Section 1018 – Disclosure Rule Enforcement Response and Penalty Policy does not change if the Complaint is limited to Willie P. Burrell and the Willie P. Burrell Trust. Under the current record, dropping Dudley B. Burrell and the Dudley B. Burrell Trust would not change the adjustment factor determinations under the Section 1018 – Disclosure Rule Enforcement Response and Penalty Policy. (See Attachment 1.) Limiting the Complaint to Willie P. Burrell and the Willie P. Burrell Trust would not alter the penalty of \$89,430, unless it is demonstrated that Respondents Willie P. Burrell and the Willie P. Burrell Trust have an inability to pay or continue in business. At this time, Respondents have not met their burden on this factor.

*a. Liability of Willie P. Burrell and the Willie P. Burrell Trust for the Entire Penalty*

The Complaint has alleged violations of the Lead Disclosure Rule requirements for lessors. A person does not have own the target housing to be the lessor of that housing under the Lead Disclosure Rule. The Lead Disclosure Rule, at 40 C.F.R. § 745.103, defines a “lessor” to mean any entity that offers target housing for lease, rent, or sublease, including but not limited to individuals, partnerships, corporations, trusts, government agencies, housing agencies, Indian tribes, and nonprofit organizations. As discussed below, Willie P. Burrell, the trustee for and owner of the Willie P. Burrell trust, was a “lessor” on all of the target housing at issue.

As alleged in the Complaint, Willie P. Burrell is the trustee of the Willie P. Burrell Trust; has been the creditor on eviction actions for all of the units cited in the Complaint; was the President of B& D Management Corp. (B&D), an Illinois Corporation involuntarily dissolved on October 1, 2001, whose letterhead and address was referenced in all of the leases at issue; and directly or through an agent offered the units for lease. (See Complaint ¶¶ 26, 27, 32, 33 and 34). As alleged in the Complaint, the Willie P. Burrell Trust or its agent offered the units for lease or entered into the applicable agreements for lease. (See Complaint ¶ 38.) By defaulting, Willie P. Burrell and the Willie P. Burrell Trust have admitted these findings under 40 C.F.R. § 22.17(a), which provides that “[d]efault by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent’s right to contest such factual allegations.” 40 C.F.R. § 22.17(a).

In his March 1, 2011 affidavit, Dudley Burrell, among other things, attested that B&D was a closely held company owned and operated by him and his wife and that it

was the company responsible for leasing apartment units owned by him, his wife and their trusts; that he would purchase, rehabilitate and construct apartment buildings; and that his wife (Willie) ran all of the office and administrative functions of the business. (See Dudley Burrell Aff. ¶¶ 14, 15 and 16.) In her March 2, 1011 Affidavit, Willie P. Burrell attested that she and the Willie P. Burrell Trust are engaged in the business of leasing residential apartment units. (See Willie P. Burrell Aff. ¶¶ 1 and 2.) She has personally brought eviction actions on leases in all of the buildings listed, including actions against the tenants in the leases cited in the Complaint at 257 N. Chicago apartments 1 and 5 and 1975 Erzinger, even though that building is owned by the Dudley B. Burrell Trust. (See Complainant's Memorandum in Support of Motion for Default Order Attachment 18.) In her March 2, 2011, Affidavit, Willie P. Burrell also attested that she is the owner of the Willie P. Burrell Declaration of Trust. (Willie P. Burrell Aff. ¶ 1.) She is the owner and trustee of the Willie P. Burrell Trust.

All of the leasing transactions cited in the Complaint used B&D letterhead. (See Complainant's Memorandum in Support of Motion for Default Order Attachments 4-9.) Willie P. Burrell was the President and registered agent of B&D. (See Complainant's Memorandum in Support of Motion for Default Order Attachment 17). While \$25,850 of the penalty calculated is associated with units at the two properties owned by the Dudley B. Burrell Trust, Willie P. Burrell, the trustee and owner of the Willie P. Burrell trust, leased those properties as well as the properties owned by her and/or the Willie P. Burrell Trust.

As President of B&D, Willie Burrell is jointly and severally liable for the liabilities incurred in entering into the leases at issue. Each of those leases used B&D

documentation and was entered into after B&D was involuntarily dissolved, on October 1, 2001. Under 805 Ill. Comp. Stat. 5/8.65(3)(West 2011), the directors of a corporation that carries on its business after the filing by the Secretary of State of articles of dissolution, otherwise than so far as may be necessary for the winding up thereof, are jointly and severally liable to the creditors of such corporation for all debts and liabilities of the corporation incurred in so carrying on its business. The Illinois courts have interpreted that section to apply to corporate officers. *Chicago Tile Inst. Welfare Plan v. Tile Surfaces, Inc.*, No. 04-C4194, 2004 U.S. Dist. LEXIS 21612, at \*4 n. 1 (N.D. Ill. Oct. 25, 2004); *Chicago Title & Trust Co. v. Brooklyn Bagel Boys, Inc.*, 584 N.E. 2d 142, 146 (Ill. App. 1992); *Cardem, Inc. v. Marketron Int'l, LTD.*, 749 N.E. 2d 477 (Ill. App. 2001) (where the president of a corporation signed a new promissory note during a period of dissolution).

Leasing properties is carrying on business. In *Chicago Title & Trust Co. v. Brooklyn Bagel Boys, Inc.*, the president and secretary-treasurer of a corporation were held personally liable for rents, taxes and other expenses because they accepted a lease renewal after the corporation was dissolved for failure to file its annual report, even though the corporation was later reinstated. *Chicago Title & Trust Co. v. Brooklyn Bagel Boys, Inc.*, 584 N.E. 2d 142, 146 (Ill. App. 1992). In our case, Mrs. Burrell continued to use the B&D documentation for leases entered after that company had dissolved. As president of B&D, she “presumably knew or at a minimum should have known” that it had been dissolved. *Affiliated Capital Corp. v. Buck*, 886 F. Supp. 647, 649 (N.D. Ill. 1995). The leases entered into after the dissolution failed to provide the disclosures required by 40 C.F.R § 745.113. The penalty for failing to include those disclosures in

those leases would thus be a liability “incurred during and as a result of the continuation of business after dissolution.” *See generally, Mid-American Elevator Co. v. Norcon, Inc.*, 679 N.E.2d 387, 391 (Ill. App. 1996). As president of B&D, Willie Burrell is jointly and severally liable for that liability under 805 Ill. Comp. Stat. 5/8.65(3) (West 2011).

*b. Ability to Pay/Continue in Business*

Respondents have not met their burden on ability to pay/continue in business. In their 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 asserted that a fine as proposed by the government, would essentially put Respondents out of business or severely hamper Respondents’ ability to continue in business, that such a fine would not only hurt Respondents, but the employees of her company as well, and that some of the costs may have to be passed onto Respondents tenants, many of which are low-income. That memorandum attached 1040 income tax returns for Willie Burrell and Dudley Burrell as married filing jointly for tax years 2007, 2008, and 2009. Those tax returns have been put in question by Dudley Burrell, however, and the financial analyst does not have adequate information to make an accurate inability to pay determination.

After Respondents’ filing, Complainant arranged for a financial analyst to review the financial information and conduct an ability to pay analysis. (See Attachments 1 and 2). At Complainant’s request, after consultation with the financial analyst, Respondents also submitted an Individual Ability to Pay Claim Financial Data Request Form executed by Willie Pearl Burrell and an IRS Form 4506-T, request for transcripts, also executed by Willie P. Burrell. (Attachments 3 and 4). The Financial Analyst reviewed the Individual

Ability to Pay Claim Financial Data Request Form executed by Willie Pearl Burrell. (See Attachment 2.) The Financial Analyst also sent the Form 4506-T to the IRS, to obtain verification of the information provided; but the IRS has responded that they were unable to provide the requested information to a third party and that the taxpayer should be contacted for specific details. (See Attachments 2 and 5.)

The tax returns included in the pleadings of Respondents Willie P. Burrell and the Willie P. Burrell Trust have been put into question by Dudley Burrell. Those tax returns identified both Willie Burrell and Dudley Burrell as filers and listed the 300 N. Indiana Avenue as their home address. In his March 25, 2011, Affidavit, Dudley Burrell stated that he had never signed any of the tax returns for tax years 2007 through 2009, included in Respondents Willie P. Burrell and the Willie P. Burrell Trust's pleadings, and had not filed tax returns using the 300 N. Indiana address. (See Dudley Burrell Aff. #2 ¶¶ 8 and 11.) Without the transcripts from the IRS, we do not know whether we can rely on the tax returns submitted by Willie P. Burrell and the Willie P. Burrell Trust.

As discussed in the attached declaration of Cynthia Mack-Smeltzer, the financial analyst does not have sufficient information to make an accurate ability to pay determination. (See Attachment 2.) The Individual Ability to Pay Claim Financial Data Request Form executed by Willie Pearl Burrell listed some income, and a bank account balance that exceeded the penalty amount. (See Attachments 2 and 3.) It did not report any real estate aside from the home address, however, and included some expenses that the financial analyst found high and other information that the financial analyst needed clarification on. (See Attachments 2, 3 and 6.) The tax returns included with the pleadings had identified a number of buildings and Complainant has previously provided

a listing of numerous properties owned by Willie P. Burrell and the Willie P. Burrell Trust. (See Memorandum in Support of Respondents' Motion Opposing Motion for Default Judgment and Respondents' Motion to Dismiss Tax Return Attachments and Complainant's Memorandum in Support of Motion for Default Order Attachment 20). Moreover, no tax returns have been provided for the Willie P. Burrell Trust. While she has noted that Respondent Willie P. Burrell has some income and assets as well as expenses, our Financial Analyst needs addition information before she can make an accurate determination on the ability to pay of Respondents Willie P. Burrell and the Willie P. Burrell Trust. (See Attachment 3.)

On May 11, 2011, Complainant's counsel sent Respondent's counsel a letter requesting addition information by May 20, 2011. (Attachment 6). This letter was reviewed by the financial analyst. (See Attachment 3.) A response has not been received. Complainant's counsel attempted to send the request by certified mail on May 27, 2011 (Attachment 7), and sent the request by UPS on July 8, 2011, adding a request to provide information on the deficiency of Form 4506-T and submit a corrected form. (Attachment 8).

While Mrs. Burrell and her trust have made an inability to pay claim in their Memorandum in Support of Respondents' Motion Opposing Motion for Default Judgment and Respondents' Motion to Dismiss, the Individual Ability to Pay Claim Financial Data Request Form Willie P. Burrell executed did not report any real estate aside from her residence (Attachment 3), no tax returns were provided for the Willie P. Burrell Trust, the 1040 tax returns they submitted identifying the filers as Willie Burrell and Dudley Burrell married filing jointly have been put into question by Dudley Burrell,

the IRS did not accept the Form 4506-T request for transcript signed by Mrs. Burrell (Attachments 4 and 5), and Respondents have not provided the additional information requested on behalf of the financial analyst (Attachment 6 and 8). As the beneficiary of a land trust is to be treated as the true owner of the trust property, we also need to know whether Willie P. Burrell is the beneficiary as well as the trustee and owner of the Willie P. Burrell Trust and obtain information on the financial condition of the trust and the beneficiary. See *American National Bank and Trust Company of Chicago*, No. 95-C3750, 1997 U.S. Dist. LEXIS 7350, at \*58 (N.D. Ill. May 19, 1997) (citing *People v. Chicago Title & Trust Co.*, 389 N.E. 2d 540, 545 (Ill. Apr. 3, 1979)). Moreover, since the tax returns included were joint returns and the Burrells are still married, it may be difficult to segregate their assets, including the land trusts. (See generally, *In re Marriage of Jack D. Scoville*, 598 N.E. 2d 1026 (Ill. App. 1992)).

We have some evidence that Respondents Willie P. Burrell and her Trust have a number of assets. Willie P. Burrell and/or her trust are listed as the owner of numerous properties in Illinois. (See Complainant's Memorandum in Support of Motion for Default Order Attachment 20.). During the May 28, 2003 inspection, Willie P. Burrell indicated that she and her husband owned and managed 149 properties with 200 residential units (Complaint ¶ 29). A number of buildings were mentioned in the 2008 and 2009 tax returns included with Memorandum in Support of Respondents' Motion Opposing Motion for Default Judgment and Respondents' Motion to Dismiss submitted by Respondent's Willie P. Burrell and the Willie P. Burrell Trust. In addition, the Individual Ability to Pay Claim Financial Data Request Form executed by Willie Pearl Burrell lists

some income, and a bank account balance that exceeds the penalty amount. (See Attachments 2 and 3.)

In another Lead Disclosure Rule matter where the Respondents defaulted, by failing to file a pre-hearing exchange, Chief Administrative Law Judge Biros summarized the burdens of proof pertaining to the ability to pay penalty factor as follows:

As observed by the EAB, “the burdens of proof and other matters pertaining to this [ability-to-pay] penalty factor is well settled.” *Donald Cutler*, 11 E.A.D. 622, 631, 2004 EPA App. LEXIS29 \*28-30 (EAB 2004). In regard to meeting its burdens on penalty, EPA generally makes out a prima facie case of appropriateness of the “relief sought” by demonstrating that it considered each of the statutory penalty factors and that the recommended penalty is supported by analyses of those factors. *Cutler*, 11 E.A.D. at 631-32, 2004 EPA App. LEXIS at 28-30 (EAB 2004). If ability to pay is contested, a complainant must establish a prima facie case that a proposed penalty is nonetheless ‘appropriate’ by presenting ... ‘some evidence to show that it considered the respondent’s ability to pay a penalty’ ... some *general* financial information regarding the respondent’s financial status [that] can support the inference that the penalty assessment need not be reduced.” *Cutler*, 11 E.A.D. 622, 632, 2004 EPA App. LEXIS 29, at \* 28-30, quoting *New Waterbury Ltd.*, 5 E.A.D. 529, 542 (EAB 1994). “Once this is done, the burden of production shifts to the respondent to rebut the complainant’s evidence with specific information of its own that, ‘despite its sales volume or apparent solvency, it cannot pay any penalty’ ... The complainant bears the ultimate burden of persuasion as to penalty appropriateness, so, if the respondent satisfies its burden of production, that burden shifts back to the complainant again, in this instance to ‘rebut [the] respondent’s contentions through rigorous cross examination or through the introduction of additional information.” *Id.*, quoting *Chempace Corp.*, 9 E.A.D. 119, 133 (EAB 2000).

*In re Mardaph II LLC*, Docket No. TSCA-05-2008-0019, 2010 EPA ALJ LEXIS 13, at \*13 (June 17, 2010).

Here, Respondents Willie P. Burrell and the Willie P. Burrell Trust first raised the ability to pay claim in their Memorandum in Support of Respondents’ Motion Opposing Motion for Default Judgment and Respondents’ Motion to Dismiss. A financial analyst has reviewed the information on ability to pay Respondents provided. (See Attachment 2.)

That information shows a number of assets (See Attachment 3 and the tax returns attached to the Memorandum in Support of Respondents’ Motion Opposing Motion for

Default Judgment and Respondents' Motion to Dismiss.) Complainant has also previously identified other assets. (See Complainant's Memorandum in Support of Motion for Default Order Attachment 20). Complainant has considered Respondents' ability to pay and points to the income, assets and property of Respondents as some financial information regarding the respondent's financial status that can support the inference that the penalty assessment need not be reduced, but Respondent has not satisfied its burden of production.

While the Individual Ability to Pay Claim Financial Data Request Form Willie Burrell executed also identifies numerous expenses, our financial analyst has questions on some of those expenses and other entries, needs information on properties owned by Respondents and the assets of the trust, and cannot rely on the tax returns submitted without verification from the IRS. Complainant has requested additional information from Respondents; and it has not been provided. "Moreover, the Rules of Practice at Section 22.17(c), 40 C.F.R. § 22.17(c), provide that when the Administrative Law Judge finds that default has occurred, the relief proposed in the complaint shall be ordered unless the penalty requested is "clearly inconsistent" with the record of the proceeding or the Act." *In Re Pan American Growers Supply, Inc.*, Docket No. FIFRA-04-2010-3029, 2010 ALJ LEXIS 26, at \*8 (Nov. 30, 2010).

#### CONCLUSION

For the reasons set forth above, Complainant moves this Court for a Default Order against Willie P. Burrell and the Willie P. Burrell Trust that includes the following: 1)

finding all of the facts in the Complaint admitted; and 2) assessing a civil penalty in the amount of \$89,430 as pled in the Complaint and based on the admitted facts.

Respectfully Submitted,



Maria Gonzalez  
Associate Regional Counsel  
U.S. Environmental Protection Agency  
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