BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In Re:	)	
	)	TSCA (11)-5
Willie P. Burrell and	)	
The Willie P. Burrell Trust,	)	
Respondents below,	)	
	)	
Docket No. TSCA-05-2006-0012	)	
	)	
_____	)	

APPEAL BRIEF

Appellants, Willie P. Burrell and The Willie P. Burrell Trust (collectively "Appellants", individually "Burrell" or "Mrs. Burrell" and "Trust", respectively), by and through their Representative, Derek S. Burrell, and pursuant to 40 C.F.R. § 22.30, hereby tender their APPEAL BRIEF, and state:

I. Introduction

Appellants, pursuant to 40 C.F.R. Part 22, appeal from a Default Order and Initial Decision of the Regional Judicial Officer ("RJO"), the Honorable Marcy A. Toney, issued on November 23, 2011, assessing a civil penalty in the amount of $89,430.00 for six (6) violations of Section 1018 of the Residential Lead Based Paint Hazard Reduction Act of 1992, 40 U.S.C. §§ 4851 et. seq.

For the reasons stated below, the RJO erred in concluding that: (1) the Government was entitled to a default order when it waited

4 ½ years to seek such an order; (2) appellants failed to demonstrate good cause for their failure to timely file their answer; (3) appellants would not prevail on any of their defenses to liability and/or mitigating factors; and finally, (4) that appellants are liable for a $89,430.00 civil penalty.

II. ISSUES PRESENTED FOR REVIEW

1. Whether appellants are entitled to relief from an entry of a Default Order when the EPA waited over 4 ½ years to seek a default order.

2. Whether the gross negligence or disappearance of appellants' attorney caused them to file an untimely answer.

3. Whether appellants demonstrated meritorious defenses and mitigating factors to the complaint.

4. Whether the $89,430.00 civil penalty levied against the appellants exceeded their legal liability.

III. Background

This is a proceeding under section 16(a) of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2615(a). This proceeding is governed by the Consolidated Rules of Practice ("CROP"), codified at 40 C.F.R. Part 22. The United States Environmental Protection Agency - Region 5 ("EPA" or "Government") filed a complaint against appellants, as "lessors" of residential apartment units, in Kankakee, Illinois, for six (6) alleged violations of the TSCA "Disclosure Rule".

The Disclosure Rule requires certain "lessors" of "target housing" to provide: the disclosure of the presence of any known

lead-based paint and/or lead based hazards; available records and reports, a lead hazard information pamphlet, and attach specific disclosure and warning language in leases before the lessee is obligated to sign the lease for "target housing." See 40 C.F.R. § 745.107. As a result of these alleged "record-keeping" violations, the Government sought, and the court below ordered, a civil penalty of $89,430.00 to be levied against appellants.

IV. Procedural History

On June 22, 2006 the Government filed a complaint seeking a civil penalty of $89,430.00 against appellants. (Filing #1, Complaint). The EPA filed a Motion for Default Order on December 17, 2010. (Filing #17). Appellants received no prior notice of the default motion. Appellants received the EPA's motion for default on or about January 11, 2010[1]. (Filing # 10; Filing #14). On January 14, 2010, appellants filed their answer.[2] (Filing #22). Appellants then filed their motion and brief opposing a default order on March 1, 2011. (Filing #15).

In an Order on Motions issued July 26, 2011, the RJO held the appellants failed to demonstrate "good cause" and that their various defenses and mitigating factors were not meritorious. (Filing #26). The RJO then issued a Default Order and Initial Decision on November 23, 2011, holding that appellants: (1) did not show good cause; (2) failed to demonstrate meritorious defenses; (3) could not utilize

[1] Appellants fired Mr. Lee by certified mail the same day.
[2] Appellants, in an effort to be hyper-vigilant, drove their answer to Region 5, Chicago, Illinois, approximately sixty (60) miles from appellants' offices.

mitigating factors as these were not valid defenses to the TSCA; and, (4) were jointly and severally liable for a $89,430.00 civil penalty. (Filing #30).

V. FACTUAL BACKGROUND:

Appellant Willie P. Burrell was a co-owner of B & D Management, Inc. ("B & D"), a closely-held six person family owned and operated Afro-American company located at 300 N. Indiana Avenue, Kankakee, Illinois. (Filing #1, Complaint; Filing #14, Willie Burrell Affidavit, ¶¶23-26, 41).[3] B & D became defunct on or about October 1, 2001. (Filing #1, Complaint, ¶33). On May 28, 2003, the Government conducted a surprise site inspection at B & D's office. (Filing #1, Complaint, ¶28). B & D leased, maintained and repaired residential apartment units owned by appellant, Trust and the Dudley Burrell Trust.[4] Willie P. Burrell was a co-owner and the President of B & D. (Filing #1, Complaint ¶33). Dudley Burrell was also a co-owner of B & D. (Filing #21, ¶4).

Appellants did not require the Government to provide a warrant or subpoena to inspect their files, though it was their constitutional right to do so. (See Filing #1, Complaint ¶28-29). Appellants cooperated with the Government's request for leases, contracts, attachments and other documents. (See Filing #1,

[3] B & D's successor is comprised of essentially the same family members. Dudley Burrell is currently married to Willie Burrell, but the parties are engaged in a divorce action (21st Illinois Judicial District, No. 09-D-110). The Dudley Burrell Trust is owned by Dudley Burrell.

[4] The owner of each of the individual properties will be identified, as needed.

Complaint ¶28-29). Appellants allegedly provided additional verbal information to the EPA investigator. (See Filing #1, Government complaint, p.4, ¶28-29).

Appellants' counsel, Edward Lee ("Lee" or "appellants' attorney") was first retained on or about March 1 of 2004, by appellants, to represent them regarding B & D Management, Inc. ("B & D"), B & D Property Management, L.L.C., Willie P. Burrell, and the Willie Burrell Trust. (Filing #14, Willie Burrell Affidavit attached thereto, ¶3).

On March 25, 2005, the EPA advised Lee that it was planning to file a civil administrative complaint against appellants. (Filing #14, Willie Burrell Affidavit, ¶7, Exhibit A). The March 2005 EPA letter requested that appellant provide the EPA with any evidence of her notice compliance with the TSCA, including but not limited to, any evidence of lead based paint warnings to appellant's tenants and/or tests showing no lead based paint actually existed in the apartment units. (Filing #14, Willie Burrell Affidavit, ¶8). The EPA requested specific documents to show that appellant had an "inability to pay" or "continue in business" which are mitigating factors for the proposed civil penalties sought by the EPA. (Filing #14, Willie Burrell Affidavit, ¶9). The EPA also requested that Lee provide it with the requested compliance records, lead paint test results, and mitigation documentation within ten (10) days. (Filing #14, Willie

Burrell Affidavit, ¶10).

Six (6) months later, Lee responded to the EPA by letter dated September 16, 2005. (Filing #14, Willie Burrell Affidavit, ¶11, Exhibit B). At that time, Lee provided the EPA with the Kankakee County Health Department ("KCHD") Certificates of Lead Free Home ("certificates"). (Filing #14, Willie Burrell Affidavit, ¶12). However, Lee failed to request the underlying test results for the certificates from the KCHD. Moreover, Lee never provided the EPA with other evidence of Burrell's compliance with the TSCA, nor did he provide evidence required for Burrell to assert any mitigating factors to the civil penalties sought by the EPA. (Filing #14, Willie Burrell Affidavit, ¶12).

On December 28, 2005, the EPA specifically informed Lee that it believed the certificates were legally inadequate under 40 C.F.R. § 745.103. (Filing #14, Willie Burrell Affidavit, ¶13). Lee was also informed that documentation showing the apartment units were lead-free was required by January 31, 2006.[5] (Filing #14, Willie Burrell Affidavit, ¶14). Lee failed to further respond to the EPA. (Filing #14, Willie P. Burrell Affidavit, ¶14).

On June 22, 2006, the EPA filed a complaint against appellants for alleged violations of the TSCA, requesting a civil penalty of

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

$89,430. (See Filing #1, Complaint and Filing #14, Willie Burrell Affidavit, ¶15). Lee was required to file an answer within thirty (30) days.[6] To date, Lee: never entered an appearance; never filed an answer; never advised Burrell that she was required to file an answer; never informed Burrell a complaint had been filed by the EPA. (Filing #14, Willie Burrell Affidavit, ¶16). Remarkably, on December 17, 2010, almost four and one half (4 1/2) years after the filing of the complaint, the EPA filed a Motion for Default Order. (Filing #7 and #14). Appellants received no prior notice that a Motion for Default was to be filed by the EPA. (Filing #14, Willie Burrell Affidavit, ¶14). [7] The basis for the default judgment was appellants' failure to timely file an answer. Id.

To date, we know of no action appellants' attorney took since his September 16, 2005 letter to the EPA. In summary, appellants' attorney: failed to make initial inquiries regarding appellants' potential liability; never engaged in any pre-trial motions or negotiations; failed to contact the EPA for preliminary settlement discussions; failed to request a hearing; and, failed to file an answer or assert any mitigating factors or defenses.

Prior to September 2010, Lee communicated that all of [appellants'] affairs "were in order" and that he "was on top of it."

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

[7] The CROP does not directly address how to resolve a 4 ½ year lapse from the filing of the Complaint until the answer is filed. Some ALJ's review their own docket for default, while other ALJ's have asked parties to "Show Cause" before entering a default order against a party. Here, the case just sat on the docket.

(Filing #14, Willie Burrell Affidavit, ¶4). Since September 2010, Burrell has attempted to communicate with Lee, by telephone, on numerous occasions. (Filing #14, Willie Burrell Affidavit, ¶4). Burrell also attempted to meet with Lee, personally, at his office. (Filing #14, Willie Burrell Affidavit, ¶4). However, Lee was not and has not been willing to meet with Burrell since September 2010. (Filing #14, Willie Burrell Affidavit, ¶5). On January 11, 2011, appellants sent Lee a certified termination letter. The letter was returned, "UNCLAIMED," on February 4, 2011. (Filing #14, Willie Burrell Affidavit, ¶21). Lee has, in essence, vanished. (Filing #14, Willie Burrell Affidavit, ¶22).

On December 17, 2010, the EPA filed a Motion for Default Order against Appellants. (Filing #7). Appellants received this motion on or about January 11, 2011. Appellants filed their answer, pro se, three days later on January 14, 2011.[8]

VI. Default Judgments

The appeal of a Default Order, which constitutes an Initial Decision, is governed by 40 C.F.R. Part 22 (the "Consolidated Rules of Practice"). The CROP provides as follows under § 22.17 Default:

> (a) Default. A party **may be** found to be in default: after motion, upon failure to file a timely answer to the complaint; upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the

8 See Chie Ping Wu and Ping Auto Center, Docket No. RCRA-3-99-003 (ALJ, November 20, 2000)(Respondent never cured the default by filing an answer, nor explained prior counsel's failure to file an answer. Here, appellants did both.)

> Presiding Officer; or upon failure to appear at a conference or hearing. Default by respondent constitutes, for purposes of the pending preceding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations. Default by complainant constitutes a waiver of complainant's right to proceed on the merits of the action, and shall result in the dismissal of the complaint with prejudice.

First, the plain meaning of the permissive use of the word "may" in defining default, means issuance of a default order is not a matter of right, even when an "unresponsive party is technically in default." Donald L. Lee and Pied Piper Pest Control, Inc., FIFRA 09-0796-92-13, November 9, 1992, 1992 WL 340775 (E.P.A.). Thus, the Presiding Officer need not have entered a default judgment against appellants, in the first instance.

Secondly, the mere passage of time alone should preclude a default order in this case. See Jay Harcrow, Docket No. UST6-91-031-A0-1 (ALJ, September 20, 1995). Third, the default has essentiallly been cured. See Environmental Control Systems, Inc., Docket No. IFFRA-III-432-C (July 13, 1993).

Finally , when determining whether or not a default order should be reversed, the Board has considered a plethora of framework in which to determine whether default is appropriate, such as: (1) willfulness and bad faith, Malter International, EPA Docket No. EPCRA-3-2000-0010, EPCRA 3-2000-0011 (ALJ, August 14, 2001); (Lyon County Landfill, EPA Docket No. 5-CAA-96-011 (ALJ, September 11, 1997); (2) the totality of the circumstances [("fairness or balance

of the equities")], In re Rybond, 6 E.A.D. 614, 616 (EAB 1996); (3) good cause [In re B & L Plating, 11 E.A.D. 182, 191, f.n. 15 (2002)]; and or (4) the action would have had a different outcome, In re Rybond, 6 E.A.D. at 616. Irrespective of the analytical legal framework, appellants are entitled to relief from an order of default.

A. Appellants Did Not Willfully Default or Act In Bad Faith

Discretion is informed by "the type and the extent of any violations and by the degree of actual prejudice to the [party seeking default]." Lyon County Landfill, supra. "A default judgment is appropriate where the party against whom the judgment is sought has engaged in willful violations of court rules, contumacious conduct, or intentional delays, neither evinces bad faith nor continued dilatory conduct." The answer is the first thing appellants were required to do. It was not willful, intentional nor dilatory. Appellants would have filed an answer if they had known and their attorney had not said he was "on top of it". (Filing 14, Willie Burrell Affidavit, ¶4). Certainly, no reasonable party would believe that a tactic of waiting four and one-half (4 ½) years to file an answer would be of benefit. Finally, appellants filed their answer, three (3) days, after receiving the Government's Motion for Default.(See Filing #21).

B. The Government Suffered No Harm or Prejudice

There is no evidence that appellants were attempting to delay the proceedings or any indication of bad faith. However, "where a defendant's failure to plead or defend results from bad faith to the court or the other party, default is appropriate". Moore's Federal Practice, § 55.05[2], p. 54-24 (1991). The Government never alleged any bad faith, prejudice or harm resulting from appellants' failure to timely file their answer, nor does the record reflect that the Government suffered prejudice or harm by appellants' late filing. See, Malter International, supra (no finding of default despite Respondent's delinquent Pre-Hearing Exchange filing); Lyon County Landfill, supra, (Respondent's default was mitigated by the lack of any actual prejudice to the EPA); Feeders Grain and Supply, Inc., Docket No. FIFRA-07-2001-0093 (ALJ, August 27, 2002); In Re: Gard Products, Inc., Docket No. FIFRA-98-005 (ALJ, June 2, 1999). The court refused to grant default orders in these cases because the EPA did not demonstrate that it had suffered prejudice and the record did not denote bad faith or continued dilatory conduct.

Here, we have strained to imagine prejudice to the EPA and we can fathom none. The EPA purportedly was preparing a Motion for Default as early as December 17, 2007. (Filing #4, EPA e-mail). The EPA waited another three (3) plus years to seek an order of default. Clearly, the EPA has suffered no prejudice or harm, especially since it waited over 4 ½ years to file its motion for default order.

Moreover, this is a records-keeping case. The Government already has as attachments to its complaint, all of the documents appellants maintain regarding their obligations under the TSCA.

An order of default is inappropriate under the circumstances of this case. To award the EPA a default order, given the facts and above authorities, would be extremely harsh.

C. Appellants Can Show "Good Cause"

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

a. Board Case Law

The RJO held that the neglect of a party's attorney does not excuse an untimely filing, nor does lack of willfulness affect the determination. In Re: Pyramid Chemical Company, RCRA Appeal No. 03-03 (Sept. 16, 2004). Under Board precedent an attorney stands in the shoes of his or her client, and ultimately, the client takes responsibility for the attorney's failings. Id. citing Jiffy Builders, 8 E.A.D. at 321 (EAB 1999); accord Detroit Plastic, 3 E.A.D. at 106, also citing Link v. Wabash R.R. Co., 370 U.S. 626, 633-34 (1962); c.f., In Re: Gard Products, Inc., Docket No. IFFRA-98-005 (ALJ, June 2, 1999).

However, under the CROP, "[i]t is appropriate to examine whether fairness and a balance of the equities dictate that a default order be set aside." Id. The Board, recognized such equities when it recognized a hypothetical where an excuse for an untimely filing may

exists when a party's attorney is so ill as to be incapacitated and does not have the opportunity to notify the adjudicator, the appropriate hearing clerk, or the client of his or her disabling. In re B & L Plating, 11 E.A.D. 182, 191, f.n. 15 (2002). Prior to and since the B & L Plating footnote, Administrative Law Judges have had to fashion real, practical, and equitable decisions on a case-by-case basis, which would provide relief from a Default Order.

i. The EPA's Proof of Service was Defective

A cloud over the "proof of service" has been the basis to set aside a default order. In re: Marc Mathys d/b/a/ Green Tree Spray Technologies, L.L.C., Docket No. RCRA-03-2005-0191 (ALJ, April 17, 2006). Proof of service of the complaint is governed by CROP. 40 C.F.R. § 22.5(C) (iii) provides, in relevant part:

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

In Mathys, the proof of service appeared to be incomplete as to Respondent Mr. Mathy, individually, and he thought only his purported company, True Green, had been sued. Mr. Mathy was subsequently informed by counsel that he had been sued personally because his company had not yet been formed. However, a cloud over the proof of service made default an improper remedy.

Here, as in Mathy, there is a cloud over the "proof of service". The record reveals that the Government filed its complaint against

appellants on June 22, 2006. Willie P. Burrell signed the certified mail receipt ("green cards") for her and her trust, on July 10, 2006. Purportedly, the Government filed the "proof of service" with the Regional Hearing Clerk ("RHC") on July 17, 2006 and July 18, 2006. Irregularities with the green cards make proof of service on appellants defective.

First, it is the customary practice of the Government to "date stamp" the green cards on the same side as the purported signature. (Filing # 14, Derek Burrell, Affidavit, ¶¶5-6). This was not done. Secondly, a Region 5 employee, LaDawn Whitehead, indicated that she altered (or added to) the green cards by writing "July 17, 2006" and "July 18, 2006" on the front of the green cards. (Filing # 14, Derek Burrell Affidavit, ¶10). Ms. Whitehead indicated that she made the alterations, not contemporaneous with the time that the green cards were purportedly originally stamped, but at a much later time after her employment began with the EPA. (Filing # 14, Derek Burrell Affidavit, ¶¶10-12). The date Ms. Whitehead wrote on the green cards had to be on or after October 10, 2010. (See Filing #5). Moreover, at least one of the four green cards had been altered with whiteout. (Filing # 14, Derek Burrell, Affidavit, ¶11; Filing #2, CPC).

It also appears that the date of delivery was written at a different time and with different ink than the remainder of the document. (See Filing #2, CPC). The handwritten dates purport to match those that are stamped on the non—signature side of the green

cards. (Derek Burrell Affidavit, ¶14). As a result, a cloud exists over the true date the green cards were actually filed by the Government with the RHC. As in Mathy's, the EPA may not obtain a default, when its own duty under the CROP 40 C.F.R. § 22.5(C) (iii), was not met.

The EPA controls the entire mechanism regarding proof of service and the filing of documents. The EPA must avoid, even the appearance of impropriety, to maintain its validity and credibility in the legal process. Since a cloud exists over the green cards and proof of service, the Default Order should be vacated and reversed. (See Filing #2 and 3).

ii. **Mistaken Belief of Law**

In Keller Industries, Inc., Docket No. RCRA-III-249 (ALJ, July 7, 1999), the respondent believed a bankruptcy stay operated to stay the RCRA proceeding. The respondent merely filed a copy of the stay issued by the bankruptcy court. The ALJ ruled it did not operate as a stay to the RCRA proceeding. Nevertheless, the ALJ denied a motion for default and provided the respondent an opportunity to file its answer. Technically, the respondent willfully and deliberately, as a tactic, failed to file its answer, yet no default was entered. The respondent was allowed to file a late answer.

iii. Attorney Negligence Before and After B & L Plating

Prior to B & L Plating, in In Re: Gard Products, Inc., Docket

No. IFFRA-98-005 (ALJ, June 2, 1999), where Respondent's attorney notified respondent that he filed a Motion to Amend the Complaint and a Motion to Withdraw due to a conflict of interest. The Respondent filed his pre-hearing exchange timely, but failed to file an amended answer. Respondent claimed his attorney stated the EPA would file a new complaint and he would answer. The court refused to order a default, even though Respondent's attorney never filed a Motion to Withdraw, was the attorney of record, yet no answer was timely filed.

Thus, an attorney's negligence and a client's reliance on the attorney's word that the answer was or would be filed timely, has been the basis for relief from default in Gard. Surely, appellants' attorneys' gross negligence here, coupled with the attorney's affirmative statement that "he was on top of it", is more than a sufficient basis to provide appellants with relief from an order of default. Moreover, appellants immediately cured their default once they learned no answer had been filed. Like in Gard, there was no prejudice or harm to the Government.

A case post-Pyramid Chemical, supra, is all square with the instant one In re Four Quarters Wholesale, Inc., Docket No. FIFRA-9-2007-0008 (CALJ, March 18, 2008) where the court refused to enter a default where the Respondent's attorney simply "forgot" the deadline. Here, appellants' attorney essentially disappeared, causing appellants to miss their answer deadline. Appellants can only assume Mr. Lee forgot the deadline. Why would he fail to file an answer

on purpose? After obtaining a new attorney, appellants subsequently timely filed their Motion Opposing Default, in accordance with the RJO's orders. Here as in Four Quarters, the equities do not support default when a party intends to defend, and simply misses the deadline. Based on Four Quarters, default is not proper and this matter should be remanded in total.

b. **Federal Case Law**

In the absence of other applicable Board or E.A.D. case law, the Board has looked to federal case law for guidance, *but by no means is the Board bound by them*.[9] See, e.g., In re Euclid of Va., Inc., 13 E.A.D. 616, 657-58 (EAB 2008); In re Lazarus, Inc., 7 E.A.D. 318, 330 n.25 (EAB 1997). For comparison, Federal Rule of Civil Procedure 60(b)(6)[10] provides a default judgment may be set aside when there is any reason not previously considered in the rule that justifies granting relief. A party merits relief under Rule 60(b)(6) if he demonstrates "extraordinary circumstances which prevented or rendered him unable to prosecute [his case]." Martella v. Marine Cooks and Stewards Union, 448 F.2d 729, 730 (9th Cir.1971) (per curiam); see also Pioneer Investment Servs. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 393, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993).

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

[10] Rule 60(b)(6) states: Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for: * * * (6) any other reason that justifies relief.

Rule 60(b) is remedial in nature and thus must be liberally applied. See Falk v. Allen, 739 F.2d 461, 463 (9th Cir.1984) (per curiam).

In essence, the RJO relied solely on Link v. Wabash Railroad Co. where the U.S. Supreme Court held that a client chooses its attorney as its representative in an action and thus cannot avoid the consequences of the acts or omissions of its freely selected agent:

> "Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'"

370 U.S. 626, 633-34. However, the Link court expressly declined to state whether it would have held that the district court abused its discretion if the issue had arisen in the context of a motion under Rule 60(b).[11] Id. at 635-6. Link did not prohibit a finding that gross negligence by a party's counsel constitutes "extraordinary circumstances."[12]

Nevertheless, Link led to a split of authority in the federal circuit courts. The majority, and more reasoned, view has been articulated by the Third, Sixth, and Ninth Circuit Courts. Those authorities have concluded that a party should not be held liable on a default judgment resulting from an attorney's grossly negligent conduct.[13] "Gross negligence" is defined as "neglect so gross that

[11] Link was decided within the context of a failure to prosecute under FRCP 41(b), not FRCP 60(b)(6).
[12] See F.n.9.
[13] The 1st and 4th Circuits concur, albeit in dicta. In re Virginia Info. Sys. Corp., 932 F.2d 338, 342 (4th Cir.1991)[(malfeasance which actively misleads a client might ground a Rule 60(b) motion.")(overruled on other grounds)]; Greenspun v. Bogan, 492 F.2d 375 (1st Cir.1974)(60(b) is a remedial rule which receives a liberal

it is inexcusable." Lal v. California,[14] 610 F.3d 518 (9th Cir. 2010).

In Carter v. Albert Einstein Medical Center, the plaintiff's attorney failed to submit answers to interrogatories, to appear at a pretrial conference, and failed to comply with a discovery order. The court found the attorney's conduct to be "inexcusable." 804 F.2nd 805, 806 (3rd Cir.1986). In Community Dental Services v. Tani, D.D.S., the attorney ignored critical deadlines and court orders, neglected motions, missed hearings and other court appearances, failed to file pleadings or serve them on opposing counsel, and otherwise abandoned his client by failing to commence with his client's defense. 282 F.3d at 1170-71. The Tani court held that such conduct resulted in the client receiving "virtually" no representation at all. Id. at 1171. The court held that the attorney's conduct constituted gross negligence. Id.

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

The conduct of the attorneys in Tani and Lal, is identical to the conduct of appellants' attorney here. Appellants' attorney failed to: make inquiries regarding appellants' liability; engage in any pre-trial motions or negotiations; engage in any preliminary

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construction from courts concerned that cases not be decided in default against parties who are inadvertently absent. See Silas v. Sears, Roebuck & Co., 586 F.2d 382, 385-86 (5th Cir.1978)(dismissal of action to sanction attorney's failure to appear, was error).

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

settlement discussions; timely request a hearing; and, failed to timely file an answer or assert any affirmative defenses or mitigating factors.

Similar to the attorneys in Tani and Lal, appellants' attorney provided them with virtually no legal representation at all. (Willie Burrell Affidavit, ¶¶2-22). Moreover, in Tani and Lal, the attorneys mislead clients to believe its cases were progressing. Tani 282 F.3d at 1170-71; Lal, 610 F.3d at 525. Similarly, appellants' attorney misled them by telling them that their case was "being taken care of" and that he was "on top of everything." (Willie Burrell Affidavit, ¶4).

In the Seventh, Eighth, and presumably the Tenth Circuit Courts, no relief would be available under Rule 60(b)(6), under any circumstances, U.S. v. 7108 West Grand Avenue, Chicago, Illinois, 15 F.3d. 632 (7th Cir. 1994) ("gross negligence" of attorney insufficient); BMFI v. Traditional Baking, Inc., No. 08-1967 [(7th Cir. 2009)(lack of malpractice insurance is not an "exceptional circumstance" under Rule 60(b)(6))]; Heim v. Commissioner, 872 F.2d 245, 248 (8th Cir. 1989) (gross negligence not exceptional circumstances);[15] Pelican Production Corp. v. Marino, 893 F.2d 1143, 1146 (10th Cir.1990).[16]

The Board, by utilizing the "good cause" and "totality of the circumstances" test in determining whether to set aside a Default

[15] The minority view simply states that something, an act, or non-act is not an "exceptional circumstance" ergo, no relief. So attorneys, whom are officers of the court, typically have no malpractice insurance and typically fail to file answers to complaints for 4 1/2 years? The minority view has not articulated what facts create an "exceptional circumstance".

[16] Pelican is easily distinguishable because there, the party failed to offer any explanation for the attorney's failure to file and answer to a motion to dismiss.

Order, along with its holdings in In re: Four Quarters, supra, In re: Gard, supra, and B & L Plating, 11 E.A.D. 182, 191, F.n.15., has rejected the minority view's harsh and inequitable approach. This approach would yield no set of circumstances which would allow a default judgment to be set aside based on either illness, gross or willful conduct, or even the disappearance of a party's attorney. Therefore, the RJO committed plain error by relying solely on Link in denying appellants' motion opposing default. See Four Quarters Wholesale, Inc., supra.

Even, the Second Circuit has granted relief from a default judgment where the attorney failed to appear for depositions and his complaint was dismissed by an unopposed motion. Vindigni v. Meyer, 441 F.2d. 376, 377 (2nd Cir,. 1971). The court found that the attorney had constructively disappeared. Id. The court reversed the default judgment. Id. at 376. Here, appellants' attorney has constructively, "disappeared." (Filing #14, Willie Burrell Aff., ¶20-22).

Relief from a default judgment is proper when it results from the "gross negligence" or "disappearance" of a party's attorney because, here, the attorney was de facto incapacitated and as a result, he failed to notify the appropriate adjudicator, hearing clerk and even appellants, of whatever condition prevented him from filing an answer.[17]

[17] Because Lee refused to communicate with Burrell, she could not ascertain the nature of Lee's malady. Lee's refusal to cooperate with appellants should not be a further barrier to obtaining relief. Lee's interests do not include assisting appellants. Basically, the minority view would require appellants to file a disciplinary complaint against Mr. Lee, file a malpractice claim against him, and seek his assistance with explaining his conduct in this case to the Board.

c. Illinois Law Would Have Offered Appellants Relief

For example, 735 ILCS 5/2 1401, which states: Relief from judgments.

> (a) Relief from final orders and judgments, after 30 days from the entry thereof, may be had upon petition as provided in this Section. Writs of error coram nobis and coram vobis, bills of review and bills in the nature of bills of review are abolished. All relief heretofore obtainable and the grounds for such relief heretofore available, whether by any of the foregoing remedies or otherwise, shall be available in every case, by proceedings hereunder, regardless of the nature of the order or judgment from which relief is sought or of the proceedings in which it was entered. Except as provided in Section 6 of the Illinois Parentage Act of 1984, there shall be no distinction between actions and other proceedings, statutory or otherwise, as to availability of relief, grounds for relief or the relief obtainable.

Public policy favoring relief is obviously robust under Illinois law. See also 735 ILCS 5/2-1301 (relief 30 days from entry of judgment).

d. Sound Public Policy Requires The Board To Adopt The Majority View

Sound public policy dictates that the Board articulates a rule to be applied to all the Regions. The Government contends that appellants are not entitled to relief, solely because Lee's conduct occurred in the 7th Circuit. However, neither Board nor E.A.D. case law are bound by federal decisions, as such decisions merely provide guidance. Moreover, the 7th circuit's approach would only serve to create inconsistent holdings amongst the Regions, much like the state of the law in the federal circuit courts. Such an approach would yield

inconsistent holdings within a Region. (Filing #18, Exhibit A).[18]

The appropriate remedy for grossly negligent conduct would be to sanction appellants' attorney and let the case proceed on the merits. See Carter, 804 F.2d at 807. A malpractice claim against appellants' former attorney is not viable for appellants. Even if it were, a malpractice suit cannot make appellants whole. The interim period between default judgment and possible recovery via malpractice has already created financial difficulties for appellants who maintain that they have an inability to pay. Moreover, appellants will likely lose the opportunity to expand or create new businesses because those resources must now be set aside to contest this matter, a possible civil fine, in addition to the cost of another attorney to pursue a case in malpractice. Furthermore, a malpractice claim would increase the total burden on the courts because now a new case must be fully litigated.

Also, low-income litigants are obviously disadvantaged under the RJO's approach because of the expense involved in retaining new counsel to pursue a malpractice claim; a litigant can of course precede pro se, but the problems with that are obvious.

Undoubtedly, courts require the power to dismiss suits with prejudice in order to police crowded dockets. See Link, 370 U.S. 626, 630-31. Judicial efficiency concerns are better served with trying the original case on the merits through Rule 60(b)(6) relief, versus

[18] For example, Region 4 is responsible for states that sit within the 4th, 6th, and 11th Federal Circuit Courts.

relying on compensation through the perils of a malpractice action.

Arguably of greater concern is the loss of prestige the judicial system suffers when a client's suit is dismissed solely because of the attorney's wrongdoing. As the court in Carter pointed out, a default reflects poorly upon the entire system because attorneys are officers of the court. 804 F.2d at 808. To put it slightly differently, "[when an attorney is grossly negligent . . , the judicial system loses credibility as well as the appearance of fairness, if . . . an innocent party is forced to suffer drastic consequences." Tani, 282 F.3d at 1170. Moreover, there is a judicial preference for a trial on the merits. See e.g., In Re Rybond, at 616. As stated, the judicial system loses prestige when innocent parties are punished solely for the acts of their representative. Likewise, the judicial system loses prestige when the people it governs doubt its ability to adjudicate fairly.

Finally, it is extremely extraordinary and rare for an attorney to fail to provide a client virtually no representation at all, in any context. Allowing an attorney's gross negligence to serve as a basis for good cause does not undercut the requirement that a party file a timely answer.[19] Sound public policy dictates that the gross negligence or disappearance of a party's attorney is good cause providing relief from a default order.

Therefore, appellants request that the Board reverse the RJO's

[19] If appellants were granted relief from a default order, they would still be required to file an answer.

Order of Default, dated November 23, 2010, and allow appellants to proceed with their case on the merits.

VII. The Action Would Have Had A Different Outcome Because Appellants Have Statutory Defenses and Mitigating Factors To The Complaint and Request for Civil Penalty

The Board has also utilized the preponderance of the evidence standard to determine success. See 40 C.F.R. § 22.24(b); see also, In re The Bullen Co's., 9 E.A.D. 620 (EAB 2001). In so doing, the Board may take into consideration "the likelihood that the action would have had a different outcome had there been a hearing." See In Re Rybond, 6 E.A.D. at 625. In assessing the likelihood of a different outcome, we have [also] considered whether the [appellants] would likely prevail on any defenses to liability. Id. at 628. There is a strong probability that the following defenses would be successful, if appellants had their day at a hearing on this matter.

A. Appellants Were Not The "Lessors" of the Oak and Erzinger Properties, as a Matter of Law.

Before liability may be imposed, the Disclosure Rule requires that a party be a "lessor" of target housing. A lessor is defined as:

> "any entity offers target housing for lease, rent, or sublease, including but not limited to individuals, partnerships, corporations, trusts . . ."

40 C.F.R. § 745.103.

In this case, the court below erred as a matter of law, when it summarily concluded "with regard to the penalty. . . " [that

appellants] "were lessors by virtue of their default . . . and are deemed to have admitted all facts alleged in the Complaint and have waived their right to contest the factual allegations contained therein". [(Filing #30, Order of Dismissal and Default Order and Initial Decision, November 23, 2011, pp. 2-5, 14)(hereinafter, "Order")]. However, the RJO failed to consider that if appellants were not "lessors" of 1395 E. Chestnut and 1975 Erzinger (collectively, "the properties" or "the leases"), then as to those two separate counts alleged in the complaint, the appellants demonstrated a "strong probability" of success on this statutory defense, as a matter of law.[20]

1. The Willie P. Burrell Trust Was Not a "Lessor" as a Matter of Law

In shot gun fashion, the EPA originally contended that four (4) parties were lessors of the properties. (Filing #1, Complaint ¶¶32-38). Willie Burrell and her trust *appear* to be lessors. (Filing #1, Complaint and #27, Complainant's Supplement, Attachment 1, ¶17). On the other hand, the EPA contended that Willie P. Burrell, the trustee for and owner of the Willie P. Burrell trust (hereinafter, "trust") was a "lessor" on all of the target housing at issue.' (Id., Filing #1, Complaint, ¶38). These allegations are wholly unsupported by the facts and are clearly inconsistent with the record of this proceeding, the Act and Illinois law.

[20] The civil penalty, if any should be reduced $25,850 if the penalties for Chestnut and Erzinger are vacated.

First, two other parties admitted they were the lessors (Filing #21, ¶17) of the properties and appellants denied the same (Filing #22, ¶17), in their respective answers. Secondly, the undisputed facts are: (1) the trust did not own the properties [(Filing #1, Complaint ¶¶20-21)(Filing #21, W. Burrell Aff. #2, ¶¶7 and 12)(Dudley Burrell Affidavit #3, ¶¶5-6)]; (2) Willie Burrell never offered nor executed the leases for the properties, in her capacity as trustee of her trust. [Filing #21; Filing #22, W. Burrell Affidavit #2, ¶15, Dudley Burrell Affidavit #3, ¶¶4 and 7)]; and, (3) Willie Burrell never entered into any oral agreement, on behalf of her trust, to offer any leases, yet alone leases for the properties. The record is devoid of any cited legal precedent or facts which would make the Willie Burrell trust a "lessor" of the properties, as a matter of law.

2. Willie P. Burrell, Individually, Was Not a "Lessor," as a Matter of Law

B & D Management Corporation (hereinafter, "B & D") was the leasing agent responsible for leasing the properties. (Filing #1, Complaint, ¶32). The leasing documents at issue were on B & D letterhead. Id. However, B & D became defunct on or about October 1, 2001. Willie Burrell was B & D's President (Filing #1, Complaint ¶33).

While corporate officers may be liable for business carried on after dissolution, in their individual capacities, liability may

attach only to the corporate officer that committed the act which purported to "carry on the business" of the defunct corporation. Chicago Tile Inst. Welfare Plan v. Tile Surfaces No. 04-94, 2004 U.S.Dist. LEXIS 21612, at *4 n.1 (N.D. Ill. October 25, 2004); Chicago Title & Trust Co. v. Brooklyn Bagel Boys, Inc., 584 N. E. 2d 142, 146 (Ill.App.1992), Cardem, Inc. Marketron Int'l, LTD, 749 N.E. 2d 477 (Ill.App.2001).

Here, prior to, during, and after the offer and execution of the leases, Dudley Burrell and Willie Burrell (individual co-respondents below) began referring to certain properties as his or her properties, so to speak. [21] (Filing #29, Zinia Burrell Affidavit, ¶7). Dudley Burrell (hereinafter, "Mr. Burrell") began demanding to screen potential tenants for properties which were "his". (Id. at ¶8). At the time in question, Mr. Burrell considered the properties to be "his". (Id. at ¶9). The office assistant testified that Mr. Burrell offered the leases. [22] (Id. at ¶10). Mr. Burrell directed the office assistant to use standard B & D letterhead and to place those documents into "his" company files. (Id. at ¶11). The Assistant Office Manager does not recall receiving any instructions regarding the properties from Mrs. Burrell. (Id. at 12). Mrs. Burrell did not direct anyone to offer or execute the leases

[21] Mr. and Mrs. Burrell were estranged at the time of the EPA's initial enforcement inspection. They physically separated on or about December 31, 2003 and are currently in an Illinois divorce action, The 21st Judicial District, Circuit Court, Iroquois County, Illinois, Cause No: 09-D-110.

[22] Zinia Burrell is the individual parties' daughter-in-law.

for the properties. (Filing #29, Willie Burrell Affidavit #2, ¶2).

i. 1975 Erzinger

Erzinger was and is legally owned by the Dudley Burrell trust. [(Filing #1, Complaint, ¶21)(Filing #29, Willie Burrell Affidavit #2, ¶2; Dudley Burrell Affidavit #3, ¶5). Dudley Burrell and his respective trust had sole control of the conditions leading up to alleged violations for Erzinger. (Filing #13, Respondents' Motion to Dismiss, Dudley Burrell Affidavit, ¶13)(Filing #29, Dudley Burrell Affidavit #3, ¶11). Dudley Burrell also testified that he was responsible to "purchase, rehabilitate and construct apartment buildings; and that his wife ran all of the office and administrative functions of the business." (Filing #27, Dudley Burrell Affidavit #1, ¶¶14-16). Yet, Dudley Burrell executed the lease. [(Filing #1, Complaint, Attachment 8)(Filing #29, Willie Burrell Affidavit #2, ¶5 and Dudley Burrell Affidavit #3, ¶¶2-7, 9-14)].

Willie Burrell did not enter into nor offer a lease on Erzinger. (Filing #27; Filing #29, Willie Burrell #2, ¶5 and Dudley Burrell Affidavit #3, ¶¶2-7 and 9-14). Dudley Burrell offered and entered into the lease for Erzinger using B & D letterhead. (Filing #16, Attachment 8)(Filing #29, Affidavit of Willie Burrell #2, ¶5). (Dudley Burrell Affidavit #3, ¶¶7 and 10).

Under Illinois law, Dudley Burrell and his trust are solely liable for the Erzinger leases. For example, the director in Chicago Title & Trust was held liable, individually, because he executed a

promissory note at the time when he knew the company was defunct. 584 N. E. 2d at 146. Here, Willie Burrell, nor her trust offered nor executed any of the leasing documents for Erzinger. (Filing #29, Affidavit of Willie Burrell #2, ¶5; Affidavit of Dudley Burrell #3, ¶¶7 and 13).

In Cardem, the director took the affirmative step to sign, purportedly as president of a corporation that had been dissolved three years earlier was likewise, held liable, because he executed the note. 749 N.E. 2d at 479. Here, Dudley Burrell, not Willie Burrell, took the affirmative step of offering and executing the Erzinger lease, on behalf of B & D after it had been dissolved. (Filing #29, Willie Burrell Affidavit #2, ¶¶5, 6, 12, and 14; Affidavit of Dudley Burrell #3, ¶¶7-11). That affirmative act was the solely performed by Dudley Burrell. (Filing #29, Affidavit of Dudley Burrell #3, ¶¶2-9). Moreover, Mr. Burrell was unaware that B & D was defunct. (Filing #29, Affidavit of Dudley Burrell #3). It is unclear if Dudley Burrell, individually, could be held liable under Illinois law, yet alone Mrs. Burrell. The Government has cited no legal authority that would cause the purported liability from Dudley Burrell and/or his trust to be imputed to Willie Burrell, in her individual capacity, for the Erzinger lease.

ii. 1393 E. Chestnut

Similarly, Willie Burrell, in her individual capacity, is not responsible for any liability resulting from the lease at Chestnut.

The property was legally owned and titled to Dudley Burrell and leased individually, and solely by Dudley Burrell. (Willie Burrell Affidavit #2 and ¶7). Co-Respondent below, Dudley Burrell, and his respective trust had sole control of the conditions leading up to alleged violations for Chestnut (Filing #29, Dudley Burrell Affidavit, ¶13)(Filing #29, Willie Burrell Affidavit, ¶13-17).

Neither Willie Burrell nor Dudley Burrell entered into an oral or written agreement for Willie Burrell or her Trust to offer the Chestnut lease. (Willie Burrell Affidavit #2 and ¶6)(Affidavit of Dudley Burrell #3, ¶¶2-3, 7, 9-11). In fact, Willie Burrell never executed any of the corporate form lease documents for Chestnut. (Filing #1, Complaint, Attachments 4 and 8)(Filing #29, Willie Burrell Affidavit #2, ¶5).

More importantly, Zinia Burrell, the Assistant Office Manager testified that she was directed by Mr. Burrell to execute the lease. (Filing #29, Zinia Burrell Affidavit, ¶¶1-12). Mr. Burrell admits that he directed Zinia Burrell to use the B & D forms and that he offered and executed the Chestnut lease, unaware that B & D had become defunct. (Filing #29, Dudley Burrell Affidavit, #3, ¶¶2, 7-8).

Other than mere suppositional musings by the Government, the record is completely devoid of any evidence that Willie Burrell, or her trust, made an affirmative act to offer or execute the leases. The evidence clearly demonstrates that Dudley Burrell offered and executed the leases, on his own, without Mrs. Burrell's consent or

approval. In both cases, Mr. Burrell used defunct B & D letterhead to offer and execute the leases. At best, Mr. Burrell was liable individually, jointly and severally, with B & D, as one of its owner-officers. Since Mrs. Burrell did not carry on the business of B & D with respect to the leases, Mr. Burrell, nor his trusts' liability may not be imputed to Mrs. Burrell, as a "lessor". The $89,430 civil penalty assessed against appellants exceeds their legal liability. The $25,850 levied against appellants for these properties must be reversed and vacated, as a matter of law.

B. Ability to Pay/ Continue in Business

Pursuant to 40 C.F.R. § 22.24, the Region bears the initial burden of proof (i.e., the burden of going forward) that the proposed penalty is appropriate, after which the burden of going forward shifts to the Respondents to rebut the Region's prima facie case. In re New Waterbury, Ltd., 5 E.A.D. 529, 538-39 (EAB 1994). The ultimate burden of persuasion, however, rests with the Region as the proponent of the penalty. Id. at 538. The EPA proposes a fine of $89,430. (Filing #1, Complaint).

1. Mrs. Burrell's Individual Ability to Pay

Relying on the EPA's financial analyst, the RJO merely rubber-stamped her conclusions. Willie Burrell cannot prove a negative. Individually, she owns no real property. She does not own the house she lives in or the car she drives. She does own an engagement ring, wedding ring, a few watches, a fur coat, furniture

and some clothes. She earns a salary of approximately $58,000 per year. She does pay her utilities, gas, clothes, entertainment, and food from her salary. The EPA certainly tendered no evidence that Mrs. Burrell owned or owns any real or personal property of significance and we invite the Board to review the record for such evidence. Therefore, the penalty against Willie Burrell, individually, should be zero ($0) dollars as she has an inability to pay the proposed penalty or alternative penalties proposed by appellants herein.

2. The Willie Burrell Trust's Ability to Pay

First, appellants object to the Government's practice of "cherry-picking" files. For purposes of this argument only, appellants concede that all of its leases, on May 28, 2003, failed to include the necessary lead-based paint warnings, yet the Government alleged only six (6) leases were in violation of the TSCA. Clearly, there were more than 50 such leases. Given the average of about 12,000 per lease, that would be a $600,000 penalty instead of the $89,430 carefully selected leases utilized in the complaint.

In essence, the EPA acts as prosecutor and judge and because its discretionary actions attempt to circumvent the legislative intent of providing financial relief to a party that has an inability to pay as well as the courts' ability to review the record. The policy takes into account that the number of the total penalized leases could outstrip a company's ability to pay. The EPA has essentially

circumvented this defense, by purposefully failing to allege all the violations found.

Secondly, even if the fine was $89,430 as proposed by the Government or $63,580, it would still essentially put appellants out of business or severely hamper appellants' ability to continue in business. (Willie Burrell Affidavit, ¶27). The proposed penalty is over twenty-four (24%) percent of appellants' gross income. The RJO failed to realize that Dudley Burrell is married to Mrs. Burrell and Mr. Burrell is a part owner of Mrs. Burrell's Trust, thus Mr. Burrell is legally entitled to one half (1/2) of the reported gross receipts from the trust, as one of its principal owners. It would be grossly inequitable to base the Trust's liability on its total income, when Mr. Burrell is entitled to half of the real property, proceeds and gross income and those individual parties are engaged in a divorce action.

The effective penalty percentage rate would be near 25%. It is hard to imagine how the Trust could continue in business after a penalty of 25% of its gross income. Moreover, such a fine would not only financially cripple appellants, but the employees of the successor company as well. (Willie Burrell Affidavit, ¶28). Finally, some of the costs may have to be passed onto tenants, many of which are low-income. (Willie Burrell Affidavit, ¶29).

B. Selective Enforcement

It is uncontroverted from the record that appellants asserted that they were singled out by the EPA. (Filing #14, Willie Burrell Affidavit, ¶23). Several apartment rental companies in the Kankakee, Illinois area: (1) Crestview Village Apartments; (2) East Court Village; (3) Hidden Glenn Apartments; (4) Preferred Property Group, L.L.C.; (5) Property Management, Ltd.; (6) Sherwood Forest Apartments; and (7) Stafford Apartments. (Filing #14, ¶24).

Appellants also contended that the Government has selected the [Appellants] for enforcement action "invidiously or in bad faith, *i.e.*, based upon the impermissible consideration of their race as Afro-Americans and their well-known political views." (Filing #14, ¶25). The Government has a desire to prevent the exercise of [Appellants'] constitutional rights, while other similarly situated violators named above were left untouched. (Filing #14, ¶26).

The RJO erred in concluding appellants would not prevail on this defense because the ruling was premature. The Government has all of the records, documents and interviews, in its possession which are necessary to prove appellants' defense. Under the CROP, appellants are not entitled to discovery from the Government prior to a pre-hearing exchange. See 40 C.F.R. § 22.19. Specifically regarding selective enforcement, once a party puts that defense in issue, it is the Government which has control over the relevant records that must be produced to appellants. Appellants can think of no other

analogous federal procedure they could have utilized to obtain the discovery to demonstrate this defense, post-motion for default.

As a result of the RJO finding appellants in default, prematurely, at least to this issue, the appellants were denied their right to prove this defense. As to this issue, the Board should remand this issue to the RJO with instructions to allow appellants discovery on their selective enforcement defense. See generally, In re: TIFA, Ltd., I.F.& R. Docket No. II 547-C (Oct. 22, 1998).

D. Laches

The EPA waited over 4 and ½ years to prosecute their claim. Moreover, the Appellants are prejudiced because witnesses and documents that could have established proof of various defenses can no longer be located or established. For example, it is impossible to re-test the units to confirm that they were lead-free. Confirming the units are lead free would have provided appellants with mitigating defenses to any alleged liability.

E. Mitigating Factors

The RJO erred by refusing to consider any mitigating factors as defenses to the complaint. Under unusual circumstances there may be other factors not specified herein that must be considered to reach a just resolution. See 15 U.S.C. § 2615(a)(2)(B).

1. Size of Business

Appellants are in essence a small closely held family owned African-American business. (Filing #29, Willie Burrell Affidavit,

¶41). The appellants' business is eligible for the elimination of the entire proposed penalty since the record demonstrates that appellants have made good-faith effort to immediately comply with the disclosure rules of the TSCA; the Governments' allegations, if true, would mean this is appellants' first offense; appellants immediately, upon notice of violating the TSCA, came into full compliance with the TSCA in 2003; finally, the alleged violations do not constitute a significant health or environmental threat, because the units were, in fact, lead-free. (Filing #29, Willie Burrell Affidavit, ¶42, Exhibit E). The Default Order must be reversed and remanded, with instructions for the RJO to consider the size of appellant Mrs. Burrell and appellant Trust regarding their ability to pay.

2. **No Known Risk of Exposure**

As the facts must be construed in favor of the defaulting party, it is uncontroverted from the record that appellants submitted their Lead-Free Certificate of Home, the Illinois license of the inspector who actually performed the tests, and the underlying test results for all of the properties at issue here. (Filing #14, Willie Burrell Affidavit ¶32, Exhibit E).

The RJO erred because the Order does not detail, what if any evidence the RJO utilized in coming to the conclusion that the units were not lead free. Even if the RJO relied on some evidence, that evidence led her to the wrong conclusion. Clearly, the EPA has no

evidence whatsoever, that lead existed in the appellants' units. Moreover, appellants have demonstrated a high probability of success that they can demonstrate that there was no known risk of exposure.

3. Attitude

As the facts must be construed in favor of the defaulting party, it is uncontroverted from the record that the appellants were willing to cooperate with the Governments' enforcement action of the TCSA. (Willie Burrell Affidavit, ¶33). Any lack of cooperation thus far, has been the result of their prior attorney's gross negligence. (Willie P. Burrell Affidavit, ¶34). Appellants requested a settlement conference with the Government. (Willie Burrell Affidavit, ¶35, Exhibit D).

The RJO erred because the Default Order does not detail, what if any evidence the RJO utilized in coming to the conclusion that appellants had not demonstrated the proper "attitude". Even if the RJO relied on some evidence, that evidence led her to the wrong conclusion. Clearly, the EPA has no evidence whatsoever, that appellants had a bad attitude regarding this enforcement action. Moreover, appellants have demonstrated a high probability of success that they can demonstrate that their attitude was one of good-faith and cooperation.

4. Cooperation

Appellants did not require the Government to provide a warrant or subpoena to inspect their files, though it was their

constitutional right to do so. (See Filing #1, Complaint ¶28-29). Appellants cooperated with the Government's request for leases, contracts, attachments and other documents. (See Filing #1, Complaint ¶28-29). Appellants allegedly provided additional verbal information to the EPA investigator. (See Filing #1, Government complaint, p.4, ¶28-29). Appellants agreed to a site inspection without being compelled to do so. (Willie Burrell Affidavit, ¶36). The only reason appellants failed to further cooperate was a result of their grossly negligent attorney who failed to provide the Government with information that would have shown appellants' belief that the units were lead free. (Willie Burrell Affidavit, ¶37). Appellants were willing to cooperate as they believed they were in compliance with the TSCA. (Willie Burrell Affidavit, ¶38). Thus, the proposed penalty should be reduced by 10%. There are no other facts on the record, thus appellants would prevail, by a preponderance of the evidence, on this mitigating factor at a hearing.

5. Compliance

As the facts must be construed in favor of the defaulting party, it is uncontroverted from the record that "[appellants] came into compliance with the TSCA after realizing that strict written compliance with the TSCA was required." (Willie Burrell Affidavit, ¶39). Thus, the proposed penalty should have been reduced by 10%.

6. Early Settlement

As the facts must be construed in favor of the defaulting party, it is uncontroverted from the record that appellants were willing to settle this matter prior to any pre-hearing exchange document. (Willie Burrell Affidavit, ¶40). Thus, the proposed penalty should have been reduced by 10%.

7. GROSS RENTS

As the facts must be construed in favor of the defaulting party, it is uncontroverted from the record that the appellant Mrs. Burrell makes around $XXX,000 per year, gross. She owns virtually nothing in her individual capacity. The trust's gross rents averaged $XXXX.00 for the last tax years 2007, 2008, and 2009. (Willie Burrell Affidavit, ¶48). For example, applying the four percent (4%) rule announced in In re: Chempace Corporation, FIFRA Appeal Nos. 99-2 & 99-3 (May 18, 2000), the maximum penalty should be twenty-six thousand seventy-three dollars ($XXXXX.00) before applying any mitigating factors which would further decrease the penalty.

Wherefore, Appellants Willie P. Burrell and the Willie P. Burrell Trust hereby tender their Appeal Brief and respectfully request that the Environmental Appeals Board reverse and vacate the Default Order entered against appellants on November 23, 2011 and remand this proceeding to the Environmental Protection Agency Region 5, for

proceedings not inconsistent with the Board's decision.

_____ _____
Respectfully submitted, Date
Derek S. Burrell, Representative
For Appellants

CERTIFICATE OF SERVICE

Appellants, Willie P. Burrell and The Willie Burrell Trust hereby certify that this **APPELLATE BRIEF**, in the above-captioned matter was served upon the following, by U.S. Mail, postage pre-paid, this 2nd day of FEBRUARY 2012, to:

The Environmental Appeals Board
[(Clerk of the Board)(Mail Code 1103B]
United States Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

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