UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

FEB 21 2012

BY UPS

REPLY TO THE ATTENTION OF:

Eurika Durr
U.S. Environmental Protection Agency
Clerk of the Board, Environmental Appeals Board
Ronald Reagan Building
EPA Mailroom
1300 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Re: In re Willie P. Burrell and The Willie P. Burrell Trust
Appeal No. TSCA 11-05

Dear Ms. Durr:

Enclosed please find the original and five copies of Appellee's Response Brief in the above-referenced matter. I am also enclosing three copies of the attachments to that Brief. The copies of Attachment 12, which contains confidential personal privacy information, are confidential.

Respectfully submitted,

Maria E. Gonzalez
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Attorney for Appellee

Enclosures

cc: Derek Burrell

In the Matter of: Willie P. Burrell and The Willie P. Burrell Trust,
Appeal No.: TSCA-11-05

CERTIFICATE OF SERVICE

I hereby certify that today I sent the original and five copies of Appellee's Response Brief and three copies of its Attachments by UPS to:

Eurika Durr
U.S. Environmental Protection Agency
Clerk of the Board, Environmental Appeals Board
Ronald Reagan Building
EPA Mailroom
1300 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

I also caused a true and accurate copy to be mailed by first class mail to:

Derek S. Burrell
300 North Indiana Avenue
Kankakee, IL 60901

Willie P. Burrell and
The Willie P. Burrell Trust
300 North Indiana Avenue
Kankakee, IL 60901

dated: 21 February 2012

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

In re:	)	
	)	
Willie P. Burrell and	)	Appeal No. TSCA 11-(05)
The Willie P. Burrell Trust	)	
	)	

APPELLEE'S RESPONSE BRIEF

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BEFORE THE ENVIRONMENTAL APPEALS BOARD
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WASHINGTON, D.C.

In re:	)	
	)	
Willie P. Burrell and	)	Appeal No. TSCA 11-(05)
The Willie P. Burrell Trust	)	
	)	

APPELLEE'S RESPONSE BRIEF

Pursuant to 40 C.F.R. § 22.30(a) and 22.7 and the Environmental Appeals Board's Practice Manual, Appellee, the Director of the Land and Chemicals Division, United States Environmental Protection Agency (EPA), Region 5, by and through her attorney, hereby responds to the Appeal by Appellants Willie P. Burrell and the Willie P. Burrell Trust in this matter. Appellants have appealed the November 23, 2011 *Order of Dismissal and Default Order and Initial Decision* issued by the Presiding Officer in this matter, Region 5 Regional Judicial Officer Marcy Toney, on November 23, 2011. (Attachment 1)

I. INTRODUCTION

The November 23, 2011 Order of Dismissal and Default Order and Initial Decision found Appellants in default for failure to timely answer the Complaint. The Complaint in this matter was filed on June 16, 2006. (Attachment 2) Appellant Willie Burrell signed both of the Appellants' certified mail receipts on July 10, 2006. (Attachment 3) Appellants did not respond to the Complaint until Appellee filed a Motion for Default on December 17, 2010. The Presiding Officer issued the November 23, 2011 Order of Dismissal and Default Order and Initial Decision under 40 C.F.R. § 22.17 of the Consolidated Rules. That Section provides that "[A] party may be found to be in default: after motion, upon failure to file a timely answer to the complaint" 40 C.F.R. § 22.17(a). "Default 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." *Id.* 40 C.F.R. § 22.17(c) provides:

> (c) Default order. When the Presiding Officer finds that default has occurred, he shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued. If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision under these Consolidated Rules of Practice. The relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act. For good cause shown, the Presiding Officer may set aside a default order.

Appellants have appealed the November 23, 2011 Order of Dismissal and Default Order and Initial Decision to the Environmental Appeals Board (the Board).

II. ISSUES

Appellants' Notice of Appeal states the issues as follows:

1) Whether Appellants are entitled to relief from an entry of a Default Order when the EPA waited over 41/2 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.

This brief addresses the issues as presented in the Appeal Brief under the standard of review for an appeal to the Board. As discussed below, Appellants received the Complaint, which notified them that an Answer was due within 30 days, but did not file an Answer until long after it was due and Appellee had filed a Motion for Default. The Board should uphold the Presiding Officer's Default Order because this is proper grounds for default; the gross negligence of Appellants' former attorney is not a valid excuse for default; Appellants have not established a

strong probability that litigating the defenses raised in their brief will produce a favorable outcome; and the $89,430 penalty is reasonable.

III. FACTUAL AND PROCEDURAL BACKGROUND

A representative of EPA conducted an inspection at Appellants' office at 300 N. Indiana Avenue in Kankakee, Illinois on May 28, 2003, to monitor compliance with Section 1018 of Title X, the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. §§ 4851-4856 (the Act) and its implementing regulations at 40 C.F.R. Part 745, Subpart F. (*See* Attachment 4) Pursuant to Section 108(b)(5), a violation of the disclosure Rule is a prohibited act under Section 409 of the Toxic Substances Control Act, 15 U.S.C. §§ 2601 – 2692 (TSCA) and is subject to EPA enforcement authority under Section 16 of TSCA. Appellee sent Appellants a pre-filing notice letter dated March 25, 2005, advising Respondents that EPA was planning to file a civil administrative complaint against Appellants for alleged violations of Section 1018 and asking Appellants to identify any factors Appellants thought EPA should consider before issuing the complaint. The letter asked Appellants to submit specific financial documents if Appellants believed there were financial factors which bore on Appellants' ability to pay a penalty (*See* Attachment 5).

Appellants' former attorney Edward Lee responded on behalf of Appellants by letter dated September 16, 2005, providing "lead safe" certificates issued by Kankakee County, but did not claim or provide information regarding ability to pay. (*See* Attachment 6) Representatives of Appellee held a call with Appellant Willie Burrell and Edward Lee on December 14, 2005, and sent a letter to Appellants dated December 28, 2005, specifying the information needed to show that units are lead free, and requesting this information by January 3, 2006. (*See* Attachment 7)

Appellee filed the Complaint in this matter on June 22, 2006, alleging in five counts that Respondents violated TSCA by failing to include for six leases of target housing, either within the lease or as an attachment to the lease: 1) a Lead Warning Statement; 2) a statement disclosing either the presence of any known lead-based paints and/or lead-based paint hazards in target housing or a lack of knowledge of such presence; 3) a list of any records or reports available to the lessor regarding lead-based paints and/or lead-based paint hazards in target housing or a statement that no such records exist; 4) a statement by the lessee affirming receipt of the information set out in 40 C.F.R. § 745.113(b)(2) and (3); and 5) the signatures of the lessor and the lessee certifying to the accuracy of their statements to the best of their knowledge along with the date of signatures before the lessees were obligated under the contract to lease the target housing. The Complaint proposed a penalty of $89,430. It notified Respondents that they had thirty (30) days from receipt of the Complaint to file an Answer. Appellant Willie P. Burrell signed the certified mail return receipts for each Appellant on July 10, 2006. (*See* Attachment 2) The return receipts were filed with Regional Hearing Clerk on July 17 and 18, 2006. (*See* Attachment 3)

Appellee filed *Complainant's Motion for Default Order* on December 17, 2010. On January 12, 2011, Appellants served their *Motion for Extension of Time to File Responsive Pleadings to Complainant's Motion and Memorandum in Support of its Motion for Default Order*, seeking time to obtain new counsel.[1] That Motion attached a January 12, 2011 request for informal settlement conference, to which Appellee's counsel responded. (*See* Attachment 8)[2] Appellants also submitted an Answer to the Complaint on January 14, 2011.

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[1] This discussion relays the pleadings filed by Appellants and Appellee and the Orders issued by the Presiding officers, but does not detail the pleadings filed by other parties in the matter below.

[2] While this was sent for settlement purposes and was not filed, Appellee is including this Attachment because the Appeal Brief mentioned the request but not the response.

In her February 3, 2011, *Order Granting Extension of Time*, the Presiding Officer granted Appellants' motion for extension of time until March 14, 2011. That Order noted that Appellants' Motion for Extension of Time might not have been filed within the time allowed for Response to Appellee's motion, but considered them timely filed and granted the extension. On March 7, 2011, Appellants' current counsel, who represented all of the Respondents in the matter below, filed his appearance, a *Motion to Dismiss for Defective Proof of Service*, and a *Motion Opposing Order of Default Judgment*. Appellee filed a response on March 14, 2011, and Appellant filed a reply on March 23, 2011. Appellants' reply attached a copy of the January 14, 2011 Answer. On April 8, 2011, the Presiding Officer issued an *Order Regarding the Filing of Answers*, allowing Appellant's Answer to be filed with the Regional clerk as a proposed answer pending the outcome of the rulings on the dispositive motions in this matter.

On July 26, 2011, the Presiding Officer issued an *Order on Motions* allowing the parties to supplement the record with respect to whether the Complaint should be dismissed against the other Respondents, Dudley Burrell and the Dudley B. Burrell Trust, and, if so, what should be the appropriate penalty to be assessed against the remaining Respondents, the Appellants. Under that Order, Complainant was to supplement the record on or before August 16, 2011; and Respondents would have the opportunity to reply to Complainant's submission on or before August 30, 2011. Appellee filed its supplement on August 16, 2011; and Appellants filed their supplement on August 31, 2011. On September 14, 2011, the Presiding Officer issued her *Order Regarding the Filing of Respondents' Joint Supplemental Memorandum*, reminding the parties that where a party seeks to file a document with the Regional Hearing Clerk after the deadline for such filing has passed the party needs to seek leave or permission from the Presiding Officer

and provide a justification for the late filing, but permitted Appellants to file their pleading out of time.

On November 23, 2011, the Presiding Officer issued the *Order of Dismissal and Default Order and Initial Decision*, finding Appellants in Default and issuing a Default Order assessing a penalty of $89,430. The November 23, 2011 Order made findings of facts and conclusions of law and discussed the penalty criteria and calculation and the ability to pay submittals. It advised the parties that the decision would become final unless a party took an appeal to the Board within 30 days of the date of service, a party moved to set aside the default order, or the EAB elected *sua sponte* to review the decision within 45 days.

On November 29, 2011, Appellants filed its counsel's appearance and a motion to extend the time to file their notice of appeal, brief and related pleadings with the Board. On December 7, 2011, the Board issued the *Order Granting in Part and Denying in Part Appellants' Motion to Extend Time*, directing Appellants' counsel to file a notice of appeal no later than December 28, 2011, and Appellants' appeal brief no later than February 1, 2012. Appellants filed their notice of appeal on December 28, 2011. Their brief was filed on February 1, 2012, though served on February 2, 2012.[3] Appellants have not file a motion to set aside the default order under 40 C.F.R. § 22.17 (c).

IV. STANDARD OF REVIEW

In considering an appeal of a default order, the Board applies a "totality of the circumstances" test to determine whether the default order has properly been entered. *In re Rocking BS Ranch,* Inc., *CWA Appeal No. 09-04, at 9 (EAB Apr. 21, 2010) (Final Decision and Order)); In re Jiffy Builders, Inc.*, 8 E.A.D. 315, 319 (EAB 1990); *In re Rybond, Inc.*,6 E.A.D.

[3] See Appellants' Brief Certificate of Service.

614, 624 (EAB 1996).[4] This review looks at the nature of the procedural requirements violated and whether there is a valid excuse for the violation:

> While the Board considers a number of factors in weighing the totality of the circumstances, "first and foremost" the Board will examine the nature of the alleged procedural omission that led to the issuance of a default order, including whether a procedural violation actually occurred, whether a particular procedural violation is proper grounds for a default order, and whether there is any valid excuse for failing to adhere to the procedural requirement.

Rocking BS Ranch, CWA Appeal No. 09-04, at 9, citing *JHNY*, 12 E.A.D. at 384; *Jiffy Builders*, 8 E.A.D. at 320 & n.8; *Rybond*, 6 E.A.D. at 625.

"The Board may also consider whether a defaulting party would likely succeed on the merits if a hearing were held." *Rocking BS Ranch,* CWA Appeal No. 09-04, at 9, citing *JHNY*, 12 E.A.D. at 384; *In re Pyramid Chem. Co.,* 11 E.A.D. 657, 662 (EAB 2004); *Jiffy Builders*, 8 E.A.D. at 319; *Rybond*, 6 E.A.D. at 628 & n.20. The Board has consistently held that Respondents bear the burden of establishing that there is more than a mere possibility of a defense, but rather that there is a "strong probability" that litigating the defense will produce a favorable outcome. *See Rocking BS Ranch,* CWA Appeal No. 09-04, at 9, *JHNY*, 12 E.A.D. at 384; *Pyramid Chem.,* 11 E.A.D. at 662; *Jiffy Builders*, 8 E.A.D. at 322; *Rybond*, 6 E.A.D. at 628. In *Jiffy Builders*, the Board explained that this necessarily means that 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. *Jiffy Builders*, 8 E.A.D. at 322. As part of this inquiry, the Board has also examined whether the penalty assessed in the default order is reasonable. *Rocking BS Ranch*, CWA Appeal No. 09-04, at 10, citing *JHNY*, 12 E.A.D. at 384.

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[4] The standard for a direct appeal differs from the standard for Motion to the Presiding Officer to set aside a default order under 40 C.F.R. § 22.17(c). *See Rocking BS Ranch, Inc., CWA Appeal No. 09-04, at n.9.*

V. TOTALITY OF THE CIRCUMSTANCES

a. The Nature of the Procedural Omission Involved in this Matter is Proper Grounds for a Default Order.

There is no question that Appellants failed to file a timely Answer or that a failure to file a timely Answer is cause for a finding of default under 40 C.F.R. § 22.17(a). On June 22, 2006, Appellee filed the Complaint against the Respondents in this matter under Section 16(a) of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2615(a). (Attachment 2) Appellee mailed copies of the Complaint via certified mail, return receipt requested, to Willie P. Burrell, The Willie P. Burrell Trust, Dudley B. Burrell and The Dudley B. Burrell Trust at 300 North Indiana Avenue, Kankakee, IL 60901. Appellant Willie Burrell signed and dated the certified mail return receipts for Appellants on July 10, 2006. (*See* Attachment 3) Pursuant to the Consolidated Rules, the Answer was due by August 9, 2006. Appellants did not file an Answer until January 14, 2011.

Appellants cite several administrative cases where the Administrative Law Judge exercised his/her discretion not to grant a default order under circumstances quite different from this matter. *See generally, In re Donald L. Lee and Pied Piper Pest Control, Inc.,* EPA Docket No. FIFRA- 09-0796-92-13, 1992 EPA ALJ LEXIS 824 (ALJ, Nov. 9, 1992) (where Respondent filed a timely Answer but, with the parties close to a settlement that fell through, Complainant filed its pre-hearing exchange late and Respondent did not file one, instead sending Respondent ability to pay information); *In re Jay Harcrow,* EPA Docket no. UST-6-91-031-A0-1, 1995 EPA ALJ LEXIS 53 (ALJ, Sept. 20, 1995) (where Respondent filed a timely Answer and a timely but incomplete pre-hearing exchange that was missing ability to pay information that it filed much later); *In re Envtl. Control Systems, Inc.*, EPA Docket No. FIFRA-III-432-C, 1993 EPA ALJ LEXIS 465 (ALJ, July 13, 1993) (where Complainant's motion for default was based on

Respondent's failure to file the pre-hearing exchange and the ALJ granted a partial accelerated decision instead of a default judgment); *In re Malter Int'l.,* EPA Docket Nos. EPCRA-3-2000-0010, EPCRA-3-2000-0011, 2001 EPA ALJ LEXIS 154 (ALJ, Aug. 14, 2001) (where Respondent filed a timely Answer, but filed its pre-hearing exchange two weeks late because it went out of business); *In re Feeder's Grain and Supply, Inc.,* EPA Docket No. FIFRA-07-2001-0093, 2002 EPA ALJ LEXIS 53 (Aug. 27, 2002) (where Respondent filed its pre-hearing exchange 10 days late); *In re Lyon County Landfill,* EPA Docket No. 5-CAA-96-011, 1997 EPA ALJ LEXIS 193 (ALJ, Sept. 11, 1997) (where the ALJ found that Respondent timely "served" the Answer by mailing it to the Complainant and Regional Hearing Clerk but the hearing clerk did not receive it for filing until it was faxed 6 months later); *In re Gard Products, Inc.,* Docket No. IFFRA-98-005, 1999 EPA ALJ LEXIS 30 (ALJ, June 2, 1999) (where Respondent, allegedly believing that the Amended Complaint would start a new process and cancel deadlines previously set, did not file its pre-hearing exchange or an Amended Answer, in response to the Amended Complaint); *In re Four Quarters Wholesale, Inc.*, Docket No. FIFRA-9-2007-0008, 2008 EPA ALJ LEXIS 10 (ALJ, March 18, 2008) (where Respondent served its prehearing exchange on the Complainant on time but filed it days late with the Regional Hearing Clerk, and the ALJ instead of issuing a default order cautioned Respondent to strictly follow instructions and orders in the future)[5]. While these cases show the exercise of discretion by Presiding Officers in deciding whether to grant a default order, they do not contradict that a failure to file a timely Answer is a cause for default under 40 C.F.R. § 22.17. In this matter, the Answer was filed and served long past its due date and the Presiding Officer did issue a Default Order.

[5] The Regional Judicial Officer in this matter exercised similar discretion when she allowed Appellants' Motion for Extension of Time and Appellants' Supplement.

b. Appellants have not presented a valid excuse for failing to file a timely answer.

i. Alleged lack of willful intent

Appellants say the delay was not willful. A lack of a willful intent to delay the proceedings, by itself, however, does not excuse noncompliance with EPA's procedural rules. *Rocking BS Ranch,* CWA Appeal No. 09-04, at 11, citing *Pyramid Chem.,* 11 E.A.D. at 662; *Jiffy Builders*, 8 E.A.D. at 320 & n.8.

ii. Alleged gross negligence of Appellants' former Attorney

Appellants' main contention is that gross negligence by an attorney constitutes extenuating circumstances. They claim their former attorney never entered an appearance, never filed an answer, never advised Appellant Willie P. Burrell that she was required to file an answer, never informed her that a complaint had been filed by EPA, and communicated that all affairs were in order and that he was on top of it.

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. *Rocking BS Ranch,* CWA Appeal No. 09-04, at 13, quoting *Pyramid Chem.,* 11 E.A.D. at 667. In *Pyramid Chem.*, where Respondent did not respond to the Complaint in any manner until over three months after the deadline to file an answer, the Respondent also claimed it relied on its attorney for its updates and argued that it believed it was addressing the complaint through counsel. The Board cited the certified mail return receipts showing that Respondent received the Motion for Default and the Complaint, however, and observed that Respondent did not challenge the signatures on either of the return receipts. *See Pyramid Chem.,* 11 E.A.D. 657. In our case, Willie Burrell received the Complaint, as evidenced by her signature on the return receipts. While Appellants claim a cloud on service,

as discussed below, they do not challenge Appellant Willie Burrell's signature on the green cards. The Complaint and cover letter both specified that an Answer was due within 30 days. Appellants were on notice that the Answer was due by August 9, 2006, and could have checked on this matter and replaced their attorney or taken other appropriate action long before September 2010. They should have recognized the attorney's supposed neglect and taken matters into their own hands, by replacing their attorney or taking other appropriate action. *See Pyramid Chem., 11 E.A.D.* at 668.

Gross negligence is not the sort of circumstance the Board would have considered extenuating in *In re B&L Plating*, 11 E.A.D. at n. 15 (EAB 2002). While the Board may not have specified that negligence by an attorney rising to the level of gross negligence is not a valid excuse, it has upheld default orders in cases where the Respondent's attorney was grossly negligent. In *Jiffy Builders*, Respondent retained counsel who failed to meet a prehearing exchange deadline after admonition by the ALJ on the critical importance of timely responses. *See Jiffy Builders,* 8 E.A.D. 315, 321. In *B&L Plating,* Respondent filed its Answer over 6 months after it was due, never filed the prehearing exchange required by the Presiding Officer's Order, and filed an untimely appeal. *See B&L Plating,* 11 E.A.D. at 183.

To accept gross negligence as an extenuating circumstance would excuse considerable departures from the deadlines and requirements in the rules and the orders of presiding officers on the basis that they were excessive. For example, Appellants' arguments would excuse a complete failure to file an Answer and other failures that constitute gross negligence. Such a precedent would not encourage parties to comply with the requirements set forth in the Consolidated Rules or bring repose and certainty to the administrative enforcement process.

Appellants argue that their former attorney has in essence vanished. In *Rybond,* the Board rejected the argument that a lack of legal representation constitutes good cause for vacating a default order, observing that Respondent was apprised of the due date. *Rybond,* 6 E.A.D. at 627. As discussed above, the Board precedent is that the client ultimately takes responsibility for the attorney's failings.

Appellants ask the Board to look beyond this EAB precedent as well as the precedent in the Circuit where the violations occurred, the Seventh Circuit. They cite cases where the Second, Third and Ninth Circuits found gross negligence by an attorney to constitute grounds for relief under Fed. R. Civ. P. 60(b). In each of those cases, however, the clients were not informed of the procedural requirement violated and acted diligently once they learned of the procedural violation. Here, by contrast, the Appellants knew about the Answer deadline. The Complaint they received on July 10, 2006, notified them an Answer was due in 30 days.

The Seventh Circuit squarely addressed the question of whether a former attorney's gross negligence in representing his clients' interests entitled them to another opportunity to litigate, holding that "[m]alpractice, gross or otherwise, may be good reason to recover from the lawyer but does not justify prolonging litigation against the original adversary." *U.S. v. 7108 Grand Ave., Chicago, Ill.,* 15 F.3d 632, 633 (7th Cir. 1994), *cert. denied*, 512 U.S. 1212 (1994). In *7108 Grand Avenue*, the Defendants challenged a default judgment in a forfeiture proceeding. The Seventh Circuit saw no reason that labeling the attorney's negligence as "gross" would make a difference to the underlying principle that "the errors and misconduct of an agent redound to the detriment of the principal (and ultimately, through malpractice litigation, of the agent himself) rather than of the adversary in the litigation." *Id.* at 634. The Seventh Circuit has continued to hold clients in civil proceedings accountable for their attorneys' gross negligence, noting that

"[s]ince clients must be held accountable for their attorney's actions, it does not matter where the actions fall between 'mere negligence' and 'gross misconduct.'" *Bakery Mach. & Fabrication, Inc. v. Traditional Baking, Inc.*, 570 F.3d 845, 848-49 (7th Cir. 2009). In *Bakery Mach.*, the Seventh Circuit followed the Supreme Court's reasoning: "Petitioner voluntarily chose this attorney as his representative in the action and he cannot now avoid the consequences of the acts or omissions of this freely selected agent." *Id.* at 849 (citing *Link v. Wabash R.R. Co.*, 370 U.S. 626, 633-634 (1962)).

iii. Alleged Cloud on Service

Appellants challenge the proof of service on Appellants.[6] There is no question that Willie Burrell signed the certified mail receipts (a/k/a green cards) for the Complaint on July 10, 2006, and the Regional Hearing Clerk file stamp on those green cards indicate receipt on July 17 and 18, 2006. Willie Burrell does not deny signing the green cards for the Complaint. What Appellants question is the Regional Hearing Clerk's notation of the date of the file stamp on the other side of the green card. Appellants cite Appellants' counsel's own statement that it is the customary practice of the Government to date stamp the green cards on the same side as the purported signature to argue that this places a cloud on service and cite *In Re Marc Mathys d/b/a Green Tree Spray Technologies, LLC,* EPA Docket No. RCRA-03-2005-0191, 2006 EPA ALJ LEXIS 18 (ALJ, April 17, 2006). As set forth in the attached *Declaration of the Regional Hearing Clerk on File Stamp Dates on Certified Mail Receipts*, documents, including green cards, are stamped with the Regional Hearing Clerk file stamp on the date they are filed in the Regional Hearing Clerk's Office. (*See* Attachment 9) The green cards addressed to the Willie P. Burrell Trust was stamped with the Regional Hearing Clerk's file stamp, showing a filing date of

[6] This issue was not listed in the notice of appeal, but was raised in the Appeal Brief and in the matter below.

July 18, 2006; and the green card addressed to Willie P. Burrell was file stamped with the Regional Hearing Clerk's file stamp, showing a filing date of July 17, 2006. (*See* Attachment 3) While it is the current hearing clerk's practice to insert the filing date on the signature side of the cards, for scanning, there is no policy dictating which side of the card to file stamp.

The green cards contain the signature and date of signing by Willie P. Burrell as well as the file stamp date of the Regional Hearing Clerk. (*See* Attachments 3 and 9) The Regional Hearing Clerk's notation does not alter the fact that Willie Burrell signed the green cards for the Complaint. She made her own notation but did not change the fact that the green cards came back, as evidenced by the file stamp. Appellants can't deny the Complaint was served on Willie Burrell. It is undisputed that Willie Burrell received the Complaint on July 10, 2006.

Appellants cite the ALJ's Order Granting Respondent's Motion to Set Aside a Default Order in *Marc Mathys,* EPA Docket No. RCRA-03-2005-0191, 2006 EPA ALJ LEXIS 18 (ALJ, April 17, 2006). There, the ALJ found an individual Respondent's assertion that he was unaware that the action was being brought against him personally, as well as on his company, supported by a certificate of service that indicated only that the Complaint was filed with the Regional Hearing Clerk. Here, the Complaint was served on Willie Burrell, as well as on her trust, as set forth in the Complaint's certificate of Service, and Willie Burrell signed the return receipts. (*See* Attachment 3)

A properly executed return receipt constitutes proof of service of the Complaint. *In re Bobby Rowe Energy, Inc.*, Docket No. CWA-06-2009-1761, RJO LEXIS (RJO, July 6, 2010); *In re K Indus., Inc.,* Docket No. RCRA-06-2003-0915, 2005 EPA RJO LEXIS 109 (RJO, March 2, 2005). The notation of the filing date on the back side of the green card by the Regional Hearing Clerk does not vitiate the proof of service, but in fact supports it. In addition, there is no claim

here that actual service was not completed. All indications are that service was completed as set forth on the green cards. The green cards contain the signature and date of signing by Willie P. Burrell as well as the file stamp date of the Regional Hearing Clerk.

iv. Reference to a case involving a mistake of law

Appellants cite a case where Respondents filed a timely Answer but timely filed a letter stating it had filed for bankruptcy in lieu of the prehearing exchange under the alleged mistaken belief that the Bankruptcy proceeding stayed the EPA administrative proceeding, and the ALJ set a new prehearing exchange date instead of granting the default motion. *In re Keller Indus., Inc.,* Docket No. RCRA-III-249, 1997 EPA ALJ LEXIS 66 (ALJ, April 9, 1997). Appellants cite that case as an example of a willful and deliberate failure to file an Answer that did not result in entry of default. That case involved a Respondent's mistake of law as to the application of the automatic stay under the Bankruptcy Code to the EPA administrative proceeding at the time the prehearing exchange was due, however. Appellants have not claimed a mistaken belief of law in our case and did not file anything in lieu of their Answers by the deadline.

VI. DEFENSES

Appellants have not established a "strong probability" that litigating their defenses will produce a favorable outcome. As discussed above, Appellants need to demonstrate not only that they have a defense that, if proved, would avoid liability, but also that they would likely prevail on their defense were it litigated.

A. Lessor status Defense on two of the six properties

Appellants claim they were not the Lessors at 1393 E. Chestnut and 1975 Erziner. Those two properties are respectively owned by the Dudley Burrell Trust and Dudley Burrell's former company, New World Development. As a preliminary matter, this defense would not avoid liability. As set forth in Appellee's Motion for Default, the Willie Pearl Burrell Trust owns the other three properties: 257 N. Chicago, 575 E. Oak, and 993 Schuyler Av. (*See* Attachments 10). Its trustee and owner[7], Appellant Willie Burrell, was the President of B&D Management Corp., an Illinois Corporation that had dissolved prior to the execution of the leases at issue. (*See* Attachment 11) B&D. Management Corp. letter-head was used on all of the leases, including the Chestnut and Erziner leases. (*See* Attachment 12) Appellant Willie Burrell has stated that she and her trust are engaged in the business of leasing residential apartment units. (March 2, 2011 Willie Burrell Affidavit at ¶ 2) Appellant Willie Burrell has also personally brought eviction actions for all of the properties in this action, including the Chestnut and Erzinger properties, and brought an action against the tenant who signed the Erzinger lease at issue, Martha Eggleston, in 2004. (*See* Attachment 13) Dudley Burrell has attested that at all times alleged in the complaint B&D was the company responsible for leasing apartment units owned by him, his wife, and their respective trusts, and that his wife, Appellant Willie Burrell, ran all of the office and administrative functions of the business (March 1, 2011 Dudley Burrell Affidavit at ¶ 15 and ¶17).[8]

The Illinois statutes provide that 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

[7] Willie Burrell admits that she owns the Willie Pearl Burrell Trust. (March 2, 2011 Willie Burrell Affidavit at ¶ 1).
[8] This affidavit is an attachment to Appellants' Appeal Brief.

corporation for all debts and liabilities of the corporation incurred in so carrying on its business. *See* 805 Ill. Comp. Stat. 5/8.65(3)(West 2011). Leasing properties is carrying on business. *See* March 2, 2011 Willie Burrell Affidavit at ¶ 2. In *Chicago Title & Trust Co. v. Brooklyn Bagel Boys, Inc.*, 584 N.E. 2d 142 (Ill. App. 1992), 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. *Brooklyn Bagel*, 584 N.E. 2D at 146. As president of B&D Management Corp., Appellant Willie Burrell "presumably knew or at a minimum should have known" that B&D had been dissolved. *See Affiliated Capital Corp. v. Buck*, 886 F. Supp. 647, 649 (N.D. Ill. 1995), yet the leases issued afterward for 1393 E. Chestnut and 1975 Erzinger in the office she ran, purported to be from B&D Management Corp. (See Attachment 12). Appellants have not demonstrated a strong probability that litigating this defense would, if proved, avoid liability and that Appellants would likely prevail on this defense were it litigated. See *Jiffy Builders* 8 E.A.D. at 322.

B. Selective Enforcement Defense

Appellants assert that it is uncontroverted that they "asserted" that they were singled out by EPA. Appellants have not established that there is a strong probability that litigating the defense will produce a favorable outcome. As a preliminary matter, this defense was not raised in Appellants' proposed Answer. Moreover, it is based on unsubstantiated assertions from the party claiming the defense. Such a defense faces a "daunting" burden of proof, as the Board has previously recognized:

> Respondent faces a daunting burden in establishing that the Agency engaged in illegal selective enforcement, for courts have traditionally accorded governments a wide berth of prosecutorial discretion in deciding whether, and against whom, to undertake enforcement actions. This deference to prosecutorial discretion is founded upon sound

> policy considerations....As a consequence, the judicial decisions establish that an affirmative defense of selective enforcement or prosecution requires proof that (1) the government "singled out" a violator while other similarly situated violators were left untouched, and (2) the selection was in bad faith based on such impermissible considerations as race, religion, or the desire to prevent the exercise of constitutional rights.

In re B&R Oil Co., 8 E.A.D. 39, 51 (EAB 1998) (citing *U.S. v. Smithfield Foods, Inc.*, 969 F. Supp. 975, 985 (E.D. Va. 1997)); *U.S. v. Anderson*, 923 F.2d 450, 454 (6th Cir. 1988); *Schiel v. Comm'r*, 855 F.2d 364, 367 (6th Cir. 1988). *See also In re Envtl Protection Services, Inc.*, 13 E.A.D. 506, 588. (EAB 2008). Making an assertion does not establish a defense, or meet the selective enforcement burden of proof.

Appellants point to the existence of several apartment rental companies in the Kankakee, Illinois area they say were left untouched. Appellants have not submitted evidence on inspections in the area, violations cited elsewhere, or the basis for selection. The inspection report indicates that the May 28, 2003, TSCA 1018 inspection was a neutral scheme inspection (*See* Attachment 4 at 1) In *Martex Farms v. EPA*, 559 F.3d 29 (1st Cir. 2009), an allegation that EPA "left untouched the rest of the Puerto Rico's agricultural community" was not enough to support such a claim. *Id.* at 32.

Respondent Willie P. Burrell's assertions in her affidavit do not meet the burden of proof for a selective enforcement claim and do not establish a "strong probability" that litigating this defense will produce a favorable outcome.

C. LACHES DEFENSE

For the first time in this matter, and without citations, Appellants raise the issue of laches. Laches is commonly defined as an inexcusable delay that results in prejudice to the Defendant. *In re Eads*, 417 B.R. 728, 744 (Bky. E.D. Tex. 2009), citing *Conan Properties, Inc. v. Conans*

Pizza, Inc. 752 F.2d 145, 153 (5th Cir. 1985). A defense of laches has three elements: (1) delay in asserting one's rights, (2) lack of excuse for the delay, and (3) undue prejudice caused by the delay. *Id.*, citing *Elvis Presley Enter., Inc. v. Capece*, 141 F. 3d 188, 205 (5th Cir. 1998). Laches is an affirmative defense, and the party asserting it has the burden of proof. *Id.* citing *In re Borhar*, 743 F.2d 313, 326 n. 13 (5th Cir. 1984). A finding of prejudice requires more than simply delay in bringing an action. *Id.,* citing *Envtl. Def. Fund, Inc. v. Alexander*, 614 F.2d 474, 479 (5th Cir. 1980). There must be a delay which causes a disadvantage in asserting and establishing a claimed right or defense. Id, citing *Esso Int'l, Inc. v. The SS Captain John*, 443 F.2d 1144, 1150 (5th Cir. 1971).

Here, Appellants had ample opportunity to file an Answer and provide information during the time period before Appellee filed the motion for default order. Appellants say it is impossible to retest the units to confirm that they are lead free, but they were asked to provide test results and inspection report to show that the apartments were lead free before the Complaint was even filed. They never supplied the inspection report and have not explained why it is impossible to retest their units, or identified witnesses no longer available. Respondents cannot wait until a Motion for Default is filed to file an Answer, and then claim undue prejudice based on their own failure to file.

Moreover, as a general rule laches or neglect of duty on the part of officers of the Government is no defense to a suit by it to enforce a public right or protect a public interest. *Utah Power and Light Co. v. U.S.*, 243 U.S. 389, 409 (1917); *Nevada v. U.S.*, 463 U.S. 110, 141 (1983); *U.S. v. Mandycz*, 447 F.3d 951, 964 (6th Cir. 2006); *In re Iowa Turkey Growers Coop.*, EPA Docket No. CWA-07-2001-0052, CERCLA-07-2002-0009, EPCRA-2002-0009, 2002 EPA ALJ LEXIS 31, *4 (ALJ, May 20, 2002).

VII. PENALTY ASSESSMENT AND INABILITY TO PAY

The Presiding Officer concluded that the $89,430 penalty EPA proposed is consistent with the evidence in the record and in accord with the penalty criteria set forth in TSCA and the Section 1018 Disclosure Rule Enforcement Response and Penalty Policy (the Disclosure Rule ERP). In Evaluating the Appellants' inability to pay claim, the Presiding Officer applied Board precedent on burden of proof:

> As the Environmental Appeals Board has noted, "the law pertaining to the burdens of proof and other matters pertaining to [the ability to pay] penalty factor is well settled." *In re Donald Cutler,* 11 E.A.D. 622, 631 (EAB 2004). In regard to meeting its burdens on penalty, EPA can make 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 analysis of those factors. *Cutler* 11 E.A.D. at 631-632. "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 tht it considered the respondent's ability to pay a penalty." *Cutler*, 11 E.A.D. at 632, quoting *In re New Waterbury, Ltd.*, 5 E.A.D. 529, 542 (EAB 1994). Complainant need not present any specific evidence to show that respondent can pay, "but can simply rely on some *general* financial information regarding the respondent's financial status which can support the *inference* that the penalty assessment need not be reduced." *New Waterbury*, 5 E.A.D. at 543. "Once the respondent has presented specific evidence to show that despite its ... apparent insolvency it cannot pay any penalty, the Region as part of its burden of proof in demonstrating the 'appropriateness' of the penalty must respond either with the introduction of additional evidence to rebut the respondent's claim or through cross examination it must discredit the respondent's contentions." *Id.* (Attachment 1 at 10)

As discussed below, EPA considered the statutory penalty factors and met its burden with respect to Appellants' claim of inability to pay.

A. Penalty Assessment

In determining the amount of any civil penalty, Section 16 of TSCA, 15 U.S.C. § 2615, requires EPA to take into account the nature, circumstances, extent and gravity of the violation or violations alleged and, with respect to the violator, ability to pay, affect on ability to continue

to do business, any history of prior such violations, the degree of culpability, and such other factors as justice may require. The penalty calculation considered these factors and applied the Section 1018 Disclosure Rule Enforcement Response Policy. (Attachment 14)[9] That policy provides a rational, consistent and equitable calculation methodology for applying the statutory factors to a particular case. As discussed by the Presiding Officer, the Disclosure Rule ERP sets forth a two stage process for calculating a proposed civil penalty for a violation of the Disclosure Rule. The first step is to determine the gravity-based penalty, referring to the overall seriousness of the violation, taking into account the nature of the violations, the circumstances of the violation, and the extent of the harm that may result from a given violation. Once the gravity-based penalty has been determined, upward or downward adjustments may be made to that penalty in consideration of the violator's ability to pay/continue in business, history of prior violations, degree of culpability, voluntary disclosure, and "such other factors as justice may require." (See Attachment 1 at 6).

In her *Order of Dismissal and Default Order and Initial Decision*, the Presiding Officer set out the circumstance levels and extent categories for each of the five violation types that occurred with respect to each of the six leases at issue. The Presiding Officer also reviewed the application of the adjustment factors and Respondent's claim of inability to pay.

Appellants claim that the RJO refused to consider any mitigating factor. In particular, they challenge the Agency's review of the size of business, risk of exposure, attitude, cooperation, compliance, and early settlement.

i. Size of Business

[9] The Default Motion included reference to both the 2000 and the 2007 ERP. The citations here are to the 2007 ERP.

As discussed in the Disclosure Rule ERP, a violator may request assistance under EPA's Policy on Compliance Incentives for Small Business, which states that a business with fewer than 100 employees is eligible for elimination of the entire civil penalty if the violator participates in the compliance assistance program or conducts a voluntary self-audit and meets four criteria listed in the Small Business Policy. EPA included information on the Small Business Policy with its March 25, 2005 pre-filing notice letter. (*See* Attachment 5) Appellants have not established that they participated in a compliance assistance program or conducted a voluntary self-audit, however, and this factor was not found to be applicable. (*See* Attachment 14 at 20; Attachment 1 at 9.).[10]

ii. Risk of Exposure

Under the Disclosure Rule ERP, EPA will adjust the proposed penalty downward 80% if the responsible party provides EPA "with appropriate documentation (e.g. reports for lead inspection conducted in accordance with HUD guidelines for Assessment of Lead-Based Paint and Lead-Based Paint Hazards in Target Housing)" that clearly demonstrates that the target housing is found by a certified inspector to have been lead-based paint free. (Attachment 14 at 21). Appellants claim 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. It is Appellants that needed to provide EPA with appropriate documentation, however. Appellants were advised that the "lead safe" certificates did not demonstrate that the units were "lead free" and were told what documentation would be needed to show that the units were lead free, but did not supply it.

[10] The 2000 ERP also provided an adjustment for individuals who own one target housing unit for lease or one target housing unit which is for sale by owner if no agent was involved in the transaction and the person has no history of prior violations, as such sellers and lessors are generally not engaged in the selling or leasing of property as a business. This adjustment did not apply however. There is more than 1 target housing unit owned.

As indicated in Appellee's earlier response, the sampling results Appellants attached to their Response to the Motion for Default did not include sufficient information or context to ascertain whether the testing was complete and/or was conducted subsequent to lead abatement. In their *Reply to Complainant's Response to Respondents' Motion Opposing Default Judgment and Motion to Dismiss*, filed on March 29, 2011, Appellants said the government cites no authority that "the underlying test data results do not include sufficient information which would satisfy the requirements of the TSCA," yet cited to regulations at 40 C.F.R. § 745.103 that required an inspection report explaining the results of the investigation. EPA specifically requested such an inspection report in its December 28, 2005 letter (*See* Attachment 7), enclosing the HUD guidelines on the contents of such a report and requesting the documentation by January 31, 2006. In her July 26, 2011 *Order on Motions*, the Presiding Officer found that the documentation Appellants provided does not establish that the apartments were in fact "lead-based paint free" as that term is defined in the applicable regulations to qualify for an exemption from the Disclosure Rule, citing 40 C.F.R. §§ 745.101, 103. Appellants' subsequent *Joint Supplement Pursuant to July 26, 2011 Order* did not supply the documentation. Appellants have not provided "appropriate documentation" (e.g. reports for lead inspection conducted in accordance with HUD guidelines) that the target housing is certified to be lead-based paint free by a certified inspector. It is Appellants' ultimate responsibility to ensure that any documentation in support of its position is properly submitted. *Rocking BS Ranch,* CWA Appeal No. 09-04, at 13.

iii. Gross Rents

Based on the gross receipts from their leasing business, Appellants argue that the maximum penalty should be $26,073 based on the 4% rule "announced" in the Federal

Insecticide, Fungicide, and Rodenticide Act (FIFRA) appeal *In re Chempace Corp.*, 9 E.A.D. 119 (EAB 2000). That decision upheld a Presiding Officer's application of the FIFRA ERP's guideline of 4% of average gross income. Under the FIFRA ERP, Size of Business is determined based on an individual or a company's gross revenues from all revenue sources during the prior calendar year. This is not how the TSCA ERP addresses the small business adjustment. TSCA and the TSCA Lead Disclosure Rule ERP do not contain such a guideline. The *Order of Dismissal and Default Order and Initial Decision* shows that the Presiding Officer in this matter applied the TSCA statutory factors and the Disclosure Rule ERP.

iv. Attitude

With respect to attitude, the Agency has the discretion to reduce the proposed civil penalty up to 10% for cooperation throughout the entire compliance, case development and settlement process, up to 10% for immediate good faith efforts to comply with the Disclosure Rule and the speed and completeness with which it comes into compliance; and up to 10% if the case is settled before the filing of pre-hearing exchange documents. (*See* Attachment 14 at 23)

In this matter, EPA representatives sent Appellants a pre-filing notice letter on March 25, 2005, held discussions with Appellant and her counsel on December 14, 2005, and sent a letter on December 28, 2005, detailing the information needed to establish that units were lead free and requested a response by January 31, 2006, but did not receive a response from Appellants until after the Motion for Default Judgment had been filed.

Appellants claim the Presiding Officer erred because the Default Order does not detail what evidence the Presiding Officer utilized in concluding that appellants had not demonstrated the proper "attitude;" but the record does not contain evidence to warrant a downward adjustment for attitude as discussed in the Disclosure Rule ERP, and Respondents have not

provided evidence to support it. Appellants cite Appellant Willie Burrell's own affidavit to support the contention that "it is uncontroverted from the record that Appellants came into compliance with TSCA after realizing that strict written compliance with TSCA was required." Aside from Appellant's own statement, however, there is nothing in the record to demonstrate that Appellants have revised their leases to include the required disclosures or, if so, when Appellants' leases started to include the required information. Appellants argue for "early settlement," saying that it is uncontroverted that Appellants were willing to settle prior to any pre-hearing exchange document. Providing a reduction in cases where a pre-hearing exchange is not ordered because the Respondent fails to file a timely Answer or seek a timely extension to file an Answer does not encourage "early" settlement.

B. Ability to Pay

i. Appellant Willie Burrell

Appellants fault the Presiding Officer for relying on a financial analyst's information needs in evaluating Appellant Willie Burrell's ability to pay. Appellant Willie Burrell claims she owns no real property or car and earns a salary of approximately $58,000 per year. Appellants allege that Appellee tendered no evidence that Appellant Willie Burrell owned or owns any real or personal property of significance and invites the Board to review the record for such evidence. Appellant Willie Burrell is listed as the owner on a number of properties (*See* Attachment 16). The amended April 14, 2011 Individual Ability to Pay Form Appellant Willie Burrell submitted deleted her residence, without explanation. Appellant Willie Burrell has not explained the significant CD pledged amount listed on her form; the size of her household, to account for the amount attributed to food, clothing and personal care; provided documentation on insurance; answered question 4 on the financial form; or indicated whether she has any ownership interest

in her the employer listed on her forms, Burrell Property Management LLC. While Appellant Willie Burrell submitted tax returns, her co-filer initially contested that those were his forms. According to Mrs. Burrell's March 2, 2011 Affidavit, she owns the Willie Burrell Trust. She and/or this trust appear to own a significant amount of properties. (*See* Attachment 16) As owner of the trust, Appellant Willie Burrell has an ownership interest in those assets, but she has not provided tax returns or other information on the assets and makeup of that trust. Additionally, Appellant Willie Burrell's March 2, 2011 Affidavit indicates significant gross rents. The financial information Appellant Willie Burrel submitted was incomplete.

ii. Appellant Trust

Appellants did not provided information on Appellant trust's ability to pay. In the Trust ability to pay discussion of the Appeal Brief, Appellants contend that they actually had many more violations at "over 50 leases" and that the penalty could have been higher. This contention neither supports mitigating the penalty for the violations found during the inspection nor demonstrates an inability to pay. Appellants, who characterize this as a records-keeping case at p. 12 of their Appeal Brief, contend that the Agency's discretionary actions attempt to circumvent the legislative intent of providing financial relief to a party that has an inability to pay.

Appellants' characterization of this case loses sight of the nature of the underlying violation and the statutory purposes of the requirements. The regulations violated are key components in the national strategy to reduce and eliminate the threat of childhood lead poisoning. The Complaint alleged that Respondents failed to make the required disclosures before the lessees were obligated under the contract for six target housing units. Young children resided in some of the leases. (See Attachment 12) Appellants have not demonstrated that they have returned to compliance with the TSCA disclosure rule.

As importantly, Appellants have not provided documentation to indicate that Appellant trust has an inability to pay the penalty. Appellants have not submitted documentation to support Willie Burrell's statements that the proposed penalty would put Appellants out of business or severely hamper Appellant's ability to continue in business. Appellants have not provided documentation on the assets or content of the trust. Appellant Trust has defaulted and has been found liable. If it claimed an ability to pay, it needed to present documentation to support an ability to pay determination. Appellants also claim it would be grossly inequitable to base the Trust's liability on its total income, due to Appellant Willie P. Burrell's divorce proceeding. However, where a party is liable, we look at that party's finances, be it an individual, a corporation or a trust. The information on the Trust's makeup, contents, terms, ownership, and finances is in the possession of Appellants, and they have not provided this information.

Appellee made a *prima facie* case by presenting evidence that it considered Appellants' ability to pay a penalty. Appellants presented specific evidence as to Appellant Willie Burrell's ability to pay, but did not provide information on Appellant Trust, which Willie Burrell owns. Appellee has identified issues that discredit the documentation submitted as Appellant Willie Burrell's ability to pay, and Appellant trust has not rebutted the *prima facie* case of the appropriateness of the relief. *See generally Cutler*, 11 E.A.D. at 631-632, *New Waterbury, Ltd.*, 5 E.A.D. at 542 – 543 (EAB 1994).

VIII. CONCLUSION

Based on the totality of the circumstances, the Board should uphold the Default Order the Presiding Officer entered, including the $89,430 penalty. The nature of the violation of the procedural rules was an appropriate ground for default. Appellants did not have a valid excuse

for their default, and cannot establish a "strong probability" that litigating their defenses will produce a favorable outcome. Furthermore, the penalty was reasonable, and considered the statutory factors and applied the appropriate penalty policy.

Respectfully Submitted,

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ATTACHMENTS

1. November 23, 2011 Order of Dismissal and Default Order and Initial Decision

2. June 16, 2011 Complaint

3. Copies of certified mail receipts indicating Appellant's receipts of Complaint

4. Inspection Report for May 28, 2003 Inspection (Att. 3 to Default Motion)

5. March 25, 2005 Pre-filing Notice Letter (from Att. 28 to Default Motion)

6. September 16, 2005 correspondence from Edward Lee (from Att. 28 to Default Motion)

7. December 28, 2005 correspondence to Edward Lee (from Att. 28 to Default Motion)

8. February 24, 2011 correspondence to Willie Burrell on request for settlement conference

9. March 11, 2011 Declaration of Regional Hearing Clerk (Att. 1 to Complainant's March 14, 2011 Response to Appellants Motion Opposing Order of Default Judgment)

10. Ownership information for 257 N. Chicago, 575 E. Oak and 993 Schuyler Av. (From Att. 10, 12, 13, and 15 of Default Motion)

11. B & D Management Corporation information (Attachment 17 of Default Motion)

12. Leases (Att. 4-9 to Default Motion) **CONFIDENTIAL: Personal Privacy Information**

13. Eviction Actions (Att. 18 to Default Motion)

14. Lead Disclosure Rule Enforcement Response Policy (Att. 27 to Default Motion)

15. Declaration of Joanna Bezerra (Att. 25 to Default Motion)

16. Ownership listings for Appellants (Att. 20 to Default Motion)