IN RE WILLIE P. BURRELL & THE WILLIE P. BURRELL TRUST

TSCA Appeal No. 11-05

FINAL DECISION AND ORDER

Decided August 21, 2012

Syllabus

Willie P. Burrell and the Willie P. Burrell Trust ("WB Trust") appeal from an Order of Dismissal and Default Order and Initial Decision ("Default Order") issued by Regional Judicial Officer ("RJO") Marcy A. Toney pursuant to 40 C.F.R. § 22.17(a). The default finding was based on the failure of Willie Burrell and the WB Trust to file a timely answer to a complaint issued by the U.S. Environmental Protection Agency ("EPA"), Region 5 ("Region") alleging failure to comply with EPA's regulations known as the "Lead Paint Disclosure Rule," 40 C.F.R. Part 745, Subpart F, with respect to six rental properties. The Lead Paint Disclosure Rule implements the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. §§ 4851-4856, and Section 403 of the Toxics Substances Reform Act ("TSCA"), 15 U.S.C. § 2683, and generally requires landlords of designated housing built before 1978 to disclose known lead-based paint and lead-based paint hazards to renters, to provide renters with a lead hazard information pamphlet and available reports, and to attach specific disclosure and warning language to leases.

The RJO's default finding constitutes an admission of all facts alleged in the complaint in the proceeding and a waiver of Willie Burrell and the WB Trust's right to contest those factual allegations. As a result, the RJO found Willie Burrell and the WB Trust, as lessors of apartment units in Kankanee, Illinois, liable for violations of TSCA section 409, 15 U.S.C. § 2689. The RJO assessed a penalty in the amount of $89,430, as proposed by the Region, finding the amount to be within the range of penalties provided in the penalty guidelines with no documented basis for adjustment.

Held: The Environmental Appeals Board ("Board") affirms the RJO's default finding and penalty assessment, based on the following:

1. Willie Burrell and the WB Trust did not file a timely answer to the administrative complaint, which constitutes a procedural violation leading to default. Additionally, Willie Burrell and the WB Trust failed to demonstrate a valid excuse for the procedural violation, as the neglect of a party's attorney does not excuse an untimely filing. Moreover, Willie Burrell and the WB Trust had direct knowledge of the complaint and facts alleged because Willie Burrell signed the return receipt cards accompanying the complaint on behalf of both herself and the WB Trust.

2. Willie Burrell and the WB Trust failed to demonstrate that they were likely to succeed on the merits of their defenses.

a. The Board declined to consider whether Willie Burrell and the WB Trust were likely to succeed on their defense that Willie Burrell was not a lessor because this defense was not raised below until after the RJO determined that Willie Burrell and the WB Trust failed to demonstrate good cause to deny entry of the default order, and thus the defense is waived.

b. Similarly, because Willie Burrell and the WB Trust raised the laches defense only after the RJO's good cause determination, the Board declined to consider Willie Burrell and the WB Trust's likelihood of success on the laches defense.

c. Willie Burrell and the WB Trust did not demonstrate that they are likely to succeed on their selective enforcement defense because they did not show that the Region singled them out while other similarly situated violators were left untouched, and that the Region's enforcement of Willie Burrell and the WB Trust's Lead Paint Disclosure Rule violations were in bad faith based on such impermissible considerations as race, religion, or the desire to prevent the exercise of constitutional rights.

d. Willie Burrell and the WB Trust did not demonstrate that they were likely to succeed on their "mitigating factors" defense as the cited mitigating factors – ability to pay, size of business, no known risk of exposure, attitude, willingness to cooperate, compliance, and willingness to settle – if proven at hearing, do not constitute defenses to liability.

3. The RJO properly considered the Region's proposed penalty in light of the statutory penalty factors and EPA's penalty guidelines for violations of the Lead Paint Disclosure Rule. Accordingly, following applicable Board precedent, the Board does not substitute its judgment for the RJO's decision absent a showing that the RJO committed an abuse of discretion or a clear error in assessing the penalty, which Willie Burrell and the WB Trust have not demonstrated in this case. Accordingly, the Board affirms the RJO's $89,430 penalty assessment.

Before Environmental Appeals Judges Leslye M. Fraser, Catherine R. McCabe, and Kathie A. Stein.

Opinion of the Board by Judge Fraser:

I. *STATEMENT OF THE CASE*

Appellants Willie P. Burrell and the Willie P. Burrell Trust ("WB Trust") (collectively, "Appellants") appeal to the Environmental Appeals Board ("Board") from the Order of Dismissal and Default Order and Initial Decision ("Default Order") that Regional Judicial Officer ("RJO") Marcy A. Toney issued on November 23, 2011. Having earlier found that Appellants did not demonstrate good cause why a default order should not be assessed against them, the RJO found Willie Burell and the WB Trust to be in default pursuant to 40 C.F.R. § 22.17(a). The default

finding constituted an admission of all facts alleged in the complaint that the U.S. Environmental Protection Agency ("EPA"), Region 5 ("Region") had served on Appellants, and a waiver of Appellants' right to contest those factual allegations. Order of Dismissal and Default Order and Initial Decision 2 (Nov. 23, 2011) ("Default Order"); *see also* 40 C.F.R. § 22.17(a). As a result, the RJO found Appellants, as lessors of apartment units in Kankanee, Illinois, liable for violations of the Toxic Substances Control Act ("TSCA") regulations known as the "Lead Paint Disclosure Rule" ("Disclosure Rule"). The Disclosure Rule, 40 C.F.R. part 745, subpart F, implements the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. §§ 4851-4856, and Section 403 of the Toxics Substances Reform Act ("TSCA"), 15 U.S.C. § 2683. The Disclosure Rule generally requires landlords of designated housing built before 1978 to disclose known lead-based paint and lead-based paint hazards to renters, to provide renters with a lead hazard information pamphlet and available reports, and to attach specific disclosure and warning language to leases. 40 C.F.R. § 745.100. Finally, the RJO assessed a penalty in the amount of $89,430, as proposed by the Region, finding the amount to be within the range of penalties provided in the penalty guidelines with no documented basis for adjustment.

II. *ISSUES ON APPEAL*

Based on Appellants' challenges, the Board must decide the following issues and sub-issues:

1. Is there a procedural violation of the Consolidated Rules of Practice ("CROP"), 40 C.F.R. part 22, that leads to the default, and if so, have Appellants shown that there is a valid excuse for the violation?

2. Have Appellants demonstrated that they are likely to succeed on the merits of the defenses, if the case were litigated?

3. Does the penalty assessed in the Default Order fall within the range of penalties provided in the applicable penalty guidelines?

    a. Do Appellants demonstrate that the RJO abused her discretion or clearly erred by not adjusting the gravity-based penalty on the basis of Appellants' inability to pay?

    b. Do Appellants demonstrate that the RJO abused her discretion or clearly erred by not otherwise adjusting the gravity-based penalty?

III. *FACTS AND PROCEDURAL HISTORY*

From 1965 to 2003, Willie Burrell and her now-estranged husband, Dudley Burrell (collectively, "Burrells"), were together engaged in the business of leasing residential apartment units under various corporate entities, including B&D Management, Inc. ("B&D"), which they co-owned and operated.[1] 1st Dudley B. Burrell Affidavit ¶¶ 5, 14, 15 (Mar. 1, 2011) ("1st D. Burrell Aff."); Burell Appeal Brief at 4 ("Burrell Appeal Br.").[2] Both Willie Burrell and Dudley Burrell also were individual owners of trusts in their respective names. 1st D. Burrell Aff. ¶ 14; 2nd Willie P. Burrell Affidavit ¶ 1 (Aug. 30, 2011) ("2nd W. Burrell Aff."); Burrell Appeal Br. at 4. Approximately eighty rental units were designated in the WB Trust. 2nd W. Burrell Aff. ¶ 2. A number of properties also were designated in the Dudley B. Burrell Declaration of Trust ("DB Trust"). 1st D. Burrell Aff. ¶ 13. In sum, the Burrells owned and managed 149 properties with 200 residential units. Region's Response Brief, att. 4 (Pesticides and Toxics Enforcement Section, Inspection Report, File No. 03TL295) ("Region's Resp. Br."). B&D was responsible for leasing apartment units owned by the Burrells and their respective trusts. 1st D. Burrell Aff. ¶ 15.

The State of Illinois involuntarily dissolved B&D on October 1, 2001. Region's Resp. Br., att. 11 (Illinois Secretary of State, Corporation File Detail Report). Notwithstanding, from December 2001 through at least April 2003, the Burrells rented various properties using B&D lease agreements. *See* Default Order at 3; Region's Resp. Br. at 17. In December 2003, the Burrells became estranged, 1st D. Burrell Aff. ¶ 8, and they began divorce proceedings on November 17, 2009, *id.* ¶ 11.

On May 28, 2003, the Region conducted an inspection at the B&D office to review records and files for compliance with Section 1018 of Title X, the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. §§ 4851-4856, and its implementing regulations, the Disclosure Rule at 40 C.F.R. part 745, subpart F. Region's Resp. Br., att. 4 (Pesticides and Toxics Enforcement Section, Inspection Report, File No. 03TL295). Violation of the Disclosure Rule is a prohibited act under TSCA Section 409, 15 U.S.C. § 2686, and is subject to EPA enforcement authority under TSCA Section 16, 15 U.S.C. § 2615.

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[1] Dudley Burrell "purchase[d], rehabilitate[d], and construct[ed] apartment buildings [while his] [w]ife ran all of the office and administrative functions of the business." 1st Dudley B. Burrell Affidavit ¶ 16 (Mar. 1, 2011) ("1st D. Burrell Aff.").

[2] In this appeal, Appellants filed two versions of their brief: a version containing material Appellants claim as confidential business information, or "CBI," and a redacted, CBI-free version. The Board cites only the CBI-free version of the brief in this decision.

By letter dated March 25, 2005, the Region sent the Burrells and their respective trusts a pre-filing notice advising that the Region intended to file a civil administrative complaint against them for alleged violations of Section 1018 and its implementing regulations, and requesting the Burrells to identify any factors that the Region should consider prior to issuing the complaint. Region's Resp. Br., att. 5 (Letter from Dale Meyer, Acting Chief, Pesticides and Toxics Branch, U.S. EPA Region 5, to B&D Management Corp., et al., *Notice of Intent to File Civil Administrative Complaint* (Mar. 25, 2005)). The letter requested that the Burrells and their respective trusts submit specific financial documents if they believed that there were financial factors that bore on their ability to pay a penalty. *Id.*

By letter dated September 16, 2005, the Burrells and their respective trusts responded through attorney Edward Lee, who identified Willie Burrell, Dudley Burrell, the WB Trust, and the DB Trust as his clients. *Id.*, att. 6 (Letter from Edward Lee to Joana Bezerra, U.S. EPA, Region 5, *Re: Notice of Intent to file Civil Action Letter dated March 25, 2005* (Sept. 16, 2005)). Telephone and written correspondence between the Region and Mr. Lee continued in December 2005. *Id.*, att. 7 (Letter from Maria Gonzalez, Associate Regional Counsel, U.S. EPA Region 5, to Edward Lee, *Re: Lead Free Demonstrations* (Dec. 28, 2005)).

On June 22, 2006, the Region filed an administrative complaint ("Complaint") against Willie Burrell, Dudley Burrell, the WB Trust, and the DB Trust. The Region served the Complaint on the same day. The Complaint alleged in five counts that the Burrells and their respective trusts had violated TSCA by failing to include with six leases of "target housing,"[3] either within each lease or as attachments to each lease, the following: (1) a Lead Warning Statement;[4] (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 pres-

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[3] "Target housing" is any housing constructed before 1978, except housing for the elderly or persons with disabilities (unless a child less than six years of age resides or is expected to reside in such housing), or a zero-bedroom dwelling. 40 C.F.R. § 745.103.

[4] The Disclosure Rule provides the following language for the required Lead Warning Statement:

> Housing built before 1978 may contain lead-based paint. Lead from paint, paint chips, and dust can pose health hazards if not managed properly. Lead exposure is especially harmful to young children and pregnant women. Before renting pre-1978 housing, lessors must disclose the presence of lead-based paint and/or lead-based paint hazards in the dwelling. Lessees must also receive a federally approved pamphlet on lead poisoning prevention.

40 C.F.R. § 745.113(b)(1).

ence; (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 aforementioned information described in (2) and (3) above; 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.[5] Complaint ¶¶ 53, 62, 71, 80, 89. The Complaint proposed a $89,430 penalty and informed Appellants that they had thirty days from receipt of the Complaint to file an answer. *Id.* at 14. The certified mail domestic return receipt cards ("green cards") for Willie Burrell, Dudley Burrell, the WB Trust, and the DB Trust accompanying the Complaint bear the signature of Willie P. Burrell. Region's Resp. Br., att. 3-1-2 (copies of green cards for Complaint mailed to Willie Burrell and the WB Trust); *id.*, att. 9-5- 6 (Declaration of LaDawn Whitehead on File Stamp Dates on Certified Mail Receipts, att. (Mar. 11, 2011) (copies of green cards for Complaint mailed to Dudley B. Burrell and the DB Trust)). The green cards were filed with the Regional Hearing Clerk on July 17 and 18, 2006. *Id.*, att. 9-3 (Declaration of LaDawn Whitehead on File Stamp Dates on Certified Mail Receipts ¶¶ 11-12). Neither the Burrells nor their respective trusts filed answers to the Complaint, which were due thirty days after the Region served the Complaint. Order on Motions 1 (July 26, 2011); Memorandum in Support of Motion for Default Order, att. 2 (Declaration of LaDawn Whitehead ¶¶ 1-2 & att. C (Oct. 8, 2010) (certified administrative record index for *In re Willie P. Burrell, et al.*, Docket No. TSCA-05-2006-0012)); *see also* 40 C.F.R. § 22.15(a) (setting forth answer filing deadline).

On December 17, 2010, the Region sought a default order. In response, Appellants[6] requested a settlement conference. 1st Willie P. Burrell Affidavit, ex. G (Mar. 2, 2011) (Letter from Willie P. Burrell to Maria E. Gonzalez, Associate Regional Counsel, U.S. EPA Region 5 (Jan. 12, 2011)) ("1st W. Burrell Aff."). Appellants, Dudley Burrell, and the DB Trust, pro se and later through Appellants' current representative in this matter, then filed several motions and other pleadings in opposition to the Region's motion for default order, including documents that the RJO later accepted for filing as "proposed" answers.[7] *See* Order

[5] These requirements are set forth in 40 C.F.R. § 745.113(b).

[6] In the proceeding before the RJO, Willie Burrell and the WB Trust corresponded with the Region or filed some documents separately from Dudley Burrell and the DB Trust. Accordingly, when describing the proceedings below, "Appellants" continues to refer to only Willie Burrell and the WB Trust.

[7] Dudley Burrell and the DB Trust filed a joint Answer, and Willie Burrell and the WB Trust filed a separate joint Answer. Default Order at 1. However, the Burrells and their respective trusts filed their Answers out of time and without having first sought or received leave to file such Answers. *Id.*
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Regarding Filing of Answers 2 (Apr. 8, 2011). Appellants also filed a "motion opposing the order of default judgment," which in an exercise of her discretion, the RJO construed as a brief in opposition of the Region's motion. Order on Motions at 1. Appellants' brief raised the following defenses to the merits of the case: selective enforcement, ability to pay/continue in business, no known risk of exposure, attitude, cooperation, compliance, early settlement, size of business, the absence of target occupants, and culpability.[8] Memorandum in Support of Respondents' Motion Opposing Motion for Default Judgment and Respondents' Motion to Dismiss 17-21 (Mar. 3, 2011). The Region filed a response to the opposition on March 14, 2011, and Appellants filed a surreply on March 23, 2011.

On July 26, 2011, the RJO denied several motions that Willie Burrell, the WB Trust, Dudley Burrell, and the DB Trust had filed. Order on Motions at 9. The RJO also held that Willie Burrell did not demonstrate good cause to deny the entry of the default order against Willie Burrell and the WB Trust. *Id.* The RJO deferred her rulings on the Region's motion for default and Dudley Burrell's motions to quash and to dismiss for improper service, to allow the parties to supplement the record in certain respects. *Id.* In particular, the RJO requested that the parties address, *inter alia*, the appropriate penalty to be assessed against Willie Burrell and the WB Trust in the event that the complaint against Dudley Burrell and the DB Trust was dismissed. *Id.* at 9-10.

On November 23, 2011, the RJO issued her Default Order, granting the motion to dismiss filed by Dudley Burrell and the DB Trust,[9] and granting the Re-

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(continued)
The RJO accepted the answers for filing, but considered them to be "proposed" Answers pending the outcome of the dispositive motions that the parties had filed. *Id.* at 2.

[8] With respect to culpability, Appellants stated:

> The two principal criteria for assessing culpability are: (1) the violator's knowledge of the Disclosure Rule, and (2) the violators [sic] control over the violative condition. [Willie Burrell] contends that she was unaware of the Disclosure Rule in 2003. [Willie Burrell and the WB Trust] admit that they had sole control over the conditions that led up to the violations for 257 N. Chicago #1; 257 N. Chicago #5; 575 E. Oak and 993 N. Schuyler. [Willie Burrell and the WB Trust] did not willfully violate the TSCA. Moreover, the government has not alleged willful conduct. Thus, the penalty should be decreased since all of the alleged violations were unintentional.

Memorandum in Support of Respondents' Motion Opposing Motion for Default Judgment and Respondents' Motion to Dismiss 21 (Mar. 7, 2011) (citations omitted).

[9] Specifically, the RJO found that the Region had not effected proper service of the Complaint on Dudley Burrell and the DB Trust, Order on Motions at 7, and the Region opted not to further pursue Dudley Burrell and the DB Trust in this matter. Default Order at 2.

gion's motion for default as to Appellants. Having determined in her earlier Order on Motions that Appellants did not demonstrate good cause to deny entry of default against them, the RJO analyzed the penalty as proposed by the Region and assessed the proposed amount, $89,430. Default Order at 7-11.

On January 10, 2012, Appellants filed this appeal of the Default Order with the Board. The Region filed its response brief on February 22, 2012. The case now stands ready for the Board's decision.

IV. *STANDARD OF REVIEW*

The appeal of a default order and initial decision is governed by the Consolidated Rules of Practice found at 40 C.F.R. part 22. As with other enforcement proceedings, "[t]he [Board] shall adopt, modify, or set aside the findings of fact and conclusions of law or discretion contained in the decision or order being reviewed." 40 C.F.R. § 22.30(f); *see also* Administrative Procedure Act, 5 U.S.C. § 557(b) ("On appeal from or review of [an] initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."). In the case of default orders, the Board may assess a penalty that is equal to or lower than the amount proposed in the complaint or in the motion for default, whichever is less. 40 C.F.R. § 22.30(f).

Default is generally disfavored as a means of resolving EPA enforcement proceedings. *In re JHNY, Inc.*, 12 E.A.D. 372, 384 (EAB 2005) (stating principle); *In re Thermal Reduction Co.*, 4 E.A.D. 128, 131 (EAB 1992) (same); *see, e.g.*, *Enron Oil Corp. v. Diakuhara*, 10 F.3d 90, 95-97 (2nd Cir. 1993) (reversing trial court's finding of default where court failed to consider extenuating circumstances that mitigated litigant's procedural errors). In close cases, doubts are typically resolved in favor of the defaulting party so that adjudication on the merits, the preferred option, can be pursued. *Thermal Reduction*, 4 E.A.D. at 131 (citing treatise on federal practice and procedure); *see In re Neman*, 5 E.A.D. 450, 454-60 (EAB 1994) (vacating default order where amended complaint was not properly served on defaulting party). But, the Board has not hesitated to affirm default orders in cases where the circumstances clearly indicate that the imposition of such a remedy is warranted. *E.g.*, *In re Rocking BS Ranch, Inc.*, CWA Appeal No. 09-04 at 13 (EAB Apr. 21, 2010) (Final Decision and Order); *In re Four Strong Builders, Inc.*, 12 E.A.D. 762, 772 (EAB 2006); *In re B&L Plating, Inc.*, 11 E.A.D. 183, 191-92 (EAB 2003); *In re Jiffy Builders, Inc.*, 8 E.A.D. 315, 320-21 (EAB 1999); *In re Rybond, Inc.*, 6 E.A.D. 614, 625-38 (EAB 1996); *In re House Analysis & Assocs.*, 4 E.A.D. 501, 506-08 (EAB 1993); *Thermal Reduction*, 4 E.A.D. at 130-32.

V. *ANALYSIS*

The Board considers the "totality of the circumstances" when evaluating the appeal of a default order. *In re Four Strong Builders, Inc.*, 12 E.A.D. 762, 766 (EAB 2006); *In re Jiffy Builders, Inc.*, 8 E.A.D. 315, 319 (EAB 1999); *In re Rybond, Inc.*, 6 E.A.D. 614, 624 (EAB 1996). As explained below, the Board has examined the procedural omission that led to issuing the default order following the test set forth in *Four Strong Builders*, 12 E.A.D. 762. Under this test, the Board considers whether the party challenging the default order violated a procedural requirement; whether that particular procedural violation constitutes proper grounds for a default order; and whether the party challenging the default order has demonstrated a valid excuse or justification for noncompliance with that procedural requirement. *Four Strong Builders*, 12 E.A.D. at 766-67; *see also In re Pyramid Chem. Co.*, 11 E.A.D. 657, 661 (EAB 2004) ("When a party commits a procedural violation that can give rise to a default, such as an untimely answer, a significant factor in the good cause determination is whether the purported defaulting party has any valid excuse for the procedural violation.") (footnote omitted).

In addition to evaluating the procedural omission, the Board has considered the defaulting party's likelihood of success on the merits of the underlying case. *E.g.*, *Rybond*, 6 E.A.D. at 625. The appellant must demonstrate that there is more than the mere possibility of a defense, but rather a "strong probability" that litigating the defense will produce a favorable outcome. *Jiffy Builders*, 8 E.A.D. at 322 ("Respondent would need to demonstrate not only that it has a defense that, if proved, would avoid liability, but also that it would likely prevail on its defense were it litigated."); *Rybond*, 6 E.A.D. at 628; *In re Midwest Bank & Trust Co.*, 3 E.A.D. 696, 701 (CJO 1991).

A. *There is a Procedural Violation Leading to Default*

The RJO based her finding of default on Appellants' failure to file a timely answer. A party "may be found in default: after motion, upon failure to file a timely answer to the complaint." 40 C.F.R. § 22.17(a). In general, the deadline to file an answer to a complaint is thirty days after service of the complaint.[10] *Id.* § 22.15(a). In this case, the Region commenced the administrative proceedings on June 22, 2006, and served Appellants by certified U.S. mail the same day. No other pleading was filed in the matter before the RJO until the Region moved for a default order on December 17, 2010. Appellants then filed several motions and other pleadings opposing the Region's motion, including a document that the RJO accepted for filing as a proposed answer. *See* Order Regarding Filing of Answers

[10] An additional five days is granted if the complaint was served by a method other than overnight or same-day delivery. 40 C.F.R. § 22.7(c).

(Apr. 8, 2011). The proposed answer remained a proposed answer for the duration of the proceedings, and the RJO did not accept it for filing as an answer. As Appellants' did not file a timely answer, Appellants have committed a procedural violation that leads to default.

1. *Appellants Have Not Demonstrated a Valid Excuse for the Procedural Violation*

Appellants attribute their procedural violation to what they term their attorney's gross negligence. Burrell Appeal Br. at 6-7. According to Appellants, their attorney "never entered an appearance; never filed an answer; never advised [Willie] Burrell that she was required to file an answer; [and] never informed [Willie] Burrell a complaint had been filed by the EPA." *Id.* at 7. Appellants state that they relied on their attorney's statement "that all of [Appellants'] affairs were 'in order' and that [the attorney] 'was on top of it.'" *Id.*

The neglect of a party's attorney does not excuse an untimely filing. *Pyramid*, 11 E.A.D. at 665 ("[The Board] ha[s] made clear, time and again, that the failings of a client's attorney does not excuse compliance with the Consolidated Rules].") (citing *In re Gary Dev. Co.*, 6 E.A.D. 526, 531-32 (EAB 1996), and *In re Detroit Plastic Molding Co.*, 3 E.A.D. 103, 105-06 (CJO 1990)). The Board has repeatedly held that "an attorney stands in the shoes of his or her client, and ultimately, the client takes responsibility for the attorney's failings." *Pyramid*, 11 E.A.D. at 667; *accord Four Strong Builders*, 12 E.A.D. at 770; *JHNY*, 12 E.A.D. at 382-83 & n.15; *Jiffy Builders*, 8 E.A.D. at 320-21; *see also Detroit Plastic Molding*, 3 E.A.D. at 105-06 (pre-Board case). In general, a client voluntarily 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.'" *Link v. Wabash R.R. Co.*, 370 U.S. 626, 634 (1962) (quoting *Smith v. Ayer*, 101 U.S. 320, 326 (1879)); *accord United States v. Boyle*, 469 U.S. 241, 249-52 (1985) (tax return must be timely filed regardless of whether a client entrusted its attorney with the duty to make a timely filing).

Despite Willie Burrell's allegation that her former attorney did not notify her that a complaint had been filed, Burrell Appeal Br. at 7, Willie Burrell and the WB Trust had direct notice of the Complaint as Willie Burrell signed the return receipt cards accompanying the Complaint. Region's Resp. Br., att. 2 (Complaint, att. B, copies of domestic return receipt cards); *see also* Order on Motions at 4 ("The parties do not dispute that the return receipts for the copies of the Complaint that were mailed to Mr. Burrell and the [DB] Trust were signed by 'Willie Pearl Burrell' and dated July 10, 2006."). Moreover, the cover letter to the Complaint also is addressed to Willie Burrell, with the attorney listed as a carbon copy recip-

ient. Letter from Mardi Klevs, Chief, Pesticides and Toxics Branch, U.S. EPA Region 5, to Willie Burrell (June 22, 2006). In light of these facts and the governing law that an attorney's neglect does not excuse an untimely filing, the Board is not persuaded that Appellants have demonstrated that a valid excuse exists for the procedural violation.

Appellants also state that an alleged defective proof of service of the Complaint excuses them from failing to timely file an answer. Part 22 provides that "[p]roof 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." 40 C.F.R. § 22.5(b)(1)(iii). According to Appellants, irregularities in the U.S. Postal Service return receipt cards (green cards) cast a cloud on the proof of service of the Complaint and excuse Appellants from default. Burrell Appeal Br. at 15. Rather than providing a "'date stamp' [on] the green cards on the same side as the purported [recipient's] signature" to indicate the date the cards were filed with the Regional Hearing Clerk, there are notations of the filing dates, which are handwritten on top of white correction tape or ink. *Id.* at 14. According to Appellants, these "handwritten dates purport to match those that are stamped on the non-signature side of the green cards. As a result, a cloud exists over the true date the green cards were actually filed by the Government with the [Regional Hearing Clerk]." *Id.* at 14-15. Appellants continue, "the EPA may not obtain a default [] when its own duty under the CROP 40 C.F.R. § 22.5(C)(iii) [sic] was not met."[11] *Id.* at 15.

In this case, even if the Board accepted as true Appellants' allegations that the Regional Hearing Clerk did not file the green cards on the dates written on the green cards, Appellants have not explained how the alleged irregularity excuses Appellants from default. Appellants do not dispute their receipt of the Complaint, there is no confusion as to the entities subject to the Complaint, and there is no demonstration that any delayed filing of the proof of service adversely affected Appellants' ability to file a timely answer.[12] Accordingly, Appellants lack a valid

[11] The correct regulatory provision is 40 C.F.R. § 22.5(b)(1)(iii).

[12] Appellants' reliance on *In re Marc Mathys d/b/a Green Tree Spray Techs., LLC*, is misplaced. Dkt. No. RCRA-03-2005-0191 (ALJ Apr. 17, 2006) (Order Granting Respondent's Motion to Set Aside Default Order). *Mathys* concerned an incomplete *certificate* of service attached to the complaint and served upon a business. The Administrative Law Judge found it reasonable for the respondent to have believed that the complaint was filed against the business and not against the respondent as an individual because information in the certificate of service was incomplete. "In sum, the equities in this case lie with respondent Marc Mathys." *Id.* at 2. Burrell does not challenge the certificate of service in this case, but rather the filing of the proof of service once it was returned to the EPA Regional Office.

excuse for their procedural violation.

B. *Appellants Fail to Demonstrate a Likelihood of Success on the Merits*

The Complaint alleges Disclosure Rule violations at six rental properties, and Appellants concede liability for the violations at four of the properties.[13] Accordingly, the Board's analysis considers only the two properties (E. Chestnut Street and E. Erzinger Street) where Willie Burrell and the WB Trust argue that neither entity was a lessor, and instead that Dudley Burrell was the lessor because he offered the properties for rent after the dissolution of B&D. Burrell Appeal Br. at 27, 29, 31.

1. *Appellants Fail to Raise Defenses That, If Proven, Would Avoid Liability at the E. Chestnut & E. Erzinger Locations, and Appellants Do Not Demonstrate That They Are Likely to Prevail on the Merits, If Litigated*

a. *Willie Burrell's Defense That She is Not a Lessor Does Not Avoid Liability*

Appellants argue before this Board that neither Willie Burrell nor the WB Trust was the lessor at two locations listed in the Complaint – E. Chestnut and E. Erzinger – and that instead, Dudley Burrell and/or the DB Trust was the lessor. Appellants state that Dudley Burrell, not Willie Burrell, offered the E. Erzinger Street location for lease by signing the contract. *Id.* at 29. Appellants also argue that Dudley Burrell, unaware that B&D had become defunct, *id.* at 31, directed B&D's assistant office manager, Zinia Burrell, to execute the lease using B&D forms for the E. Chestnut property. *See* Respondents' Joint Supplemental Memorandum 9-12 (Aug. 31, 2011).

In the proceeding below, Appellants filed a "Motion Opposing Order of Default Judgment" (Mar. 3, 2011) in response to the Region's Motion for Default. The RJO construed Appellants' filing as a "brief in opposition of Complainant's motion for default, not as a separate and distinct motion." Order on Motions at 1 n.2. As previously discussed above, the "Motion Opposing Order of Default Judgment" raised the following defenses upon which Willie Burrell maintained she had a strong likelihood of prevailing if a hearing were held in this matter: selective enforcement; ability to pay; no known risk of exposure; attitude; cooperation; compliance, willingness to settle; size of business; lack of target occupants; and

[13] Willie Burrell admits that the Trust is lessor of (and liable for TSCA violations at) four properties located at three addresses. 1st W. Burrell Aff. ¶ 43; *see also* Proposed Answer ¶ 34 ("The Willie P. Burrell Trust, by its agent B&D, offered leases for 257 N. Chicago, 993 N. Schuyler, and 575 E. Oak, between December of 2001 and April 2003.").

lack of willful violation. Memorandum in Support of Respondents' Motion Opposing Motion for Default Judgment and Respondents' Motion to Dismiss at 17-21; *see also* Order on Motions at 9. Noticeably, Willie Burrell did not argue that she was not a lessor.

The RJO's Order on Motions resolved several issues raised in the Region's Motion for Default Judgment and Appellants' opposition. *See generally* Order on Motions. As explained above, the RJO determined that Willie Burrell had not demonstrated good cause to deny the entry of default against her and the WB Trust. *Id.* at 8-9; *see also* Default Order at 2. As a result of the default, the RJO deemed all the facts alleged in the Complaint to be true and considered Appellants to have waived their right to contest the factual allegations. Default Order at 2. The Default Order did not discuss whether Willie Burrell or the WB Trust was a lessor of property at the E. Chestnut or E. Erzinger locations. The RJO concluded that Appellants were liable for the violations as alleged in the Complaint, including the violations at the E. Chestnut and E. Erzinger locations. *Id.* at 5.

The Board previously has declined to consider an appellant's likelihood of success on the merits in an appeal of a default order when the Board determined that the appellant's assertions should have been raised earlier, in either an answer or in response to the motion for default order. *In re Thermal Reduction Co.*, 4 E.A.D. 128, 132 (EAB 1992). In *Thermal Reduction*, the appellant company did not file either an answer or a response to the motion for default, and the company's defenses were being made for the first time on appeal. *Id.* The Board stated, "We decline to accept these assertions, raised for the first time on appeal, as a basis for overturning a properly issued Default Order." *Id.*

In this context, Willie Burrell and the WB Trust attempted to defend against liability during the penalty phase of the RJO's proceedings. Moreover, the Board observes that the first opportunity for the Region to rebut the defense that neither Willie Burrell nor the WB Trust was a lessor is now, on appeal. Following *Thermal Reduction*, the Board will not consider Appellants' likelihood of success on the merits of their argument that they were not lessors when Appellants failed to raise that defense before the RJO in the liability phase of the proceedings below.

2. *Appellants' Laches Defense Does Not Defeat Liability*

Appellants argue that the doctrine of laches bars the Region's claims because the Region "waited over 4 and ½ years to prosecute their claim." Burrell Appeal Br. at 36. According to Appellants, witnesses and other evidence "that could have established proof of various defenses can no longer be located or established." *Id.* Laches is an equitable defense applicable where there has been an unreasonable delay in bringing an action, and where the party raising the defense has suffered undue prejudice. *Costello v. United States*, 365 U.S. 265, 281-82 (1961). As with the defense that neither Willie Burrell nor the WB Trust was a

lessor, and having filed neither a timely answer nor a response to the motion for default, Appellants first raised their laches defense in response to the RJO's order seeking supplemental briefing on the penalty. Because laches was not raised below until the RJO had already determined that Appellants were in default, the Board declines to consider the defense. *Thermal Reduction*, 4 E.A.D. at 132.[14]

3. *Appellants' Selective Enforcement Defense Does Not Defeat Liability*

Appellants contend that the Region did not pursue enforcement actions against seven other "similarly situated violators," and that the failure to enforce against these other violators demonstrates that the Region targeted the Appellants "invidiously or in bad faith, i.e., based upon the impermissible consideration of their race as Afro-Americans and their well-known political views."[15] Burrell Appeal Br. at 35. In their brief, Appellants name seven property rental companies in the Kankakee, Illinois area that Appellants allege are "similarly situated violators [who] were left untouched" while Appellants were subjected to enforcement. *Id.* (citing 1st W. Burrell Aff. ¶ 26).

"One who alleges selective prosecution or enforcement '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.'" *In re Ram, Inc.*, 14 E.A.D. 357, 370 (EAB 2009) (quoting *In re B&R Oil Co.*, 8 E.A.D. 39, 51 (EAB 1998)), *dismissed upon stip.*, No. 09-cv-307-JHP (E.D. Okla. Apr. 11, 2011). To prevail on a claim of selective enforcement, one must establish that "(1) the government 'singled out' a violator while other simi-

[14] The Board notes that in this case, the doctrine of laches does not apply because the United States is acting in its sovereign capacity to protect the public interest. *Nevada v. United States*, 463 U.S. 110, 141 (1983) ("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 * * * .") (quoting *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917)); *Martin v. Consultants & Adm'rs, Inc.*, 966 F.2d 1078, 1090 (7th Cir. 1992) ("As a general rule, the United States is not subject to the equitable defense of laches in enforcing its rights.") (cases cited omitted); *United States v. Arrow Transp. Co.*, 658 F.2d 392, 394 (5th Cir. 1981) ("[Laches] defense cannot be asserted against the United States in its sovereign capacity to enforce a public right or to protect the public interest"). Even if laches applied here, Appellants do not allege unreasonable delay in the Region *bringing* the action, but rather an alleged unreasonable delay in moving for default. While laches is not a defense here, the Board suggests the Region ensure in future actions that any motions to seek a default judgment are filed in a more timely manner.

[15] Appellants also allege that the RJO erred in concluding that Appellants would not prevail on a selective enforcement defense because her ruling, Order on Motions at 8-9, was made prematurely prior to a prehearing exchange, during which Appellants expected to obtain "records, documents and interviews in [the Region's] possession which are necessary to prove [A]ppellants' defense." Burrell Appeal Br. at 35.

larly 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." *B&R Oil*, 8 E.A.D. at 51.

Appellants claim that the Region singled them out due to their race and political views. Although Appellants self-identify as "Afro-Americans and [having] well-known political views," Burrell Appeal Br. at 35, they do not explain how Appellants' race or political views differed – and thus would suggest singling out – from the rental companies that Appellants state are "similarly situated violators [who] were left untouched." These claims fall well short of the threshold required to prevail on a selective enforcement claim, and Appellants have not shown a likelihood of success on this defense.

4. *Appellants' "Mitigating Factors" Defenses Do Not Defeat Liability*

Appellants raise other defenses upon which they maintain they have a strong likelihood of prevailing if a hearing were held in this matter, including: ability to pay, size of business; no known risk of exposure; attitude; willingness to cooperate; compliance; and willingness to settle. *Id.* at 36-40. Appellants claim that the RJO erred by refusing to consider any mitigating factors as defenses to the complaint. *Id.* at 36. While some of these factors, if proven at hearing, might provide a basis upon which to reduce the penalty assessed against Appellants, the "mitigating factors" do not constitute defenses to liability that would render likely Appellants successful on the merits of this case. *See, e.g.*, *In re New Waterbury, Ltd.*, 5 E.A.D. 529, 549 n.32 (EAB 1994) ("The evaluation of ability to pay is separate from the question of liability."); *see also* TSCA § 16(a)(2)(B), 15 U.S.C. § 2615(a)(2)(B) (setting forth required considerations when determining penalty amount).

C. *Penalty Assessment*

In the case of a default order, the Board may assess a penalty that is equal to or lower than the amount proposed in the complaint or in the motion for default, whichever is less. 40 C.F.R. § 22.30(f); *see also In re Rybond, Inc.*, 6 E.A.D. 614, 638-39 (EAB 1996) (reducing total penalty assessed by ALJ from $178,896 to $25,000, based on "totality of the circumstances of the violations."). "[I]n cases where the ALJ assessed a penalty that 'falls within the range of penalties provided in the penalty guidelines, the Board will generally not substitute its judgment for that of the [ALJ] absent a showing that the [ALJ] has committed an abuse of discretion or a clear error in assessing the penalty.'" *In re Friedman*, 11 E.A.D. 302, 341 (EAB 2004) (alteration in original) (quoting *In re Ray Birnbaum Scrap Yard*, 5 E.A.D. 120, 124 (EAB 1994)), *aff'd* No. Civ. 2:04-CV-00517-WBS-DAD (E.D. Cal. Feb. 25, 2005), *aff'd* 220 Fed. App'x 678 (9th Cir. 2007); *accord In re Martex Farms, S.E.*, 13 E.A.D. 464, 493 (EAB 2008) (quoting *In re Ocean State*

Asbestos Removal, Inc., 7 E.A.D. 522, 536 (EAB 1998)), *aff'd* 559 F.3d 29 (1st Cir. 2009); *In re Chempace Corp.*, 9 E.A.D. 119, 131 (EAB 2000); *In re Slinger Drainage, Inc.*, 8 E.A.D. 644, 669 (EAB 1999) ("We see no obvious errors in the [Administrative Law Judge's] penalty assessment, and, therefore, we see no reason to change his penalty assessment."), *appeal dismissed for lack of jurisdiction*, 237 F.3d 681 (D.C. Cir. 2001). Upon default, presiding officers shall order the "relief proposed in the complaint or the motion for default * * * unless the requested relief is clearly inconsistent with the record of the proceeding or the Act." 40 C.F.R. § 22.17(c).

TSCA provides that "[i]n determining the amount of a civil penalty, the Administrator shall take into account the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require." TSCA § 16(a)(2)(B), 15 U.S.C. § 2615(a)(2)(B). The Agency has developed penalty policies based on these statutory factors. The Region calculated its proposed penalty using the then-applicable Section 1018 Disclosure Rule Enforcement Response Policy (Feb. 2000) ("2000 ERP"). In December 2007, the Agency issued the Section 1018 Disclosure Rule Enforcement Response and Penalty Policy ("2007 ERP"), which supercedes the 2000 ERP. The purpose of the non-binding policy is "to provide predictable and consistent enforcement responses and penalty amounts for violations of Section 1018, yet retain flexibility to allow for individual facts and circumstances of a particular case." Waste and Chemical Enforcement Division, Office of Civil Enforcement, Office of Enforcement and Compliance Assurance, U.S. EPA, *Section 1018 Disclosure Rule Enforcement Response and Penalty Policy* 1 (Dec. 2007) ("2007 ERP"). Under either the 2000 or 2007 penalty policy, penalties are determined in two stages: (1) calculation of a gravity-based penalty that reflects the overall seriousness of the violation and that considers the nature, circumstances, and extent of harm that may result from the violation; and (2) application of adjustments to the gravity-based penalty and that considers the violator's ability to pay and to continue in business, history of the violation, degree of culpability, and other factors as justice may require, and voluntary disclosure. *E.g.*, 2000 ERP at 9.

1. *The Penalty Assessed in the Default Order Falls Within the Range of Penalties Provided in the Penalty Guidelines*

Although the Region's proposed penalty – which the RJO adopted – was based on the 2000 ERP and not the now-applicable 2007 penalty policy, the penalty amounts calculated pursuant to the 2000 ERP are identical to the penalty amounts calculated pursuant to the 2007 penalty policy. Default Order at 6 n.3; *see also* Region's Resp. Br., att. 15 (Declaration of Joana Bezerra ¶¶ 48-49 (Nov. 7, 2008)). Appellants have not challenged this conclusion. The RJO concluded that the $89,430 penalty the Region proposed in its complaint was consis-

tent with the evidence in the record and the penalty criteria set forth in TSCA and the 2000 ERP.[16] Default Order at 10. The RJO provided a detailed assessment of the penalty calculation. *Id.* at 7-10. In doing so, the RJO considered the Region's proposed penalty as described in a declaration submitted by an environmental engineer in the Region's Pesticides and Toxics Compliance Section, Land and Chemicals Division. *Id.* at 7. The Region's penalty calculation was based on an analysis using the 2000 ERP's guidance as the means for considering each of the statutory penalty factors. Declaration of Joana Bezerra ¶ 9.

The RJO considered the Region's assignment of each violation at each location to a circumstance level and to an extent category. Default Order at 7. The Region used the matrices in the 2000 ERP to determine appropriate gravity-based penalty amounts for each violation based the violation's assigned circumstance levels and extent categories.[17] *Id.* at 7-8; *see also* 2007 ERP at 30, app. B (Gravity-Based Penalty Matrix for violations occurring on or before March 14, 2004). For each violation, the RJO determined that the Region's proposed penalty was consistent with TSCA. Default Order at 7-8. Upon default, the RJO assessed the proposed penalty amount. Accordingly, the Board is persuaded that the RJO's assessed penalty falls within the range of penalties provided in the penalty guidelines.

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[16] The RJO noted:

> The Office of Enforcement and Compliance Assurance issued a revised ERP that was "immediately applicable" and "should be used to inform the appropriate enforcement response and to guide the calculation of any proposed penalties in administrative enforcement actions concerning violations of the Disclosure Rule." The penalty in this matter was originally calculated sometime before the filing of the Complaint on June 22, 2006, and thus was based on the 2000 ERP. That penalty has been more recently reviewed by Agency personnel who concluded that the penalty amount would be the same whether the 2000 or 2007 policy was applied.

Default Order at 6 n.3 (citing Complainant's Memorandum of Support of Motion for Default Order, att. 25 (Declaration of Joana Bezerra ¶ 49)).

[17] Circumstance levels are determined by the regulatory provision violated. *See generally* 2007 ERP at 27-29, app. B. The extent category is determined by the age of the youngest occupant in the target housing, or whether an occupant is a pregnant woman. Where an occupant is a child under six years of age or a pregnant woman, the extent is considered "major." *Id.* at 29 (Extent Category Matrix). If an occupant is a child six years of age or older but less than eighteen years of age, or the occupant's age is not provided, the extent is considered "significant." *Id.* Finally, the extent is considered to be "minor" when the occupant of the target housing is eighteen years of age or older. *Id.*

a. *Appellants Do Not Demonstrate That the RJO Abused Her Discretion or Clearly Erred by Not Adjusting the Gravity-based Penalty on the Basis of Appellants' Inability to Pay*

Appellants challenge the RJO's failure to adjust the gravity-based penalty on the basis of their ability to pay. "If ability to pay is contested, a complainant must establish a prima facie case that a proposed penalty is nonetheless 'appropriate' by presenting * * * 'some evidence to show that it considered the respondent's ability to pay a penalty.'" *In re Donald Cutler*, 11 E.A.D. 622, 632 (EAB 2004) (quoting *In re New Waterbury, Ltd.*, 5 E.A.D. 529, 542 (EAB 1994)). "The Region need not present any *specific* evidence to show that the respondent *can pay* or obtain funds to pay the assessed penalty, 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. Once the respondent has presented *specific* evidence to show that despite its sales volume or apparent solvency 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." *New Waterbury*, 5 E.A.D. at 542-43 (citing *In re Kay Dee Veterinary, Div. of Kay Dee Feed Co.*, 2 E.A.D. 646, 651-52 (CJO 1988)).

Although Willie Burrell concedes that she, the WB Trust, B&D, and Burrell Property Management LLC received over $600,000 in gross rents for the 2007, 2008, and 2009 tax years, 1st W. Burrell Aff. ¶ 48, at the crux of Appellants' ability to pay issue is the extent of their real property ownership. Willie Burrell claims to "own[] no real property," Burrell Appeal Br. at 32-33, but the Region contends, based on public information obtained and Willie Burrell's own statements in her affidavit, that she and/or the WB Trust "appear to own a significant amount of properties." Region's Resp. Br. at 25 (citing *id.*, att. 16 (public records real property search for Willie Burrell)); *see also* 2nd W. Burrell Aff. ¶¶ 1-2 ("Willie Burrell is the owner of the Willie Burrell Trust. Willie Burrell Trust has approximately 80 rental units.").

When a party claims an inability to pay, the Region requests and reviews financial information from claimants to better understand their financial positions. *E.g.* 2007 ERP at 17-18. Here, the financial information that Willie Burrell provided was inadequate to determine that she or the WB Trust lacked an ability to pay. After receiving Willie Burrell's Individual Ability to Pay Form, the Region sought additional information to clarify the responses. Default Order at 9; Letter from Maria Gonzalez, Associate Regional Counsel, Region 5, U.S. EPA, to Derek S. Burrell, *Re: Willie P. Burrell and Willie P. Burrell Trust Inability to Pay Claim* (May 11, 2011) ("Gonzalez May 11, 2011 Letter"). In particular, the Region sought, but did not receive, a complete list of properties that Appellants own, the

market values of those properties, and the amounts owed on those properties. Default Order at 9 (citing Memorandum in Support of Complainant's Supplement, att. 2 (Aug. 16, 2011) (Declaration of Cynthia Mack-Smetzer ¶ 23 (Aug. 15, 2011))); *see also* Gonzalez May 11, 2011 Letter at 1. Ultimately, the Region concluded that Willie Burrell did not completely explain her financial circumstances,[18] and the Region's analyst could not make an accurate determination on Willie Burrell's ability to pay. Default Order at 9 (citing Declaration of Cynthia Mack-Smetzer ¶ 30).

Appellants did not provide the Region with any information regarding the WB Trust's inability to pay. Region's Resp. Br. at 26. *But see* 1st W. Burrell Aff. ¶ 3 ("Financial information for the Willie Burrell Trust is included in the submitted tax returns for 2007-2009.").[19] The Region did not receive tax returns or other information on the assets and makeup of that trust. Default Order at 9 (citing Declaration of Cynthia Mack-Smetzer ¶ 13); Region's Resp. Br. at 26 (same). Again, due to the lack of information, the Region's analyst could not make an accurate determination of the Trust's ability to pay. Declaration of Cynthia Mack-Smetzer ¶ 30.

Willie Burrell and the WB Trust's claims that they lack an ability to pay are unsupported by specific evidence. Appellants were given the opportunity to provide such evidence but did not do so. They do not demonstrate that either entity has an inability to pay, and thus, such claims fall short. *See, e.g.*, *JHNY*, 12 E.A.D. at 383 ("Even financially challenged entities need to toe the line of compliance, and only those entities demonstrating a genuine inability to pay should be removed from the compliance-inducing influence that civil penalty assessment affords." (citing *In re Steeltech, Ltd.*, 8 E.A.D. 577, 587 (EAB 1999))).

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[18] Appellants failed to explain certain aspects of the amended April 14, 2011 Individual Ability to Pay Form Appellant. The Region states:

> The * * * [f]orm Willie Burrell submitted deleted her residence, without explanation. Appellant Willie Burrell has not explained the significant [certificate of deposit] pledged amount listed on her form; [explained] 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 employer * * * , Burrell Property Management LLC.

Region's Resp. Br. at 25-26.

[19] Additionally, Dudley Burrell states that he did not sign the joint tax returns filed by Willie Burrell from 2007 to 2009. 2nd Dudley Burrell Affidavit ¶ 8 (Mar. 25, 2011). Additionally, the tax returns do not distinguish which portion of the income is attributable to the Burrells and their separate trusts.

2. *Appellants Do Not Demonstrate That the RJO Abused Her Discretion or Clearly Erred by Not Otherwise Adjusting the Penalty*

Appellants list several statutory adjustment factors as defenses to liability, rather than as reasons for penalty adjustment.[20] Burrell Appeal Br. at 36 ("The RJO erred by refusing to consider any mitigating factors as defenses to the complaint."). The RJO examined these same arguments in the proceedings below, construed them as arguments for penalty adjustment, and concluded that the Region had considered the various adjustment factors to the penalty and found them either inapplicable or unwarranted. Default Order at 9. The Board agrees with the RJO's determination.

VI. *CONCLUSIONS OF LAW*

Based on the foregoing, the Board concludes the following:

1. Appellants' failure to file a timely answer is a procedural violation of 40 C.F.R. § 22.15(a) that leads to default, and Appellants have not shown that there is a valid excuse for the procedural violation.

2. Appellants have not demonstrated that they have a likelihood of success on the merits of the defenses, if the case were litigated.

3. The penalty assessed in the Default Order falls within the range of penalties provided in the penalty guidelines. Appellants do not demonstrate that the RJO committed an abuse of discretion or a clear error in not adjusting the gravity-based penalty on the basis of Appellants' inability to pay, nor do Appellants demonstrate that the RJO abused her discretion or clearly erred by not otherwise adjusting the penalty.

VII. *ORDER*

The Board affirms the RJO's default determination and the assessed penalty. Appellants Willie P. Burrell and the Willie P. Burrell Trust shall pay a total civil penalty of $89,430. Payment of the entire amount of the civil penalty shall be made within thirty (30) days of service of this Final Decision and Order, unless

[20] Specifically, Appellants cite size of business, no known risk of exposure, attitude, cooperation, compliance, and early settlement.

otherwise agreed to by the Region. Payment may be by certified or cashiers's check, payable to the Treasurer, United States of America, and forwarded to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

A transmittal letter identifying the case name and the EPA docket number, plus Appellants' name and address, must accompany payment. 40 C.F.R. § 22.31(c). Appellants shall serve copies of the check or other instrument of payment on the Regional Hearing Clerk and on the Region. If appropriate, the Region may modify the above-described payment instructions to allow for alternative methods of payment, including electronic payment options. Failure to pay the penalty within the prescribed time may result in assessment of interest on the penalty. 31 U.S.C. § 3717; 40 C.F.R. § 22.31(c).

So ordered.