



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
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CHICAGO, IL 60604-3590

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DEC 17 2010

REPLY TO THE ATTENTION OF:

BY HAND DELIVERY

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

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

Dear Ms. Toney:

Enclosed please find a file-stamped copy of Complainant's Motion for Default Order and supporting documentation, including the Memorandum in Support of Motion for Default Order in the above-referenced matter. EPA filed the original and one copy of this Motion with the Regional Hearing Clerk.

By copy of this letter, EPA advises Respondent that under the Consolidated Rules, a copy of which was provided with the Complaint, it must serve and file any reply to this Motion within 15 days of service.

Respectfully Submitted,

Maria Gonzalez
Associate Regional Counsel

Enclosures

cc: Willie P. Burrell (by certified mail/return receipt)
The Willie P. Burrell Trust (by certified mail/return receipt)
Dudley B. Burrell (by certified mail/return receipt)
The Dudley B. Burrell Trust (by certified mail/return receipt)
Edward Lee (by certified mail/return receipt)

2010 DEC 17 AM 10: 59

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5**

IN THE MATTER OF:

**Willie P. Burrell
The Willie P. Burrell Trust
Dudley B. Burrell, and
The Dudley B. Burrell Trust
300 N. Indiana Avenue
Kankakee, IL 60901**

Respondents

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) **Docket No. TSCA-05-2006-0012**
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COMPLAINANT'S MOTION FOR DEFAULT ORDER

Pursuant to Sections 22.16 and 22.17 of the Consolidated Rules of Practice, 40 C.F.R. §§ 22.16 and 22.17, Complainant hereby moves for entry of Default Order against Respondents Willie P. Burrell, the Willie P. Burrell Trust, Dudley B. Burrell, and the Dudley B. Burrell Trust. Enclosed is Complainant's Memorandum in Support of Motion for Default Order, a Certificate of Service, and a Proposed Default Order.

Respectfully Submitted,



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

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2010 DEC 17 AM 11:00

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

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

COMPLAINANT'S MEMORANDUM IN SUPPORT OF
MOTION FOR DEFAULT ORDER

INTRODUCTION

Pursuant to Section 22.17 of the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits" (Consolidated Rules), 40 C.F.R. § 22.17, Complainant, the Director of the Land and Chemicals Division, United States Environmental Protection Agency (EPA), Region 5,¹ by and through her attorney, moves for a Default Order against the Respondents, Willie P. Burrell, The Willie P. Burrell Trust, Dudley B. Burrell, and The Dudley B. Burrell Trust. As set forth below, Respondents have failed to file an Answer to the Administrative Complaint (Complaint) in this matter as required by 40 C.F.R. § 22.15; therefore, default is appropriate under 40 C.F.R.

§ 22.17(a). Complainant requests that the Presiding Officer issue a Default Order finding the

¹ At the time the Complaint was filed, the delegated complainant was the Chief of the Pesticides & Toxics Branch of the Waste Pesticides and Toxics Division. That Division has since reorganized as the Land and Chemicals Division and delegated issuance of Complaints to the Director. The mail code for the Regional Hearing Clerk and address for payment have also changed.

Respondent liable for the violations alleged in the Complaint and assessing a \$89,430 penalty, as proposed in the Complaint.

BACKGROUND

A. FACTS GIVING RISE TO THE COMPLAINT

On May 28, 2003, a representative of the U.S. EPA conducted an inspection at the office at 300 N. Indiana Avenue in Kankakee, Illinois to monitor compliance with Section 1018 and its implementing regulations at 40 C.F.R. Part 745, Subpart F (See Attachment 3). During the inspection, Willie P. Burrell indicated that she and her husband owned and managed 149 properties with 200 residential units (See Attachment 3). During the inspection, the inspector obtained copies of the following leases:

TABLE 1

Address	Apt. No.	Date of Lease
1393 E. Chestnut (Parcel No. 16-09-33-323-020)		12-04-01
257 N. Chicago (Parcel No. 16-09-32-421-012)	# 1	09-20-02
257 N. Chicago (Parcel No. 16-09-32-421-012)	# 5	04-01-03
575 E. Oak (Parcel No. 16-09-32-421-015)	# 5	02-07-03
1975 Erzinger (Parcel No. 16-17-04-128-017)	S/F	02-22-03
993 N. Schuyler (Parcel No. 16-09-32-203-008)	# 2	11-22-02

(See attachments 3-9).

These leases were missing the disclosures required by 40 C.F.R. 745.113(b)(1) –(4) and (6). (See Attachments 4-9.)

The leases leased units in apartment buildings located in Kankakee, Illinois, at the following addresses: 1393 E. Chestnut, 257 N. Chicago, 575 E. Oak, 1975 Erzinger, and 993 N. Schuyler in Kankakee, Illinois (the Apartment Buildings). (See Attachments 3-9.) The Apartment Buildings were constructed before 1978. (See Attachments 10.)

After reviewing the inspection report and leases, EPA determined that: each of the leases covered a period of more than 100 days; and each individual who signed a lease to pay rent in exchange for occupancy of one of Respondent's dwellings was a "lessee," and that Willie Burrell and Dudley Burrell were "lessor"s. In addition, EPA determined that each of the units leased in the leases identified in Table 1 was target housing.

Respondents control the leasing of the Apartment Buildings. 1393 E. Chestnut (Parcel No. 16-09-33-323-020) is owned by Dudley B. Burrell as trustee for the Dudley B. Burrell Declaration of Trust; and Tax records list the Dudley B. Burrell Trust and Dudley B. Burrell as owners. (See Attachment 11.) 257 N. Chicago (Parcel No. 16-09-32-421-012) was conveyed by quitclaim deed from Willie P. Burrell and Dudley B. Burrell to the Willie P. Burrell Trust in 1993 and tax records also list Willie P. Burrell as an owner (See Attachment 12). Tax records list Willie P. Burrell and the Willie P. Burrell Trust as the owner of 575 E. Oak St. (Parcel No. 16-09-32-421-015). It was initially conveyed to the City National Bank in trust by the Last Will and Testament of Harriet Edgeworth in trust no. 1611; but subpoenaed bank records list Dudley B. and Willie P. Burrell under account number 1611 and indicated that the trust was closed on July 14, 1994. (See Attachment 13.) 1975 E. Erzinger Ave. (Parcel No. 16-17-04-128-017) was conveyed by Sheriff's deed to the Dudley B. Burrell Trust in 1997, with the address of grantee listed as New World Development Corp., 300 N. Indiana Ave., Kankakee, IL 60901. (See Attachment 14.) New World Development Corporation, was a corporation dissolved on October 1, 2001, before the leases in Table 1 were executed, whose President was Dudley B. Burrell.

(See Attachment 16.) 993 North Schuyler (Parcel No. 09-32-203-008-004) was conveyed by quitclaim deed from Dudley B. Burrell and Willie P. Burrell, husband and wife, to the Willie Pearl Burrell Declaration of Trust in 1993, with instructions to send tax bills to Mr. and Mrs. Dudley Burrell; and Tax records list the Willie Pearl Burrell trust and Willie P. Burrell as the owners. (See Attachment 15.)

Respondents lease the units at the Apartment Buildings. The Apartment Buildings were leased from an Office located at 300 N. Indiana Avenue in Kankakee, Illinois, where EPA conducted its inspection and obtained the leases. (See Attachments 3-9.) All of the leasing transactions cited in the Complaint included B&D Management Corporation stationary. (See Attachments 4-9.) B&D Management Corporation was an Illinois Corporation with a registered office at 300 N. Indiana Ave, Kankakee, Illinois 60901, that was involuntarily dissolved on October 1, 2001, before the leases in Table 1 were executed, whose president and registered agent was Willie P. Burrell. (See Attachment 16 and 17.)² (See Attachments 4-9.) Respondent Willie P. Burrell has brought eviction actions on leases in all of the Apartment Buildings, including actions against three of the lessees of the leases in Table 1: Martha Eggleston, Alynthia Love, and Norrice Washington. (See Attachment 18.) Respondent Willie P. Burrell is the wife of Respondent Dudley Burrell. (See Attachment 19.) During the inspection, she indicated that she and her husband owned and managed 149 properties with 200 residential units. (See Attachment 3.) They are each listed as owners of numerous properties in Kankakee, Illinois. (See Attachments 20 and 21.) Respondent Dudley Burrell personally signed the February 22, 2003 lease of 1975 Erzinger. (See Attachment 9.). The Burrells have advertised leases. (See Attachment 22.)

² Under 805 Ill. Comp. Stat. 5/8.65(3), the directors of a corporation that carries on its business after the filing by the Secretary of State of articles of dissolution, otherwise than so far as may be necessary for the winding up thereof, are jointly and severally liable to the creditors of such corporation for all debts and liabilities of the corporation incurred in so carrying on its business.

Complainant determined that Respondents were “lessor”s because they offered target housing for lease; and that for each of the leases identified in Table 1, Respondents failed to include, within or as an attachment to the lease, the lead disclosure information required by 40 C.F.R. § 745.113)(b)(1) – (4), and (6), prior to the lessees becoming obligated under the leases, as required by 40 C.F.R. § 745.100.

B. FILING OF COMPLAINT

On June 22, 2006, Complainant 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). In the Complaint, Complainant seeks to assess an administrative penalty against Respondent for violating Section 409 of TSCA, 15 U.S.C. § 2689, and the regulations at 40 C.F.R. 745.113(b)(1) – (4), and (6). The Complaint alleged in five counts that Respondents violated TSCA by failing to include 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 in the six lease agreements cited in the table above. The Complaint proposed a penalty of \$89,430. The Complaint notified Respondents that they had thirty (30) days from receipt of the Complaint to file an Answer.

A copy of the filed Administrative Complaint is included Attachment 2 to this memorandum.

C. SERVICE OF COMPLAINT

Service of the Administrative Complaint upon Respondents Willie Burrell was complete on July 10, 2006, when Willie Pearl Burrell signed the green cards for her copy of the Complaint; her husband, Dudley Burrell's copy, the Willie P. Burrell Trust's copy and the Dudely B. Burrell Trust's copy.

Willie Burrell signed for her Complaint. Dudley Burrell was served as an individual through his wife, Willie Burrell, at a location previously listed as his address.³ This constitutes substitute service under the Rule 4(e) of the Federal Rule of Civil Procedure and 735 Ill. Comp. Stat. 5/2-203(a). What is or is not a party's 'dwelling house or usual place of abode' within the meaning of the rule or statute is a question to be determined on the facts of the particular case.' *Kalsson v. Rabinowitz*, 318 F.2d 666 (4th Cir. 1963), citing 2 James Wm. Moore Et Al., Moore's Federal Practice, ¶ 4.11 (2d ed. 1962). "To the extent that there is any rule or guide to be followed by the federal courts in such a case it is that where actual notice of the commencement of the action and the duty to defend has been received by the one served, the provisions of Rule 4(d)(1) should be liberally construed to effectuate service and uphold the jurisdiction of the court, thus insuring the opportunity for a trial on the merits." *Id.* at 668.

In *C.W. Smith*, Administrative Law Judge McGuire held that the Complainant could reasonably expect that service to that address would achieve actual service of process where the Complaint was sent by certified mail with return receipt requested and addressed to a mailing address that the Respondent had employed as a mailing address for legal documents. The mails may be used to effectuate service of process if the notice reasonably conveys the required information and affords a reasonable time for response and appearance. See *C.W. Smith*, EPA

³ Mr. Burrell was not being served as a corporate president, as B&D Management Corporation and New World Development Corporation were dissolved before the leases at issue were entered into.

Docket No. CWA-04-2001-1501, 2002 EPA ALJ LEXIS 7 (ALJ Order on Motions, February 6, 2002). *C.W. Smith* followed the 10th Circuit's holding in *Katzon Brothers, Inc. v. United States Environmental Protection Agency*, that the rules of Practice and the requirements of due process alone determine whether EPA's service of process is proper and that certified mail service under the Rules of Practice does not require actual delivery, and the Regional Judicial Officer's holding in *Herman Roberts* that a person who signs a certified mail receipt green card and picks up mail at a respondent's business post office box is authorized to receive service of process under the Rules of Practice. *C.W. Smith*, EPA Docket No. CWA-04-2001-1501, 2002 EPA ALJ LEXIS 7 (ALJ Order on Motions, February 6, 2002), citing *Katzon Brothers, Inc. v. United States Environmental Protection Agency*, 839 F.2d 1396, 1399 (10th Cir. 1988) and *Herman Roberts*, EPA Docket No. OPA-99-512, 2000 EPA RJO LEXIS 211 (RJO, "Order," April 14, 2000).

Here, Dudley Burrell has listed the 300 Indiana address as his address, it was the address of the inspection, and Mrs. Burrell signed for him at that address. (See Attachments 23, 3, 19, and 2.) Merely by moving into a new residence a defendant does not necessarily prevent his previous dwelling from being his "usual place of abode." *United Bank of Loves Park v. Dohm*, 450 N.W. 2d 974, 977 (Ill. App. 2nd dist. 1983), citing *Rich Products Corp. v. Diamond*, 51 Misc. 2d 675 (NY.S.2D 1966); *Minnesota Mining & Manufacturing Co. v. Kierkevold*, 87 F.R.D. 317 (D. Minn. 1980); *Karlsson v. Rabinowitz*, 318 F.2d 666 (4th Cir. 1963). Service of the administrative complaint by certified mail with return receipt requested to the address most recently provided satisfies due process concerns. (See *U.S. v. Serfling*, 1998 U.S. District LEXIS 3566 (N.D. Ill, E. Div. 1998), where the certified mail was unclaimed.

Mr. and Mrs. Burrell were both served, and the trusts were served by service on their trustees.⁴

A copy of the certified mail green cards establishing the dated of service is included in Attachment 2 to this Memorandum.

D. ABSENCE OF ANSWER

Pursuant to Section 22.15 of the Consolidated Rules, 40 C.F.R. § 22.15, Respondents were required to file their Answer with the Regional Hearing Clerk within 30 days after the date of service. Based on the certified mail green cards, the Answer was due not later than August 9, 2006.

As of October 8, 2010, Respondents had not filed an Answer. An affidavit from the Regional Hearing Clerk, attesting to the absence of any Answer, is included as Attachment 2 to this Memorandum.

ARGUMENT

Respondents have defaulted in this matter because Respondents have, with no justification, failed to file an Answer to the Complaint. Moreover, the Complaint, inspection report, property information, and leases clearly establish the legal and factual bases for imposition of liability and the proposed penalty. See 40 C.F.R. § 22.17(b). Therefore, the Presiding Officer should issue an order finding the Respondent in default.

A. DEFAULT IS APPROPRIATE BECAUSE RESPONDENT FAILED TO FILE AN ANSWER

Under the Consolidated Rules, failure to timely file an Answer is grounds for default, and “[d]efault by respondent constitutes, for purposes of the pending proceeding only, an admission

⁴ The Burrell’s attorney was also copied (See ccs on the complaint cover letter).

of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations." 40 C.F.R. § 22.17(a). As described above, the Answer in this matter was due not later than August 9, 2006. Now, over four years later, Respondents still have failed to file an Answer.

When a Presiding Officer determines that a default has occurred, she "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." 40 C.F.R. § 22.17(c). Since the filing of the Complaint, Respondent has filed nothing purporting to justify its failure to Answer. (See Attachment 2.) The record does not show good cause why a default order should not be issued and the Presiding Officer should, in accordance with 40 C.F.R. § 22.17(a), issue a default order under 40 C.F.R. § 22.17(c).

B. COMPLAINANT HAS ESTABLISHED A PRIMA FACIE LIABILITY CASE

40 C.F.R. § 22.17(b) provides that a movant seeking default in a penalty action must "state the legal and factual grounds for the relief requested." The Complaint alleged in five counts that Respondent violated TSCA by failing to include, either within the contract or as an attachment to the contract, for six leases of target housing: 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 evidence for Respondent's liability is contained in the inspection

report, the leases obtained during the inspection, and the property information for the Apartment Buildings and is summarized below. Through the Complaint and this evidence, Plaintiff has satisfied its burden under 40 C.F.R. § 22.17(b).

Section 1018 of Title X, the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. § 4852(d), requires the Administrator to promulgate regulations for the disclosure of lead-based paint hazards in target housing which is offered for sale or lease. The Administrator promulgated regulations at 40 C.F.R. Part 745, subpart F, Disclosure of Known Lead-Based APaint and/or Lead-Based APaint Hazards Upon Sale or Lease of Residential Property (the Disclosure Rule) on March 6, 1996, pursuant to 42 U.S.C. § 4852d. Owners of more than four residential dwellings were required to comply with the Disclosure Rule by September 6, 1996; and Owners of one to four residential dwellings were required to comply with the Disclosure Rule by December 6, 1996, pursuant to 40 C.F.R. § 745.102.

40 C.F.R. § 745.113(b) of the Disclosure Rule requires that each contract to lease target housing must include as an attachment or within the contract a lead warning statement; a statement by the lessor disclosing the presence of any known lead-based paint and/or lead-based paint hazards or lack of knowledge of such presence; a list of any records or reports available to the lessor regarding lead-based paints and/or lead-based paint hazards in the target housing or a statement that no such records exist; a statement by the lessee affirming receipt of the information set out in 40 C.F.R. §§ 745.113(b)(2) and (3) and a Lead Hazard Information Pamphlet; and signatures and dates of signatures of the lessor and lessee certifying the accuracy of their statements. 40 C.F.R. § 745.100 requires, among other things, that the seller or lessor complete these disclosure activities before a lessee is obligated under any contract to lease target housing. 40 C.F.R. § 745.103 defines "Target Housing" as any housing constructed prior to 1978, except howing for the elderly or persons with disabilities (unless any child who is less than

6 years of age resides or is expected to reside in such housing) or any 0-bedroom dwelling; “lessor” as any entity that offers target housing for lease, rent, or sublease, including but not limited to individuals, partnerships, corporations, trusts, government agencies, housing agencies, Indian tribes, and nonprofit organizations; “lessee” as any entity that enters into an agreement to lease, rent or sublease target housing, including, but not limited to individuals, partnerships, corporations, trusts, government agencies, housing agencies, Indian tribes, and nonprofit organizations; and “owner” as any entity that has legal title to target housing, including but not limited to individuals, partnerships, corporations, trusts, government agencies, housing agencies, Indian tribes, and nonprofit organizations, except where a mortgagee holds legal title to property serving as collateral for a mortgage loan, in which case the owner would be the mortgager.

The evidence of Respondent’s liability for these five types of violations at each of the following six leasing transactions is contained in the inspection report and the information gathered during the May 28, 2003 inspection (See Attachments 3-9), including leasing documents for the 12-04-01 lease of 1393 E. Chestnut (Attachment 4), the 09-20-02 lease of 257 N. Chicago Apt. no. 1 (Attachment 5), the 04-01-03 lease of 257 N. Chicago Apt. no. 5 (Attachment 6), the 02-07-03 lease of 575 E. Oak Apt. no. 5 (Attachment 7), the 02-22-03 lease of 1975 Erzinger S/F (Attachment 8), and the 11-22-02 lease of 993 N. Schuyler Apt. no. 2 (Attachment 9). Evidence that those residential units are target housing is contained in Attachments 10 which show that they were constructed prior to 1978, as well as Attachments 3 through 9, which contain information about the tenant, including birthdates of children. Evidence that Respondent leased the residential units is contained in Attachments 3 through 9. The lease transaction in Attachment 3 through 9 also evidence that the leases were for a period over 100 days. As further summarized below, the inspection report and the leases in

Attachments 3 through 9 indicate that Respondent violated 40 C.F.R. § 745.113(b)(1), (2),(3),(4), and (6) in six leases of target housing.

Moreover, Respondent's failure to admit, deny, or explain any material factual allegation contained in the Complaint constitutes an admission of the allegation under 40 C.F.R. § 22.15(d). By failing to file an Answer respondent has admitted, among other things, that between at least December 4, 2001 and April 1, 2003, Respondent leased residential units in Apartment buildings located at 1393 E. Chestnut, 257 N. Chicago, 575 E. Oak, 1975 Erzinger, and 993 N. Schuyle in Kankakee, Illinois (the Apartment Buildings); that the Apartment Buildings were constructed before 1978; that the Apartment Buildings and each residential dwelling unit within these buildings are "target housing" as defined in 40 C.F.R. § 745.103; that the Dudley Burrell Trust owned 1393 E. Chestnut and 1975 Erzinger; that the Willie P. Burrell Trust owned 257 N. Chicago and 993 N. Shuyler, and was the taxpayer on 575 E. Oak; that Dudley B. Burrell is the trustee of the Dudley Burrell Trust; that Willie P. Burrell is the trustee of the Willie P. Burrell Trust; that publicly available documents indicate that Willie P. Burrell has been the creditor in eviction proceedings for all of the apartments; that a representative of U.S EPA conducted an inspection at Respondent's office at 300 N. Indiana Avenue in Kankakee, Illinois to monitor compliance with Section 1018 and its implementing regulations found at 40 C.F.R. Part 745, Subpart F, on May 28, 2003; that during the May 28, 2003 inspection, that Willie P. Burrell indicated that she and her husband owned and managed 149 properties with 200 residential units; that Respondents entered into the six written lease agreement (contracts) set forth in the table above; that each of the six contracts referenced in the table above covered a term of occupancy greater than 100-days; that Respondents are "lessors" as defined by 40 C.F.R. § 745.103; that each individual who signed a lease to pay rent in exchange for occupancy of a unit in the Apartment Buildings became a "lessee" as defined in 40 C.F.R. § 745.103; and that

Respondent's have not claimed an inability to pay the proposed penalty. (See the Complaint in Attachment 2, at findings 16-44.)

The leasing documents, including the lease and attachments, for 1393 E. Chestnut obtained during the inspection indicate that it was a yearly lease signed on December 4, 2001, and did not contain the information required by 40 C. F. R. § 745.113(b)(1), (2), (3), (4) or (6). They also indicate that residents included a child age 3 and a child age 8. Documents are on B&D Management corporation letterhead. (See Attachment 4)

The leasing documents, including the lease and attachments, for 257 N. Chicago Apt. no. 1 obtained during the inspection indicate that it was a yearly lease signed on September 20, 2002 and October 3, 2002, and did not contain the information required by 40 C. F. R. § 745.113(b)(1), (2), (3), (4) or (6). They also indicate that residents included a child born on 11/25/97. Documents are on B&D Management corporation letterhead. (See Attachment 5.)

The leasing documents, including the lease and attachments, for 257 N. Chicago Apt. no. 5 obtained during the inspection indicate that it was a yearly lease signed on April 1, 2003, and did not contain the information required by 40 C. F. R. § 745.113(b)(1), (2), (3), (4) or (6). They also indicate that residents included a child born on March 11, 2003. Documents are on B&D Management corporation letterhead. (See Attachment 6.)

The leasing documents, including the lease and attachments, for 575 E. Oak Apt. 5 obtained during the inspection indicate that it was a yearly lease signed on February 7, 2003, and did not contain the information required by 40 C. F. R. § 745.113(b)(1), (2), (3), (4) or (6). Documents are on B&D Management corporation letterhead. (See Attachment 7.)

The leasing documents, including the lease and attachments, for 1975 Erzinger S/F obtained during the inspection indicate that it was a yearly lease signed on February 22, 2003,

and did not contain the information required by 40 C. F. R. § 745.113(b)(1), (2), (3), (4) or (6). Documents are on B&D Management corporation letterhead. (See Attachment 8.)

The leasing documents, including the lease and attachments, for 993 N. Schuyler Apt. no. 2 obtained during the inspection indicate that it was a yearly lease signed on November 22, 2002, and did not contain the information required by 40 C. F. R. § 745.113(b)(1), (2), (3), (4) or (6). They also indicate that residents included a child born on December 30, 1991, and a child born on June 14, 1993. There is a payment receipt for B&D Management Corporation and documents are on B&D Management Corporation letterhead. (See Attachment 8.)

By failing to file an Answer, Respondents have admitted the allegations in Counts 1 through 5 of the Complaint. Among other things, Respondents have admitted that they failed to include either within the contract or as an attachment to the contract, a Lead Warning Statement before the lessees were obligated under the contract for the leasing transactions referenced in the table above; that Respondents failed to include either within the contract or as an attachment to the contract to lease target housing, a statement disclosing either the presence of any known lead-based paints and/or lead –based paint hazards in the target housing or a lack of knowledge of such presence before those lessees were obligated under the contracts for the leasing transactions referenced in the table above; that Respondents failed to include, either within the contract or as an attachment to the contract, a list of any records or reports available to the lessor regarding lead-based paints and/or lead-based paint hazards in the target housing or a statement that no such records exist before the lessees were obligated under the contracts for the leasing transactions referenced in the table above; that Respondents failed to include, either within the contract or as an attachment to the contract, a statement by the lessee affirming receipt of the information set out in 40 C.F.R. §§ 745.113(B)(2) and (3) and the Lead Hazard Information Pamphlet before the lessees were obligated under the contracts for the leasing transactions

referenced in the table above; and that Respondents failed to include, either within the contract or as an attachment to the contract, a signed and dated certification by the lessee and lessor certifying the accuracy of their statements or the date of such signature before the lessees were obligated under the contracts for the leasing transactions referenced in the table above. (See the Complaint in Attachment 2, at paragraphs 47-52, 56-61, 65-70, 74-79, and 83-88.)

The May 28, 2003 inspection was conducted at B&D Management's office at 300 N. Indiana Avenue, Kankakee, Illinois 60901, and the inspector interviewed Willie Pearl Burrell. The inspection report indicates the Mrs. Burrell said she and her husband owned and managed 149 properties with 200 residential units, 69 of which were built before 1978. (See Attachment 3.)

As evidenced by Attachment 17, B&D Management Corporation was an Illinois corporation dissolved on October 1, 2001, with a registered office at 300 N. Indiana Avenue, Kankakee, IL 60901, whose officer/director and registered agent was Willie P. Burrell. As discussed above, and as shown in Attachments 4 through 9, each of the six leasing agreements mentioned in this complaint contained documents on B&D Management letterhead. While 805 Ill. Comp. Stat. 405/1 prohibits persons from conducting or transacting business in Illinois under an assumed name, or under any designation, name or style, corporate or otherwise, other than the real name of the individual conducting or transacting business unless such person files a certificate in the office of the County Clerk of the County in which such person or persons conduct or transact or intend to conduct or transact such business, no such certificate was filed with the Kankakee County Clerk's office. (See Attachment 24). The fact that leases were being issued under the letterhead of B&D Management Corporation after that corporation was dissolved and without being registered in the County Clerk's office is evidence that B&D Management Corporation is not keeping up its corporate form and that the person conducting the

leasing activity is B&D Management Corporation's officer/director and registered agent Willie Pearl Burrell.

The documents in Attachment 18 evidence that Willie P. Burrell has filed as the creditor in evictions for 1393 E. Chestnut , 257 N. Chicago Apt. no. 1 , 257 N. Chicago Apt. no. 5, 575 E. Oak Apt. no. 5, 1975 Erzinger S/F, and 993 N. Schuyler Apt. no. 2. This is additional evidence that Mrs. Burrell is a lessor of these properties.

The documents in Attachments 3 and 11-15 contain evidence that Willie P. Burrell and her husband Dudley Burrell are trustees of the trusts that pay the taxes on the apartment buildings at 1393 E. Chestnut, 257 N. Chicago, 257 N. Chicago, 575 E. Oak, 1975 Erzinger, and 993 N. Schuyler.

C. THE PROPOSED PENALTY IS APPROPRIATE CONSIDERING THE FACTS IN THE CASE AND THE STATUTORY PENALTY FACTORS

Upon a motion for default, a party can "request the assessment of a penalty...against the defaulting party" and if done, "the movant must specify the penalty or other relief sought and state the legal and factual grounds for the relief requested." 40 C.F.R. § 22.17(b). U.S. EPA requests that an order for default be entered assessing a penalty of \$89,430 against Respondents. In assessing the appropriate penalty, the Presiding Officer shall order "[t]he 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).

The evidence supporting the penalty assessment is contained in the factual admissions resulting from the default (discussed above), from the evidence obtained during the inspection (Attachments 3-9), and the Declaration of Joana Bezerra (Attachment 25).

Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. § 4852d(b)(5), and 40 C. F. R. Part 745, Subpart F authorize the Administrator of U.S.

EPA to assess a civil penalty under Section 16 of TSCA of up to \$10,000 for each violation of TSCA Section 409. The Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 note (1990), as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701 note (1996), required federal agencies to issue regulations adjusting for inflation the maximum civil penalties that may be assessed pursuant to each agency's statutes. Pursuant to the Debt Collection Improvement Act of 1996 and its implementing regulations (the Civil Monetary Penalty Inflation Adjustment Rule), EPA increased this maximum penalty amount to \$11,000 per violation for violations that occur after January 30, 1997, and before January 13, 2009. 31 U.S.C. § 3701 and 40 C.F.R. Part 19 (2009).

In determining the amount of any civil penalty, Section 16 of TSCA requires U.S. 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.

Based upon an evaluation of the facts alleged in the Complaint, and after considering the nature, circumstances, extent and gravity of the violations, the violator's ability to pay and continue in business, prior history of violations, degree of culpability, and any other matters that justice requires, the Complaint proposed that the Administrator assess a civil penalty against Respondent of \$89,430.

As discussed in the Declaration of Joana Bezerra in Attachment 25, Complainant relied on the Section 1018 - Disclosure Rule Enforcement Response Policy, dated February 2000 (Penalty Policy or ERP) (Attachment 26), in the calculation of the proposed penalty in this matter. She has also considered the impact of the December 2007 Section 1018 disclosure Rule Enforcement Response and Penalty Policy (the December 2007 Policy) (Attachment 27). The

Penalty Policy is based on the statutory factors set forth in Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B), which are the nature, circumstances, extent, and gravity of the violations, and with respect to the violator, ability to pay, effect of ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require. The Penalty Policy was developed under the general framework established by the Guidelines for Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act; PCB Penalty Policy, 45 Fed. Reg. 59770 (1980) (TSCA Civil Penalty Guidelines). (Attachment 26, at 9.)

The Penalty Policy provides a rational, consistent and equitable calculation methodology for applying the statutory factors to particular cases. As discussed in the Penalty Policy, the severity of each violation alleged in the complaint is based on the extent to which each violation impairs the ability of the lessee to assess information regarding hazards associated with lead-based paint, and precludes the lessee from making a fully informed decision whether or not to lease the housing or take appropriate measures to protect against lead-based paint hazards. The most severe consequence of failing to disclose this information is a greater likelihood that a child will be exposed to lead-based paint hazards, and eventually be poisoned by lead. Factors relevant to assessing an appropriate penalty include evidence demonstrating the presence of young children or pregnant women in these units during the period of noncompliance, information pertaining to a Respondent's ability to pay a penalty, any evidence showing that no lead-based paint exists in the cited housing, and any evidence that Respondents have taken steps to discover the presence of and/or has taken steps to abate lead-based paint and its hazards in subject housing.

Pursuant to the Penalty Policy, penalties are determined in two stages: determination of a gravity-based penalty in consideration of the nature, circumstances, extent and gravity of the

violation, and the application of adjustments to the gravity-based penalty in consideration of the violator's ability to pay and to continue in business, history of violation, degree of culpability, and other factors as justice may require (Attachment 26, at 9).

The requirements of the Disclosure Rule are categorized as a hazard assessment in nature, in that they are designed to provide prospective purchasers and lessees with information that will permit them to weigh and assess the risks presented by the possible or actual presence of lead-based paint or lead-based paint hazards in the target housing they might purchase or lease (Attachment 26, at 9). The nature of the violation has a direct effect on the evaluation of the circumstance and extent categories which make up the gravity-based penalty (Attachment 26, at 9).

The circumstances reflect the probability of harm resulting from a particular type of violation, with greater deviations from the regulations resulting in a greater likelihood that the purchaser or lessee will be uninformed about the hazards associated with lead-based paint (Attachment 26, at 10). The Penalty Policy categorizes each of the various types of possible violations into one of six circumstance levels, 1 through 6, with level 1 having the greatest deviation from the requirements and the corresponding greatest potential for harm (Attachment 26, at 10).

As discussed in the Declaration of Joana Bezerra (Attachment 25) and in the ERP (Attachment 26), a violation of 745.113(b)(1) is a Circumstance Level 2 violation; a violation of 745.113(b)(2) is a Circumstance Level 3 violation; a violation of 745.113(b)(3) is a Circumstance Level 5 violation; a violation of 745.113(b)(4) is a Circumstance Level 4 violation; and a violation of 745.113(b)(6) is a Circumstance Level 6 violation.

The extent of harm from a particular type of violation is considered by evaluating the degree, range, or scope of the violations, with a focus on the overall intent of the rule, which is to

prevent childhood lead poisoning (Attachment 26, at 10). The Penalty Policy categorizes the extent as either major, significant, or minor, based upon the risk of exposure to occupants, in consideration of the ages of any children and/or presence of a pregnant woman who are to live there (Attachment 26, at 10-11). Where a pregnant woman and/or very young children are involved, the extent is categorized as major (Attachment 26, at B-4). Where a child less than eighteen and older than six years old is involved, the extent is categorized as significant (Attachment 26, at B-4). Where the occupants are 18 years of age or older, the extent is categorized as minor (Attachment 26, at B-4).

The lease transaction documents for the February 7, 2003 lease of 575 E. Oak Apt.5 and the February 22, 2003 lease of 1975 Erzinger S/F did not include evidence of children.

The lease transaction documents for the November 22, 2002 lease of 993 N. Schuyler Apt. no. 2 indicate that residents included a child born on December 30, 1991 and a child born on June 14, 1993. This would make the children ages 10 and 9, respectively, at the time of the lease.

The lease transaction documents for the October 3, 2002 lease of 257 N. Chicago Apt. no. 1 indicate that residents included a child born on November 25, 1997. This would mean that the child was 4 at the time of the lease.

The lease transaction documents for the April 1, 2003 lease of 257 N. Chicago Apt. no. 5 indicate that residents included a child born on March 11, 2003. This would mean that the child was one month old at the time of the lease.

The lease transaction documents for the December 4, 2001 lease of 1393 E. Chestnut indicate that residents included a child age 3 and a child age 8.

As discussed in Attachment 25, Complainant calculated a gravity based penalty of \$34,540 for the six violations of 40 C.F.R. § 745.113(b)(1) (A Circumstance Level 2 violation) alleged in Count 1 of the complaint, as follows:

\$8,800 for 257 N. Chicago, Apt.1 (child under 6)
\$8,800 for 1393 East Chestnut (child under 6)
\$8,800 for and 257 N. Chicago Apt 5 (child under 6)
\$5,500 for 993 N. Schuyle (child 6-18)
\$1,320 for 575 East Oak
\$1,320 for 1975 Erzinger
\$34,540

As discussed in Attachment 25, Complainant calculated a gravity based penalty of \$25,520 for the six violations of 40 C.F.R. § 745.113(b)(2) (a Circumstance Level 3 violation) alleged in Count 2 of the complaint, as follows:

\$6,600 for 257 N. Chicago, Apt. 1 (child under 6)
\$6,600 for 1393 East Chestnut (child under 6)
\$6,600 for and 257 N. Chicago Apt 5 (child under 6)
\$4,400 for 993 N. Schuyle (child 6-18)
\$660 for 575 East Oak
\$660 for 1975 Erzinger
\$25,520

As discussed in Attachment 25, Complainant calculated a gravity based penalty of \$8,470 for the six violations of 40 C.F.R. § 745.113(b)(3) (a Circumstance Level 5 violation) alleged in Count 3 of the complaint, as follows:

\$2,200 for 257 N. Chicago, Apt. 1 (child under 6)
\$2,200 for 1393 East Chestnut (child under 6)
\$2,200 for 257 N. Chicago Apt 5 (child under 6)
\$1,430 for 993 N. Schuyle (child 6-18)
\$220 for 575 East Oak
\$220 for 1975 Erzinger
\$8,470.

As discussed in Attachment 25, Complainant calculated a gravity based penalty of \$16,830 for the six violations of 40 C.F.R. § 745.113(b)(4) (a Circumstance Level 4 violation) alleged in

Count 4 of the complaint, as follows:

\$4,400 for 257 N. Chicago, Apt.1 (child under 6)
\$4,400 for 1393 East Chestnut (child under 6)
\$4,400 for 257 N. Chicago Apt 5 (child under 6)
\$2,750 for 993 N. Schuyle (child 6-18)
\$440 for 575 East Oak
\$440 for 1975 Erzinger
\$16,830

As discussed in Attachment 25, Complainant calculated a gravity based penalty of \$4,070 for the six violations of 40 C.F.R. § 745.113(b)(6) (a Circumstance Level 6 violation) alleged in Count 5 of the complaint, as follows:

\$1,100 for 257 N. Chicago, Apt.1 (child under 6)
\$1,100 for 1393 East Chestnut (child under 6)
\$1,100 for 257 N. Chicago Apt 5 (child under 6)
\$550 for 993 N. Schuyle (child 6-18)
\$110 for 575 East Oak
\$110 for 1975 Erzinger
\$4,070

The total gravity based penalty for all five counts of violations was \$89,430, and no adjustments were made to the gravity-based penalty for ability to pay and to continue in business, history of violation, degree of culpability, other factors as justice may require, or voluntary disclosure (see Attachment 25). The violations were identified through an inspection (See Attachments 3 through 9.) The statute does not require EPA to adjust downward for lack of prior history. See *Vidiksis v. EPA*, 612 F.3d 1150, 1159 (11th Cir. 2010).

Respondents did not claim an inability to pay or submit documentation demonstrating an inability to pay. By letter dated March 25, 2005, the U.S. EPA advised Respondent that U.S. EPA was planning to file a civil administrative complaint against Respondent for alleged violations of Section 1018 and that Section 1018 authorizes the assessment of a civil administrative penalty, and asked Respondent to identify any factors Respondent thought U.S EPA should consider before issuing the complaint, and if Respondent

believed there were financial factors which bore on Respondent's ability to pay a civil penalty, the U.S. EPA asked Respondent to submit specific financial documents. (See Attachment 28 and the Complaint in Attachment 2, at findings 42 and 43.) Moreover, Respondents appear to own numerous properties. (See Attachments 20 and 21.) As discussed in Attachment 25, application of the December 2007 Section 1018 Disclosure Rule Enforcement Response and Penalty Policy to this matter, would also result in a penalty of \$89,430.

The proposed penalty of \$89,430 is appropriate in this matter (See Attachment 25.)

After reviewing Section 16 of TSCA, 15 U.S.C. § 2615, the Penalty Policy and the facts of this case, Complainant concluded that a proposed penalty of \$ 89,430 is appropriate.

CONCLUSION

For the reasons set forth above, Complainant moves this Court for a Default Order that includes the following: 1) finding all of the facts in the Complaint admitted; and 2) assessing a civil penalty in the amount of \$ 89,430 as pled in the Complaint and based on the admitted facts.

Respectfully Submitted,



Maria Gonzalez
Associate Regional Counsel
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Chicago, Illinois 60604
(312) 886-6630

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

CERTIFICATE OF SERVICE

I hereby certify that today I filed the original and one copy of COMPLAINANT'S MOTION FOR DEFAULT ORDER and COMPLAINANT'S MEMORANDUM IN SUPPORT OF MOTION FOR DEFAULT ORDER in the office of the Regional Hearing Clerk (E-19J), U.S. Environmental Protection Agency, Region 5, 77 W. Jackson Boulevard, Chicago, IL 60604-3590

I then personally served a true and accurate copy of the filed documents to:

Marcy Toney
Regional Judicial Officer (C-14J)
U.S. Environmental Protection Agency, Region 5
77 W. Jackson Boulevard
Chicago, IL 60604-3590

I also mailed today a true and accurate copy, by certified mail, return receipt-requested, to each of the following:

- | | | |
|----|---|------------------------------|
| 1. | Willie P. Burrell
300 North Indiana Avenue
Kankakee, IL 60901 | No. 7001 0320 0005 8922 3080 |
| 2. | The Willie P. Burrell Trust
300 North Indiana Avenue
Kankakee, IL 60901 | No. 7099 3400 0000 9594 1448 |
| 3. | Dudley B. Burrell
300 North Indiana Avenue
Kankakee, IL 60901 | No. 7001 0320 0005 9029 1139 |
| 4. | The Dudley B. Burrell Trust
300 North Indiana Avenue
Kankakee, IL 60901 | No. 7001 0320 0005 8922 3073 |

and

Initialed: Donald E. Ayres

 12/17/10

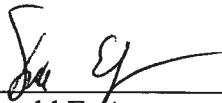
***In the Matter of: Willie P. Burrell, The Willie P. Burrell Trust, Dudley B. Burrell, and
The Dudley B. Burrell Trust
Docket No.: TSCA-05-2006-0012***

CERTIFICATE OF SERVICE (cont.)

5. Edward Lee, Esq.
507 South Harrison Avenue
Kankakee, IL 60901

No. 7001 0320 0005 8922 3097

dated: December 17, 2010



Donald E. Ayres,
Paralegal Specialist, MM2-4
Office of Regional Counsel
U.S. EPA Region 5
77 W. Jackson Blvd.
Chicago, IL 60604-3590
(312) 353-6719

ATTACHMENTS

1. Proposed Default Order
2. Declaration of Regional Hearing Clerk with filed Complaint, certified mail receipts and index
3. Inspection Report
4. Lease Documents for 1393 Chestnut
5. Lease Documents for 257 N. Chicago Apt. 1
6. Lease Documents for 257 N. Chicago Apt. 5
7. Lease Documents for 575 E. Oak
8. Lease Documents for 1975 Erzinger
9. Lease Documents for 993 N. Schuyler
10. Information on date of construction of the Apartment Buildings
11. Ownership information for 1393 Chestnut
12. Ownership information for 257 N. Chicago
13. Ownership information for 575 E. Oak
14. Ownership information for 1975 Erzinger
15. Ownership information for 993 N. Schuyler
16. Information on New World Development Corporation
17. Information on B&D Corporation
18. Information on Evictions brought by Willie P. Burrell
19. Information on marital status of Willie and Dudley Burrell
20. Information on properties owned by Willie Burrell
21. Information on properties owned by Dudley Burrell
22. Information on soliciting of leases by Burrells
23. Information on Dudley Burrell addresses
24. Information on lack of B&D Corporate registration
25. Declaration of Joanna Bezerra
26. 2000 Section 1018 Disclosure Rule Enforcement Response Policy
27. 2007 Section 1018 Disclosure Rule Enforcement Response Policy
28. March 25, 2005 Prefiling notice letter and written exchanges with Respondents