

August 31, 2011

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

US EPA Region 5
Office of the Regional Hearing Clerk
Attention: La Dawn Whitehead
77 W. Jackson Blvd.
Mailcode: E-19J
Chicago, IL 60604-3590

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AUG 31 2011

REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY

Re: EPA v. Willie P. Burrell and Dudley B.
Burrell, et. al., TSCA-05-2006-0012

Hearing Clerk:

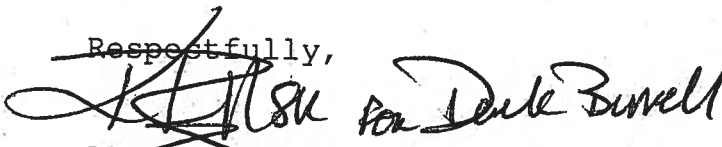
Enclosed find our Supplement Pursuant to the Court's June 26, 2011 Order and a Sanitized and Non-Sanitized Memorandum in Support of Respondents' Joint Supplement pursuant to the Court's June 26, 2011 Order, and attachments thereto.

This is a "Confidential Business Information" request for the enclosed materials. Please note that the information enclosed in the first envelope is redacted. The second envelope is sealed and marked "Confidential, Private, and Privileged."

The information contained in the second envelope, which is sealed is the non-sanitized version of the redacted information we want protected from public disclosure pursuant to 40 C.F.R. Part 2, Subpart B and 40 C.F.R. 2.203(a), 2.203(b) and 40 C.F.R. 22.5(d).

The second envelope should only be opened by those specifically authorized to receive and review Confidential Business Information. Respondents' assert that failure to do so will result in an invasion of Respondents' privacy.

Respectfully,


Derek S. Burrell

cc:

Marcy Toney (Sanitized and Non-Sanitized Copies)
Regional Judicial Officer
U.S. Environmental Protection Agency,
Region 5
77 West Jackson Boulevard
Chicago, Il 60604

cc:

Maria Gonzalez (Sanitized and Non-Sanitized Copies)
Associate Regional Counsel
Regional Judicial Officer
U.S. Environmental Protection Agency, Region 5
77 West Jackson Boulevard
Chicago, Il 60604-3590

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

In the Matter of:) Docket No. TSCA-05-2006-0012
)
Willie P. Burrell) Proceeding to Assess a Civil
The Willie P. Burrell Trust,) Penalty under section 16(a) of
Dudley B. Burrell, and the) The Toxic Substances Control
Dudley B. Burrell Trust) Act, 15 U.S.C. § 2605(a)
Kankakee, Illinois,)
)
Respondents.)

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INFORMATION CLAIMED CONFIDENTIAL IN THE ATTACHED DOCUMENT HAS BEEN DELETED AND A COMPLETE COPY OF THE DOCUMENT CONTAINING "CONFIDENTIAL BUSINESS INFORMATION" PURSUANT, BUT NOT LIMITED TO, THE TOXIC SUBSTANCES CONTROL ACT, 40 C.F.R. §§ 2.203(a), 2.203(b), 40 C.F.R. 22.5(d), HAS BEEN FILED WITH THE REGIONAL HEARING CLERK. THIS IS THE REDACTED, PUBLIC FILE, VERSION.

RESPONDENTS' JOINT SUPPLEMENTAL MEMORANDUM PURSUANT TO JULY 26, 2011 ORDER ON MOTIONS

Respondents Dudley B. Burrell, The Dudley Burrell Trust, Willie Burrell and the Willie Burrell Trust, by and through their Representative, pursuant to the Presiding Officer's July 26, 2011 Order on Motions, hereby tender their Joint Supplemental Memorandum as follows:

In her July 26, 2011 Order on Motions, the Presiding Officer requested that the parties supplement the record with the following issues:

1. Whether the Complaint against Mr. Burrell and the Dudley B. Burrell Trust should be dismissed with prejudice due to invalid service of process and the operation of the statute of limitations.

2. In the event that the Complaint against Mr. Burrell and the Dudley Burrell Trust is dismissed with prejudice, what should be the appropriate penalty to be assessed against the remaining Respondents.

Respondents are supplementing the record as follows:

Issue I:

The Government concedes that the complaint against the Respondents' Dudley B. Burrell and the Dudley B. Burrell Trust must be dismissed, with prejudice as a matter of law, as it did not present any supplemental contrary law cited by the Presiding Officer nor did the Government present additional facts on this issue, as required by the court's Order on Motions, dated July 26, 2011. Respondents Dudley B. Burrell and the Dudley B. Burrell Trust request the Court find that:

1. The complaint against Respondents Dudley Burrell and the Dudley Burrell Trust is dismissed for invalid service of process.
2. That any, and all allegations in the complaint against Dudley Burrell and the Dudley Burrell Trust be dismissed with prejudice due to the operation of the statute of limitations.

Issue II:

When a default occurs, the relief proposed in the complaint shall be ordered unless the penalty requested is "clearly inconsistent" with the record of the proceeding or the Act." In re Pan American Growers Supply, Inc., Docket No. FIFRA-04-2010-3029, 2010 ALJ LEXIS 26, at *8 (Nov. 30, 2010).

1. Respondents Have an Inability to Pay

The government claims that its financial analyst does not have adequate information to make an accurate inability to pay determination. We disagree. The tax returns are more than reliable. The tax returns are easily corroborated as they were submitted to the IRS by Respondents Certified Public Accountant (hereinafter, "CPA"). The CPA's name, address, telephone number, EIN number, are clearly present on the returns, as well his signature and date, as required by law. Additionally, Mrs. Burrell submitted these tax returns, which were submitted to the government, under oath. (Respondents' Memorandum Opposing Default Judgment, Willie Burrell Affidavit, P.6, ¶ 30). There is simply no plausible reason why the government cannot rely on the submitted tax returns. Instead, the government complains that the Respondents' Form 4506-T was deficient; the government never explains how it was deficient. (Affidavit of Willie Burrell #2, ¶ 5). In any event, Respondents submit various additional Form 4506-T's. (Attached hereto, see Exhibit A).

A. Mrs. Burrell's Inability to Pay

Mrs. Burrell does not own any real property or any motor vehicles. (Affidavit of Willie Burrell #2, ¶ 16) (See Corrected Individual Ability to Pay Form, Exhibit B). She does however pay for two (2) vehicles belonging to family members. Id. She does own some furniture, jewelry, clothing, and a small IRA. Id. While Mrs. Burrell _____ she _____ a salary by her employer, _____

(Affidavit of Willie Burrell #2, ¶ 17). Mrs. Burrell's personal living expenses, alone, equal or exceed her current income. (See Respondents' Corrected Individual Inability to Pay Form, attached hereto as Exhibit B). Any contention by the government that Mrs. Burrell, in her individual capacity, has the ability to pay any proposed penalty would be absurd. Willie Burrell has more than met her burden of production, persuasion, and proof on her "individual" inability to pay claim. Such burdens cannot be overcome by the government.

B. The Willie Burrell Trust's Inability to Pay

The government contends that the tax returns for the years 2007, 2008, and 2009 have been put into question by Dudley Burrell. This is erroneous. The record is devoid of any fact where Dudley Burrell questioned the veracity of the financial information contained in the 2007-2009 tax returns. Dudley Burrell merely objected to the government using the returns as evidence of his legal address, since he had no reasonable notice of, and an opportunity to defend, this suit. (See Respondents' Dudley Burrell and the Dudley Burrell Trusts' Motion to Dismiss, March 3, 2011 and Affidavit of Dudley Burrell, attached thereto).

All the additional requested information from the government's May 11, 2011 letter concerns the liabilities of Willie Burrell and her trust versus assets. (Memo. Complainant's Supplement, Attachment 3, EPA letter, dated May 11, 2011). Thus, the additional requested information would

only serve to support Respondents inability to pay claim. In any event, Respondents submit the additional requested information regarding its inability to pay claim. (Attached hereto, as Exhibit C).

The government next opines it needs additional information regarding the beneficiary of the Trust. The government is engaged in a fishing expedition. There has been no Court Order for a pre-hearing exchange and the government may not hide behind Respondents' inability to pay claim in an attempt to discover information that is irrelevant to Respondents' defense. The beneficiary of the trust is irrelevant as to whether or not the trust has the ability to pay the proposed penalty. Mrs. Burrell has testified that she is the owner of the Willie Burrell Trust. (Affidavit of Willie Burrell #2, ¶ 1, 2, attached hereto as Exhibit D).

The government contends no financial information was included for the Willie Burrell Trust. Remarkably, all the financial information for the Willie Burrell Trust is included in the submitted tax returns for 2007-2009. (Respondents' Motion Opposing Default Judgment, dated March 9, 2011, CBI, Tax Returns, and Affidavit of Willie Burrell #2, ¶ 3).¹

The unverified allegation by the government that Mrs. Burrell _____ is false. (Complainant's Supplement, P. 9). The number of apartment units owned by Willie Burrell _____ (Affidavit of

¹ We question, based upon the alleged deficiencies, whether these documents were thoroughly reviewed.

Willie Burrell #2, ¶ 16). The Willie Burrell Trust

(Affidavit of

Willie Burrell #2, ¶ 2). However, the Willie Burrell Trust has

(See Exhibit

D).

In an attempt _____, the Willie Burrell Trust _____ tune of

approximately _____, plus the _____

. Moreover, there are _____

_____ the Willie Burrell Trust, which include but are not limited to, _____

_____ which taken alone,

have _____

business. (See Exhibit E).

2. The penalty must not exceed \$63,580.00.

A. Alleged Liability for The Willie P. Burrell Declaration of Trust

Assuming Respondents have the ability to pay, the penalty may not exceed _____. The government contends:

'Willie P. Burrell, the trustee for and owner of the Willie P. Burrell trust, was a "lessor"² on all of the target housing at issue.'

(Complainant's Supplement Memorandum, page 3). This conclusion is unsupported by the facts and is clearly inconsistent with

² "Lessor means any entity that offers target housing for lease, rent, or sublease, including but not limited to individuals, partnerships, corporations, trusts" 40 C.F.R. 745.103.

the record of this proceeding, the TCSA, and Illinois law.

Under the government's analysis, even if B & D Management Corporation ("B & D") was defunct prior to the execution of the Chestnut and Erzinger leases, Willie Burrell (hereinafter, "Burrell" or "Mrs. Burrell") could only be jointly and severally liable with B & D, as B & D's President and in her individual capacity. [See 805 ILCS 5/8.65(3)].³

There are no facts on record that can morph liability from Mrs. Burrell, individually, to her as a trustee of the Trust, nor the Trust itself. First, the Trust did not own Chestnut or Erzinger. (Willie Burrell Affidavit #2, ¶ 7, 12) (Affidavit of Dudley Burrell Affidavit #3, ¶5, 6, attached hereto as Exhibit F). Willie Burrell never offered or executed the Chestnut nor Erzinger leases in her capacity as trustee of her Trust. (Affidavit of Willie Burrell #2, ¶15). (Affidavit of Dudley Burrell #3, ¶ 4, 7). Burrell never entered into any oral agreement, on behalf of her Trust, to offer leases for Chestnut nor Erzinger. (Willie Burrell Affidavit #2, ¶5, 6, 12, and 14) (Affidavit of Dudley Burrell #3, ¶ 3).

The government's reliance on purported eviction actions by Burrell, in her individual capacity, is misplaced and irrelevant as to whether or not her Trust "offered" the instant leases as a "lessor" within the meaning of the statute.⁴ Based

³ (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, shall be 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.

⁴ Dudley Burrell contends that Willie Burrell, a non-attorney and in her individual capacity, cannot maintain a legal action against tenants for B

solely upon the facts and the authorities cited by the government, the Willie Burrell Trust cannot be liable for violations resulting from the Chestnut and Erzinger leases.

B. The Alleged Liability of Willie P. Burrell, in her individual capacity, for Chestnut and Erzinger.

Corporate officers may be liable for business carried on after dissolution. Chicago Tile Inst. Welfare Plan v. Tile Surfaces, No. 04-C4194, 2004 U.S. Dist. LEXIS 21612, at *4 n.1 (N.D. Ill. October 25, 2004); Chicago Title & Trust Co. v. Brooklyn Bagel Boys, Inc., 584 N. E. 2d 142, 146 (Ill.App. 1992), Cardem, Inc. Marketron Int'l, LTD, 749 N.E. 2d 477 (Ill.App. 2001). However, those authorities place liability only on the corporate officer that committed the act which purported to "carry on the business" of the defunct corporation. Respondents are unaware of applicable statutory or case law which provides an officer of a defunct corporation is liable for another officer's actions or malfeasance, simply because the corporation was defunct at the time that the act took place. The government has cited none.

Here, prior to and during the offer and execution of the instant leases, Mr. and Mrs. Burrell began referring to certain properties as his or her properties, so to speak. (Affidavit

& D Management Corporation, Dudley Burrell, or the Dudley Burrell Trust.

of Zinia Burrell, ¶ 7, attached hereto as Exhibit G). Mr. Burrell began demanding to screen potential tenants for properties which were "his". (Affidavit of Zinia Burrell, ¶ 8). At the time in question, Mr. Burrell considered Chestnut and Erzinger to be "his". (Affidavit of Zinia Burrell, ¶ 9). The office assistant contends that it was Mr. Burrell who offered the leases for Chestnut and Erzinger. (Affidavit of Zinia Burrell, ¶ 10). Mr. Burrell directed the office assistant to use standard B & D letterhead and to place those documents into "his" company files. (Affidavit of Zinia Burrell, ¶ 11). The office assistant manager does not recall receiving any instructions regarding the Chestnut or Erzinger lease from Mrs. Burrell. (Affidavit of Zinia Burrell, ¶ 12). However, Mrs. Burrell asserts that she did not direct anyone to offer or execute the lease for Chestnut nor Erzinger. (Affidavit of Willie Burrell #2, ¶ 15).

1. 1975 ERZINGER

Erzinger is legally owned by the Dudley Burrell Trust. (Affidavit of Willie Burrell #2, ¶ 2) (Dudley Burrell Affidavit #3, ¶ 5). Respondents Dudley Burrell and his respective trust had sole control of the conditions leading up to alleged violations for Erzinger. (Respondents' Motion to Dismiss, Dudley Burrell Affidavit, ¶ 13) (Dudley Burrell Affidavit #3,

¶ 11). Dudley Burrell also testified that he was responsible to "purchase, rehabilitate and construct apartment buildings; and that his wife ran all of the office and administrative functions of the business." (Memo. in Support of Complainant's Supplement, p. 4, citing Dudley Burrell Affidavit, ¶¶ 14-16). Yet, Dudley Burrell executed the lease. (Claimant's Memo. in Support of Complainant's Supplement, Attachment 8) (Affidavit of Willie Burrell #2, ¶ 5). (Affidavit of Dudley Burrell #3, ¶ 2-7, 9-14).

Willie Burrell never entered into nor offered a lease on Erzinger. (Claimant's Memo. in Support of Complainant's Supplement, Attachment 8) (Affidavit of Willie Burrell #2, ¶ 5) (Affidavit of Dudley Burrell #3, ¶ 2-7, 9-14). It was Dudley Burrell who offered and entered into the lease for Erzinger using B & D Management Corporation letterhead. (Claimant's Memo. in Support of Complainant's Supplement, Attachment 8) (Affidavit of Willie Burrell #2, ¶ 5). (Dudley Burrell Affidavit #3, ¶ 7, 10).

Under Illinois law, Dudley Burrell and his trust are solely liable for the Erzinger lease. For example, the director in Chicago Title & Trust was held liable, individually, because he executed a promissory note at the time when he knew the company was defunct. Chicago Title & Trust Co. v. Brooklyn Bagel Boys, Inc., 584 N. E. 2d 142, 146 (Ill.App. 1992). Here, Willie Burrell, nor her Trust offered nor executed any of the leasing documents for Erzinger. (Affidavit of Willie Burrell #2, ¶ 5) (Affidavit of Dudley Burrell #3, ¶ 7, 13).

In Cardem, Inc. Marketron Int'l, LTD, 749 N.E. 2d 477 (Ill.App. 2001), the director "[took the affirmative step to sign, purportedly as president of a corporation that had been dissolved three years earlier]" was likewise, held liable, because he executed the note. Here, Dudley Burrell, not Willie Burrell, took the affirmative step of offering and executing the Erzinger lease, on behalf of B & D after it had been dissolved. (Willie Burrell Affidavit #2, ¶ 5, 6, 12, and 14) (Affidavit of Dudley Burrell #3, ¶ 7-11). That affirmative act was the solely performed by Dudley Burrell. (Affidavit of Dudley Burrell #3, ¶ 2-9).

The government has cited no legal authority that would cause the liability from Dudley Burrell and/or his trust to be imputed to Willie Burrell, in her individual capacity, for the Erzinger lease.

2. 1393 E. Chestnut

Similarly, Willie Burrell, in her individual capacity, is not responsible for any liability resulting from the lease at Chestnut. The property was legally owned and titled to Dudley Burrell and leased individually, and solely by Dudley Burrell. (Willie Burrell Affidavit #2, ¶ 7). Respondents Dudley Burrell (also referred to as "Mr. Burrell") and his respective trust had sole control of the conditions leading up to alleged violations for Chestnut (Respondents' Motion to Dismiss, Dudley Burrell Affidavit, ¶ 13) (Affidavit of Dudley Burrell #3, ¶ 11) (Affidavit of Willie Burrell #2, ¶ 9).

Mr. Burrell never entered into an oral or written agreement

for Willie Burrell or her Trust to offer the Chestnut lease. (Willie Burrell Affidavit #2, ¶ 6) (Affidavit of Dudley Burrell #3, ¶ 2, 3, 7, 9-11). In fact, Willie Burrell never executed any of the corporate form lease documents for Chestnut. (See EPA Complaint, Attachments 4, 8) (Willie Burrell Affidavit #2, ¶ 5). More importantly, the Assistant Office Manager testified that she was directed by Mr. Burrell to execute the lease. (Affidavit of Zinia Burrell, ¶ 1-12). Mr. Burrell admits that he directed Zinia Burrell to use the B & D forms and that he offered and executed the Chestnut lease, unaware that B & D had become defunct. (Affidavit of Dudley Burrell #3, ¶ 2, 7, 8).

Other than mere suppositional musings by the government, the record is completely devoid of any evidence that demonstrate that Willie Burrell made an affirmative act to offer or execute the lease at Chestnut or Erzinger. The evidence clearly demonstrates that Dudley Burrell offered and executed the Chestnut lease, thru Zinia Burrell, without Mrs. Burrell's consent or approval. Likewise, the evidence clearly demonstrates that Dudley Burrell offered and executed the Erzinger lease, on his own, without Mrs. Burrell's consent or approval.

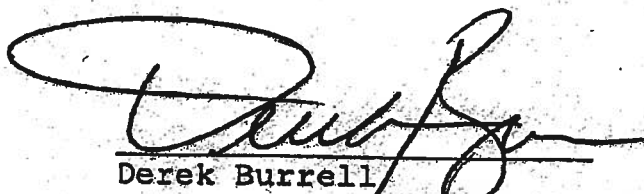
In both cases, Mr. Burrell used defunct B & D letterhead. At best, that makes Mr. Burrell, individually, jointly and severally liable with B & D, as one of its officers. Since Mrs. Burrell did not carry on the business of B & D with respect to the Chestnut and Erzinger leases, Mr. Burrell's liability may not be imputed to Mrs. Burrell, and certainly not to her trust.


The government may not saddle Mrs. Burrell and her trust with Mr. Burrell's liability simply because the government's allegations against Dudley Burrell, and his respective trust, must be dismissed.

Wherefore, Respondents Dudley Burrell and the Dudley Burrell Trust hereby move to dismiss this cause, with prejudice, as a matter of law.

Wherefore, Respondents Willie Burrell and the Willie Burrell Declaration of Trust request that the Court find they have an inability to pay, thereby eliminating the entire proposed penalty. In the alternative, Respondents request the Court, absent mitigating factors, find that the penalty against the remaining Respondents may not exceed \$63,580.00.

Respectfully submitted,


Derek Burrell
300 N. Indiana Avenue
Kankakee, IL 60901
(815) 933-6087


Derek Burrell
649 N. Rosewood
Kankakee, IL 60901
(815) 954-3296

CERTIFICATE OF SERVICE

Respondents Dudley Burrell, the Dudley Burrell Trust, Willie Burrell and the Willie Burrell Trust hereby certify that their Joint Memorandum in Support of their Supplement to July 26, 2011 Order on Motions, in the above-captioned matter was served upon the Complainant, by ~~U.S. Mail, postage prepaid~~, this 17 day of August 2011 at: *Hand Delivered wfb.*

Marcy Toney
Regional Judicial Officer
US EPA - Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

US EPA Region 5
Office of the Regional Hearing Clerk
Attention: La Dawn Whitehead
77 W. Jackson Blvd.
Mailcode: E-19J
Chicago, Illinois 60604-3590

Maria Gonzalez
US EPA - Region 5
Associate Regional Counsel
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

Willie P. Burrell

Dudley Burrell

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ATTACHMENT

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