March 23, 2011

Derek 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

Re: TSCA-05-2006-0012

Hearing Clerk:

Enclosed please find an original and two (2) copies of Respondents' Reply to Complainant's Response to Motion Opposing Default Judgment and Motion to Dismiss in the above-referenced matter. Please provide me with a file-stamped copy of which I may retain for my file. I enclose a self addressed stamped envelope for your convenience.

Respectfully,

Derek S. Burrell

Cc: US EPA, Region 5
Joana Bezerra (DT-8J)
77 West Jackson Boulevard
Chicago, Illinois 60604

Dudley B. Burrell and The Dudley B. Burrell Trust
649 North Rosewood
Kankakee, Illinois 60901

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US EPA Region 5
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Attention: La Dawn Whitehead
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Marcy Toney
Regional Judicial Officer
U.S. Environmental Protection Agency,
Region 5
77 West Jackson Boulevard
Chicago, Il 60604

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

In the Matter of:	) Docket No. TSCA-05-2006-0012
	)
Willie P. Burrell The Willie P. Burrell Trust, Dudley B. Burrell, and The Dudley B. Burrell Trust Kankakee, Illinois,	) Proceeding to Assess a Civil) Penalty under section 16(a)) The Toxic Substances Control) Act, 15 U.S.C. § 2615(a)
	)
	)
Respondents.	)
	)

REPLY TO COMPLAINANT'S RESPONSE TO RESPONDENTS' MOTION OPPOSING DEFAULT JUDGMENT AND MOTION TO DISMISS

Respondents Willie P. Burrell and The Willie P. Burrell Trust (hereinafter, referred to as, "Burrell" or "Respondents"), by and through their Representative, pursuant to 40 C.F.R. § 22.17(c), tender their Reply to Complainant's Response to Respondents' Memorandum Opposing Default Judgment and Motion to Dismiss, and hereby states:

UNDISPUTED FACTS

Burrell is engaged in the business of leasing residential apartment units. Attorney Edward Lee ("Lee" or "Respondents' attorney") was first retained, on or about March of 2004, by Burrell, to handle a variety of legal matters regarding B & D Management, Inc., Burrell Property Management, L.L.C., Willie P. Burrell, and The Willie P. Burrell Trust.

Lee was grossly negligent in handling of the Toxic Substance Control Act ("TSCA") case for Respondents. Lee's conduct was so grossly negligent that it was inexcusable. Moreover, Lee misled the Respondents about the true status of their case--telling Respondents that he was "taking care of it" and that he was "on top of it". Respondents, subsequently discovered that Lee has no malpractice insurance.[1]

Respondents were required to file an answer within thirty (30) days of receipt of the complaint on or about July 7, 2006.[2] Complainant filed its Motion for Default Judgment on or about December 17, 2010. Subsequently, Respondents filed their answer on January 14, 2011. Respondents seek an opportunity to litigate this case on the merits.

ARGUMENT

I. Respondent Can Show "Good Cause"

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

The government contends that the Respondents are not entitled to relief, solely because Lee's conduct occurred in

[1] As of March 23, 2011, the Illinois Attorney Registration and Disciplinary Commission reported that Lee had no malpractice insurance.
[2] See 40 C.F.R. 22.15(a).

the 7th Circuit. However, neither Board nor E.A.D. case law are bound by federal decisions, as such decisions merely provide guidance.

The Complainant's approach would create inconsistent holdings amongst the Regions, much like the state of the law in the federal circuit courts. Moreover, such an approach would yield inconsistent holdings within a Region. (See Exhibit A).[3] Sound public policy dictates that the court adopt a rule to be applied to all the Regions.

The government contends that Respondents' remedy rests with a suit in malpractice. A malpractice claim against Respondents' former attorney is not viable for Respondents.[4] Even if it were, a malpractice suit could not make the Respondents whole. The interim period between default judgment and possible recovery via malpractice will create financial difficulties for Respondents who maintain that they have an inability to pay. Moreover, Respondents will likely lose the opportunity to expand or create new businesses because those resources must now be set aside to pay a civil fine, in addition to the cost of another attorney to pursue their case in malpractice. Furthermore, a malpractice claim would increase the total burden on the courts because now a new case must be fully litigated.

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[3] For example, Region 4 is responsible for states that sit within the 4th, 6th, and 11th Federal Circuit Courts.
[4] See f.n. 1, supra.

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

Undoubtedly, courts require the power to dismiss suits with prejudice in order to police crowded dockets. As stated in Link, courts require this power "to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." 370 U.S. 626, 630-31. Judicial efficiency concerns are better served with trying the original case on the merits through Rule 60(b)(6) relief, versus relying on compensation through the peril's of a malpractice action.

Arguably of greater concern is the loss of prestige the judicial system suffers when a client's suit is dismissed solely because of the attorney's wrongdoing. As the court in Carter pointed out, a default reflects poorly upon the entire system because attorneys are officers of the court. 804 F.2d at 808. To put it slightly differently, "[when an attorney is grossly negligent . . , the judicial system loses credibility as well as the appearance of fairness, if . . . an innocent party is forced to suffer drastic consequences." Tani, 282 F.3d at 1170. The Board may do all acts and take all measures as are necessary for the

efficient, fair, and impartial adjudication of issues arising in a proceeding). *See also* In re A.Y. McDonald Indus., 2 E.A.D. 402, 428 (CJO 1987); In re Arrcom, Inc., 2 E.A.D. 203, 210-214 (CJO 1986).

Finally, there is a judicial preference for a trial on the merits. See e.g., In Re Rybond, at 616. As stated, the judicial system loses prestige when innocent parties are punished solely for the acts of their representative. Likewise, the judicial system loses prestige when the people it governs doubt its ability to adjudicate fairly.

Moreover, it is extremely rare for an attorney to fail to provide a client virtually no representation at all. Thus, allowing an attorney's gross negligence to serve as a basis for good cause, does not undercut the requirement that a party file an answer.[5] Sound public policy dictates that the rule announced in Tani, should be applied to the facts of the case at bar.

II. Proof of Service Was Invalid

The government contends that the Green Cards were not altered. We disagree. If the Green Cards were filed on July 17 and 18, 2006, as the government contends and the Regional Hearing Clerk wrote on and/or whited-out the Green Cards,

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

after her employment began in April of 2009, then the Green Cards were altered.[6] It can also be inferred, then, that the white-out portions of the Green Cards occurred after April of 2009.

Respondents cannot determine if the dates under the white-out represent the true date of filing the proof of service. Moreover, if the Green Cards were already date stamped on the back, then there would be no need to add such dates, some three (3) or more years later to the front of the Green Cards. Despite Complainant's protestations to the contrary, there is still a cloud over the proof of service. At a minimum, defective proof of service should serve as a bar to the government obtaining a default judgment.

III. Complainant's Contentions Regarding Respondents' Answer

Complainant contends it has not received Respondents' answer.[7] We attach a file marked copy of the answer, hereto as Exhibit B. Complainant next contends Respondents' selective prosecution defense is deficient. However, Respondents are not required to meet their burden of proof in raising the defense in their answer today. Respondents

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[6] Meriam-Webster defines alter as: to make different in some particular way, as size, style, course, or the like.

[7] As of March 24, 2011, the EPA's website does not reflect that Respondents filed their answer with the Regional Hearing Clerk on January 14, 2011.

are entitled to conduct discovery for the purposes of establishing and meeting their burden of proof, at trial.

Complainant's objection to Respondents filing their answer is moot. Respondents filed their answer on January 14, 2011. (See Exhibit B).

Finally, Complainant contends that the Respondents' test results for lead in their units were deficient. First the government contended that the "Certificates of Lead-Free Homes" were based upon visual inspections, rather than actual lead based paint tests. Respondents then obtained the underlying test results. Remarkably, now, the government still contends our lead based paint test data is insufficient. Yet, the government cites no authority that the underlying test results do not include sufficient information which would satisfy the requirements of the TSCA. Moreover, the certificates, along with the underlying test results, do comply with the requirements of the TSCA. See 40 C.F.R. § 745.103.[8] In any event, Respondents are not

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[8] *Inspection* means:
(1) A surface-by-surface investigation to determine the presence of lead-based paint as provided in section 302(c) of the Lead-Based Paint Poisoning and Prevention Act [42 U.S.C. 4822], and
(2) The provision of a report explaining the results of the investigation.
Lead-based paint means paint or other surface coatings that contain lead equal to or in excess of 1.0 milligram per square centimeter or 0.5 percent by weight.
Lead-based paint free housing means target housing that has been found to be free of paint or other surface coatings that contain lead equal to or in excess of 1.0 milligram per square centimeter or 0.5 percent by weight.

required to meet their burden of proof in raising the defense in their answer today. Respondents are entitled to conduct discovery for the purposes of establishing and meeting their burden of proof, at trial.

IV. The Penalty Calculation Is Not Appropriate

Should the court find Respondents have shown good cause to avoid a default judgment, Respondents are then entitled to assert defenses and mitigating factors. Complainant argues that:

(1) Respondents have no history of cooperation;

(2) Respondents provide no documentation of compliance;

(3) Complainant needs additional information to evaluate Respondents' inability to pay claim; and,

(4) The four percent rule announced in Chempace, a FIFRA matter, is inapplicable to this case involving the TSCA.

While Respondents had no history of cooperation with their former counsel, current counsel is actively engaged in this case. We have requested a settlement conference and we are already engaged in informal discovery with the government.

Secondly, Respondents are not required to submit documentation of compliance with the TSCA today. Respondents are entitled to conduct discovery for the purposes of establishing and meeting their burden of proof, at trial.

Third, Respondents have tendered their tax returns for the years 2007-2009. The government has requested additional financial information, which we are compiling for their financial analyst. Again, we are willing to cooperate with the government.

Finally, while the 4% rule announced in Chempace was a FIFRA case, the reasoning of the 4% rule applies just the same in the instant TSCA case. We urge the court to consider Respondents' gross income and apply a maximum penalty of 4% of Respondents' gross income, before any defenses or mitigating factors. The court is not bound by Complainant's penalty proposal.

V. Oral Argument

Complainant contends that the Regional Judicial Officer is not deciding a split among the federal circuit courts. We agree. Respondents are requesting that the court decide whether an attorney's grossly negligent conduct justifies relief from a default judgment under the Consolidated Rules of Practice. Respondents defer to the court and stand ready for oral argument.

CONCLUSION

For the reasons set forth above and in Respondents' Memorandum in Support of Opposition to Default Judgment and

Motion to Dismiss, along with supporting affidavits and exhibits, Respondents move this Court to deny an entry of Default Judgment, and find:

(a) that Respondents' former attorney was so grossly negligent, that it was inexcusable;

(b) that Respondents were misled by their former attorney about the true status of their case;

(c) the gross negligence of Respondents' former attorney is "good cause" under the "totality of the circumstances" not to enter a judgment of default against Respondents;

(d) that Respondents' answer, filed on January 14, 2011, be deemed filed timely considering the "totality of the circumstances;"

(e) that proof of service was defective, thus the Claimant is barred from obtaining a default judgment; and,

(f) that the court provide any and all relief just and proper in the premises.

Respectfully submitted,

Derek S. Burrell

3-23-11
Date

CERTIFICATE OF SERVICE

Respondents Willie. P. Burrell and The Willie P. Burrell Trust hereby certify that its Reply to Complainant's Response to Memorandum Opposing Default Judgment and Motion to Dismiss was served upon the Complainant and other Respondents, by U.S. Mail, postage pre-paid, this 23 day of March 2011 at:

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