**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
**REGION 5**

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| **In the Matter of:** | ) | **Docket No. TSCA-05-2021-0013** |
| | ) | |
| **TWDS, Inc., d/b/a Windows Direct USA of Cincinnati,** | ) | |
| | ) | |
| **Respondent.** | ) | |
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## COMPLAINANT'S REBUTTAL PREHEARING EXCHANGE

COMES NOW, the U.S. Environmental Protection Agency, Region 5 ("Complainant"), in response to this Tribunal's November 3, 2021 Prehearing Order, to respectfully submit its Rebuttal Prehearing Exchange, stating as follows:

## I. WITNESSES TO BE CALLED

**Estrella Calvo**
Section Chief
Pesticides and Toxics Compliance Section
U.S. EPA, Region 5 (ECP-17J)
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Complainant previously identified Estrella Calvo as a witness in Complainant's Initial Prehearing Exchange. Ms. Calvo is currently the Manager of the Pesticides and Toxics Compliance Section (PTCS), in the Land Enforcement Compliance Assurance Branch, in the Enforcement and Compliance Assurance Division in EPA, Region 5. In addition to the subjects identified in Complainant's original summary of her expected testimony, Ms. Calvo may be called to testify about the following:

Ms. Calvo may testify about the enforcement work performed by PTCS, specifically in terms of investigating and taking enforcement actions regarding violations of the Toxic Substances Control Act (TSCA) and the requirements of the TSCA-Lead Renovation Repair and Painting (RRP)/Lead-Based Paint Disclosure Rule (Section 1018 of TSCA), and how that work is civil in nature. She may testify about the policies, procedures and practices routinely followed by PTCS in civil enforcement actions such as the instant matter.

Ms. Calvo may be called to testify about her knowledge of the personnel employed within PTCS, and she may testify that a witness identified in Respondent's prehearing exchange who is a Special Agent employed by EPA's Criminal Investigation Division (EPA-CID) has never been employed within PTCS, the Land Enforcement Compliance Assurance Branch, or the

Enforcement and Compliance Assurance Division of EPA, Region 5. Ms. Calvo may testify that the office which employs the Special Agents of EPA-CID is not part of PTCS, the Land Enforcement Compliance Assurance Branch, or Region 5. Ms. Calvo also may testify that none of the EPA-CID Special Agents are affiliated with PTCS, and that none of those agents have ever collected evidence or performed any investigative or enforcement-related activities for or on behalf of her office (PTCS). She may testify that her office's investigation of Respondent, and the instant enforcement action that resulted from that investigation, are separate and distinct from any investigation which EPA-CID may be performing or may have performed with respect to TWDS or Windows Direct. Ms. Calvo also may testify that neither PTCS, the Land Enforcement Compliance Assurance Branch, nor the Enforcement and Compliance Assurance Division of EPA, Region 5 have requested or received any evidence in this case from EPA-CID, and that neither she nor her staff, nor any personnel working on the instant civil administrative case against Respondent, have received any information about any investigative activities which EPA-CID might have taken. Ms. Calvo also may testify that neither EPA-CID nor any of that office's Special Agents have had any input or influence over PTCS's investigation or enforcement actions in this matter.

Ms. Calvo further may testify that, prior to the service of Respondent's prehearing exchange on EPA, Region 5, she had never seen Respondent's Exhibits Nos. 28 and 29, which appear to relate to a subpoena issued by a federal grand jury, nor did she have any knowledge of the existence of these exhibits. She further may testify that PTCS, the Land Enforcement Compliance Assurance Branch, and the Enforcement and Compliance Assurance Division of EPA, Region 5 have no authority to issue or serve any grand jury subpoenas, and that the TSCA administrative subpoena which PTCS issued to Respondent in this case is not a grand jury subpoena, and that it is in fact a civil-administrative investigative tool which never involves any grand jury.

Complainant believes that Respondent's proffered Exhibits Nos. 28 and 29 are irrelevant to the instant proceeding, and that nothing which the EPA-CID Special Agent identified in Respondent's prehearing exchange could testify about has any relevance to the instant matter. Complainant believes that the EPA-CID Special Agent and Respondent's Exhibits Nos. 28 and 29 should be excluded from evidence at the hearing in the instant case, and Complainant may file an appropriate motion to exclude this proffered testimony and documentary evidence.

In rebuttal to testimony proffered by Mr. Chris Carey in which Respondent's narrative summary indicates Mr. Carey never denied EPA access to conduct an inspection, Ms. Calvo will authenticate the contemporaneous hand-written notes she took during the call with Mr. Carey on October 7, 2019, in which Mr. Carey stated he was formally denying EPA access to conduct an inspection. Ms. Calvo's notes are included as Complainant's Exhibit No. 63 in this rebuttal prehearing exchange.

**Christina Saldivar**
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Complainant previously identified Christina Saldivar as a witness in Complainant's Initial Prehearing Exchange. Ms. Saldivar is an Environmental Engineer, Compliance Officer and Inspector for EPA, Region 5, Enforcement and Compliance Assurance Division. In addition to the subjects identified in Complainant's original summary of her expected testimony, Ms. Saldivar may be called to testify about the following:

Respondent has included exhibits and testimony pertaining to matters unrelated to the allegations in the Complaint in this matter, including matters pertaining to other penalty policies and resulting settlements, and an investigation of another business entity related to Chris Carey.

If Respondent is allowed to argue that Complainant should have applied a different penalty policy to the alleged violations in this matter, or to offer testimony or introduce evidence about other penalty policies, such as EPA's *Lead-Based Paint Expedited Settlement Agreement* (LBP ESA) Policy, dated August 19, 2015, Ms. Saldivar may testify as to why Respondent's violations are not eligible for consideration under other penalty policies, including the LBP ESA.

Ms. Saldivar may testify that, as stated in the LBP ESA Policy, EPA has the option to use the LBP ESA Policy to resolve cases that involve certain minor violations of the LDR, Abatement Rule, and RRP Rule, and that use of the LBP ESA Policy is not mandatory. Ms. Saldivar may testify that the LBP ESA Policy states that the Region may implement the policy if the cited violations are listed in the policy's *Attachment B: Eligible Violations*, and the cited violations are assessed at a *minor* circumstance level.

Ms. Saldivar may testify that TWDS, Inc. committed violations of the RRP Rule that are not eligible under the LBP ESA Policy. Ms. Saldivar may testify that, with respect to the violations alleged in the Complaint in this matter, Complainant did not utilize the LBP ESA Policy because the alleged violations are not eligible under the LBP ESA Policy, and that formal enforcement was the appropriate enforcement vehicle to resolve the alleged violations.

Complainant hereby adds the *Lead-Based Paint Expedited Settlement Agreement* Policy, dated August 19, 2015, as Complainant's Exhibit No. 64.

If Respondent is allowed to enter Respondent's Exhibit 32 into evidence, Ms. Saldivar may testify that Respondent's Exhibit 32, beginning at page 41, which includes eight "Expedited Settlement Agreements," filed in EPA, Region 10, are the type of settlement agreement used by EPA to resolve violations that are eligible for resolution under the LBP ESA Policy. If Respondent is allowed to enter the eight "Expedited Settlement Agreements" filed in EPA, Region 10, into the record, or if Respondent is allowed to introduce other ESAs, Ms. Saldivar may testify that settlements that are more comparable to Respondent's violations are settlements memorialized in Consent Agreement and Final Orders (CAFOs), such as an EPA, Region 5 settlement with Feldco Factory Direct, LLC, in which an RRP-certified firm failed to document that it had provided the required pamphlet to customers, and agreed to pay a $45,000 civil

penalty and perform a supplemental environmental project at a cost of $225,000 to complete lead-based paint abatement work in Cook County. Ms. Saldivar will authenticate the relevant CAFO included as Complainant's Exhibit No. 65.

Respondent also has proffered evidence relating to EPA's investigation of Windows Direct of Columbus, including statements found in at least twelve exhibits proposed by Respondent. Complainant believes that these statements and any related testimony are irrelevant to the instant case, and should be excluded from evidence. If Respondent is allowed to introduce these particular statements into evidence, Ms. Saldivar will testify that while Complainant's investigation of Respondent and the investigation of another company in which Mr. Carey was a principal officer began at the same time, Respondent and Windows Direct of Columbus are two separate companies, EPA's investigations of these separate companies are two separate enforcement matters, and information pertaining to Windows Direct of Columbus is not relevant to this matter.

Regarding Ms. Saldivar's testimony in this matter, in addition to the testimony referenced in Complainant's Initial Prehearing Exchange, Ms. Saldivar will testify that in reviewing Respondent's contracts and checklists in this matter to evaluate Respondent's compliance, in her review of the required checklists, each checklist required by the RRP Rule was deficient, in that Respondent never included the required post-renovation cleaning information about the number of wet and dry cloths used to ensure that no lead-based paint remained in the work area (for example, in the trough, sill, and floor and/or ground near the window). Ms. Saldivar will testify that in EPA's enforcement discretion, Complainant has only alleged violations about the post-renovation cleaning information where the renovator did not check the box pertaining to post-renovation cleaning **and** the renovator did not provide a description of the required cleaning activities, but that all of the checklists in the 18 renovations were missing the required description of the cleaning required by the RRP Rule.

**Ekaterina (Katya) Smirnova**
Principal
Industrial Economics, Inc.
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Complainant previously identified Ekaterina (Katya) Smirnova as a witness in Complainant's Initial Prehearing Exchange. Ms. Smirnova is a Certified Fraud Examiner (CFE) and a Principal with Industrial Economics, Inc. (IEc). Ms. Smirnova was previously identified in the Initial Prehearing Exchange as a Senior Associate, but in January 2022, was promoted to Principal. As a Principal with IEc, Ms. Smirnova manages contracts and directs projects within her area of expertise. Ms. Smirnova's updated resume is included herewith as Complainant's Exhibit No. 66.

As set forth in Complainant's Initial Prehearing Exchange, because Respondent argued in its Prehearing Exchange that it is unable to pay all or part of the proposed penalty, Ms. Smirnova

may be called to testify that, based on her review and analysis of information including financial documents provided by Respondent, and as described in her report, it is her expert opinion that Respondent can afford the entire proposed penalty of $104,372. Ms. Smirnova may testify that the proposed penalty of $104,372 is small relative to Respondent's revenues. Ms. Smirnova may testify that Respondent could pay the proposed penalty from several sources, including operating cash flow, a temporary reduction in salaries and distributions paid to the company's sole owner, a temporary reduction in the company's advertising expenses, and/or out of its cash holdings.

Ms. Smirnova will authenticate her January 20, 2022 report entitled, "Ability to Pay in the Matter of TWDS, Inc., d/b/a Windows Direct USA of Cincinnati," included as Complainant's Exhibit No. 67 in this Rebuttal Prehearing Exchange.

Respondent's tax returns are also included as Complainant's Exhibits Nos. 68-70.

**Aaron Price**
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Complainant intends to call Mr. Price as a fact witness. Mr. Price is a Civil Investigator/Law Enforcement Forensic Specialist for the U.S. Environmental Protection Agency (EPA), Region 5, Office of Regional Counsel. Mr. Price will testify as to his professional background and over 18 years of work experience in civil and criminal law enforcement, including, but not limited to, as an Investigator and Police Officer.

Mr. Price has worked continuously for four different federal government agencies since October 4, 2004, and has worked at EPA, Region 5 since September of 2011, starting in his current position in October of 2013. Mr. Price holds a Master of Science degree in Criminal Justice from the University of Cincinnati, in Cincinnati, Ohio and a Bachelor of Science degree in Sociology – Law, Criminology, and Deviance, with a minor in Japanese, from the University of Minnesota – Twin Cities, in Minneapolis, Minnesota. He has served the Federal Executive Board in Chicago, Illinois, as a Certified Mediator since 2013, and is currently the Coordinator of its Shared Neutral Alternative Dispute Resolution Program.

Mr. Price's duties as a Civil Investigator/Law Enforcement Forensic Specialist include, but are not limited to, conducting investigations in support of the development and resolution of administrative and civil judicial enforcement cases under all of the federal environmental laws that EPA administers, locating property owners and witness, conducting interviews, performing forensic and financial analysis, and obtaining evidence needed to establish penalties and obtain reimbursement for remediation costs and injunctive relief.

Mr. Price will testify that, in his current role at EPA, Region 5, he is authorized to, trained to, and does conduct investigations, in accordance with the Toxic Substances Control Act (TSCA) and all other EPA-enforced statutes.

For EPA, Region 5's TSCA Lead-Based Paint program, among other things, Mr. Price investigates renovation firms and renovators who offer, perform, or claim to perform renovation activities on pre-1978 residential housing, or "target housing," and child-occupied facilities (places visited by children under the age of 6 years). Mr. Price also collects information necessary to determine the renovation firms' and renovators' compliance with the Renovation, Repair, and Painting (RRP) Rule, in furtherance of EPA's mission of maintaining environmental compliance of ongoing operations and remediating past environmental violations or compliance problems.

Mr. Price will testify that he has completed and annually maintains EPA, Region 5's training requirements for conducting civil investigations under EPA Order 3500.1, which establishes the minimum and consistent Agency-wide training and development programs for EPA employees conducting, participating in, or assisting with environmental compliance inspections and field investigations.

Mr. Price's annual EPA training includes the following mandatory requirements: (1) Occupational Health and Safety Curriculum; (2) Basic Inspector Curriculum; (3) Program-Specific Curriculum, including TSCA topics; (4) Annual refresher course requirements. Additionally, Mr. Price has completed general law enforcement and investigative training through the Federal Law Enforcement Training Centers (FLETC), Federal Bureau of Investigation, Department of Defense, and multiple other federal agencies and private providers. Annually, he completes dozens of hours of new and additional training to maintain relevant skills, knowledge, and abilities.

Mr Price will testify that he has been a credentialed Investigator, authorized to represent EPA while conducting civil investigations related to all EPA-enforced statutes, since October of 2013. Mr. Price will testify that he has taken the appropriate annual refresher training courses to maintain these credentials at all times between October of 2013 and the present. Mr. Price will testify that he also has taken the annual TSCA Confidential Business Information (CBI) training and is cleared to receive and review TSCA CBI since TSCA requires greater protection for information that is CBI.

Mr. Price may testify that he attempted to contact the seven customers identified as witnesses by Respondent in Respondent's Prehearing Exchange. Mr. Price may testify that on January 13, 2022, he spoke with Greg Braden, Kirt Doolin, and Abdoulaye Souare, and on January 18, 2022, Mr. Price spoke with Khahlia Sanders.

Mr. Price may testify that he was able to reach the four customers using the telephone number included in the contract between the customer and Respondent for the relevant renovation project. Mr. Price may testify that he advised each of the four customers he spoke with that Respondent had identified each of them as a witness on behalf of Respondent, and when Mr. Price asked if he or she had been contacted by Respondent to testify in this

matter, in each instance, the customer stated he or she had not been contacted by Respondent to testify in this matter, and had not agreed to testify on behalf of Respondent.

Mr. Price may testify that each of the four customers he spoke with recalled the relevant renovation project and confirmed the address of the renovation performed by Respondent.

In each instance where he was able to speak with the customer, Mr. Price may testify that he asked the customer if he or she was familiar with the legal requirements that Windows Direct was supposed to use when conducting work related to lead hazards, and each customer responded that he or she was not familiar with the legal requirements. Mr. Price may testify that in response to his questions, each of the four customers stated he or she was not a Certified Renovator, and each of the four customers stated he or she did not know the definition of "target housing."

With respect to Mr. Braden and Mr. Souare, whose renovation projects were performed by Respondent's employee, Christopher Brown, Mr. Price may testify that, in response to his question of whether the customer knew that Mr. Brown was not a Certified Renovator at the time of the renovation project, each customer stated that he was not aware that Mr. Brown was not a Certified Renovator at the time Mr. Brown performed the renovation.

In addition to the narrative summary above, with respect to Mr. Braden, Mr. Price may testify as to his conversation with Mr. Braden in which Mr. Braden confirmed that the Bro Properties' residence was occupied by adults who were likely elderly, disabled, or both, at the time of Respondent's renovation at this location.

In addition to the narrative summary above, with respect to Mr. Doolin, Mr. Price may testify that when he asked Mr. Doolin if Mr. Doolin recalled receiving any checklist from Windows Direct after the work at his property was completed, Mr. Doolin responded that he did not remember receiving any checklist.

In addition to the narrative summary above, Mr. Price may testify as to his conversation with Ms. Sanders in which Ms. Sanders stated that the building was occupied by her, the owner, and a tenant/lessee at the time of Respondent's renovation at this location.

Mr. Price may testify that as of January 18, 2022, he called and left messages with Demetrious Harris, and Mr. Harris has not returned his call. Mr. Price may testify that on January 13, 2022, he called Karen Colker's phone number listed in her contract with Respondent, and that number is now disconnected. Mr. Price may testify that on January 13, 2022, he called Kim Phillips number listed in she and her husband's contract with Respondent, and that Mr. Price was told by the woman who answered that she was not interested in speaking with him, and that she then ended the call.

**Chris Carey**
Owner, Windows Direct USA of Cincinnati
c/o Windows Direct USA of Cincinnati
11258 Cornell Park Drive, Suite 612

Blue Ash, Ohio 45242

Respondent has named Chris Carey, and identified Mr. Carey as the Owner of Windows Direct USA of Cincinnati. Complainant may call Mr. Carey to testify as a fact witness in Complainant's case-in-chief, and hereby adds Mr. Carey to Complainant's list of potential witnesses. Respondent has indicated that Mr. Carey reviewed all correspondence submitted to Complainant, including the letters submitted by Respondent's counsel. Complainant may call Mr. Carey to testify about the steps he took to have TWDS, Inc. become a certified firm in October 2019. Mr. Carey will testify why he believes that being an EPA-certified firm simply means submitting a form and paying a fee of $300, and will testify whether a certified firm has any other obligations under the RRP Rule.

Mr. Carey also may be called to testify with respect to Respondent's employee Christopher Brown, specifically regarding Respondent's representation to this Tribunal that Mr. Brown's certified firm status was sufficient for Respondent to perform renovations under the RRP Rule in renovations performed prior to receipt of his Certified Renovator certificate in October 2019. Mr. Carey may be called to testify as to why he believes that individuals performing renovations in homes constructed prior to 1978 are not required to be certified renovators who have completed and passed EPA-required eight hour training. Mr. Carey may be called to testify about how he complies with the RRP Rule despite his position that renovations in target housing are not required to be performed by certified renovators. Mr. Carey may be called to testify how his position regarding the sufficiency of Mr. Brown's certified firm status is consistent with his position that being an EPA-certified firm simply means submitting a form and paying a fee of $300.

Respondent argues in its Prehearing Exchange that Mr. Carey was unavailable to provide access for EPA's Inspector on October 7, 2019. Mr. Carey may be questioned as to why, if he was "unavailable" to provide access for the EPA inspection, he was able to deny access to EPA in his conversation with Ms. Calvo while refusing access to EPA's inspector on the same day.

Given that Respondent has identified Mr. Carey as the owner of Windows Direct USA, and that Mr. Carey is an officer of TWDS, Inc., Complainant will seek leave from the Tribunal to treat Mr. Carey as a hostile or adverse witness as allowed under Fed. R. Evid. 611(c).

**Ryan Eger**
Operations Manager, Windows Direct USA of Cincinnati
c/o Windows Direct USA of Cincinnati
11258 Cornell Park Drive, Suite 612
Blue Ash, Ohio 45242

Respondent has named Ryan Eger as a witness. Complainant may call Mr. Eger to testify as a fact witness in Complainant's case-in-chief, and hereby adds Mr. Eger to Complainant's list of potential witnesses. Mr. Eger may be called to testify about his recollection of a conversation that occurred more than two years ago, on or about October 7, 2019, with Inspector Novak, during which Mr. Novak attempted to conduct an inspection, and as to why Mr. Eger believes that his recollection of this conversation differs from the information contained in Inspector

Novak's October 10, 2019 report. In one place within Respondent's Prehearing Exchange, Respondent indicates that Mr. Eger is the "former" Operations Manager of TWDS, Inc., but in the list of Respondent's proposed witnesses, Respondent identifies Mr. Ryan Eger as the Operations Manager of Respondent. Given Mr. Eger's status as an Operations Manager of Windows Direct USA of Cincinnati in October 2019, Complainant will seek leave from the Tribunal to treat Mr. Eger as a hostile or adverse witness as allowed under Fed. R. Evid. 611(c).

**Christopher Brown**
Installer, Windows Direct USA of Cincinnati
c/o Windows Direct USA of Cincinnati
11258 Cornell Park Drive, Suite 612
Blue Ash, Ohio 45242

Respondent has named Christopher Brown as a witness who will testify that, at the time of the events relevant to the complaint, he was a "certified installer." Complainant may call Mr. Brown to testify as a fact witness in Complainant's case-in-chief, and hereby adds Mr. Brown to Complainant's list of potential witnesses. Mr. Brown may be called to testify about the training and testing he took in October 2019 to become an EPA-certified renovator. Mr. Brown also may be called to testify about the difference between his certified firm status and his certified renovator status. Mr. Brown may be called to testify about the date he was hired by Respondent, the number of jobs he has performed during his employment by Respondent, and the number of renovations he performed while he was certified as a "certified firm," and before he took the training and passed the test to become a certified renovator in October 2019. Mr. Brown may be called to testify about why he signed numerous RRP checklists indicating he was a certified renovator prior to receiving his certified renovator certification in October 2019. Given Mr. Brown's status as an employee of Windows Direct USA of Cincinnati, Complainant will seek leave from the Court to treat Mr. Brown as a hostile or adverse witness as allowed under Fed. R. Evid. 611(c).

## II. EXHIBITS INTENDED TO BE INTRODUCED

To effectively rebut the claims made in Respondent's Initial Prehearing Exchange, Complainant intends to proffer the following exhibits:

| CX No. | Title of Document | Date of Document |
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| 63 | Handwritten notes taken by Estrella Calvo during October 7, 2019 phone call with Chris Carey | Oct. 7, 2019 |
| 64 | Lead-Based Paint Expedited Settlement Agreement Policy | Aug. 19, 2015 |
| 65 | Feldco Factor Direct, LLC CAFO | Nov. 27, 2012 |
| 66 | Updated Resume, Ekaterina (Katya) Smirnova | |
| 67 | Expert Report: Ability to Pay in the matter of TWDS, Inc., d/b/a Windows Direct USA of Cincinnati, Ekaterina (Katya) Smirnova | Jan. 20, 2022 |
| 68 | Tax Return for TWDS, Inc. for the 2018 fiscal year | |
| 69 | Tax Return for TWDS, Inc. for the 2019 fiscal year | |
| 70 | Tax Return for TWDS, Inc. for the 2020 fiscal year | |

Note that Complainant's Exhibits Nos. 67 through 70 include personal privacy and other sensitive information, and Complainant is filing these four Exhibits with the Office of Administrative Law Judges using a secured OneDrive folder. Complainant's Exhibits Nos. 68, 69 and 70 complete the production of financial information included by Respondent in its Prehearing Exchange.

Respondent has proffered a number of exhibits related to two actions not at issue in the matter before this Tribunal: an investigation of a related entity, Windows Direct USA of Columbus; and an ongoing criminal investigation by EPA's Criminal Investigative Division. Respondent has also proffered exhibits discussing confidential settlement communications in this matter. Complainant notes that the following exhibits, in whole or in part, discuss these matters, which are irrelevant to the case before this Tribunal:

| RX No. | Title of Document |
|---|---|
| 6 | Response to EPA Request for Records dated December 30, 2019 |
| 7 | Notices of Potential Violation and Opportunity to Confer Regarding Windows Direct of Cincinnati and Windows Direct of Columbus, Inc., dated September 4, 2020 |
| 8 | Email to EPA discussing settlement of the matter and issues related to Windows Direct of Columbus, dated September 10, 2020 |
| 10 | Email to EPA concerning claims as to Windows Direct of Columbus and Windows Direct of Cincinnati, dated September 21, 2020 |
| 11 | Email from EPA concerning settlement of matters related to Windows Direct of Columbus and Windows Direct of Cincinnati, dated October 5, 2020 |
| 12 | Email from EPA concerning settlement of matters related to Windows Direct of Columbus and Windows Direct of Cincinnati, dated October 8, 2020 |
| 13 | Email to EPA providing tax return information for Windows Direct of Columbus, dated October 16, 2020 |
| 14 | Email from EPA concerning matters related to Windows Direct of Columbus and Windows Direct of Cincinnati, dated November 9, 2020 |
| 15 | Email to EPA providing additional information, dated November 11, 2020 |
| 16 | Email from EPA concerning tax return information related to Windows Direct of Columbus, dated November 17, 2020 |
| 17 | Email from EPA regarding Windows Direct of Columbus, dated December 2, 2020 |
| 19 | Email to EPA forwarding financial information regarding Windows Direct of Columbus, dated December 5, 2020 |
| 20 | Email from Chris Carey to Jay Langenbahn, dated December 7, 2020 |
| 24 | Call from EPA Special Agent to Windows Direct |
| 25 | Call from Ryan Eger indicating that he was contacted by EPA Special Agent |
| 26 | Email to EPA dated June 11, 2021 |
| 28 | Subpoena to Testify before a Grand Jury |
| 29 | Response to Subpoena to Testify before a Grand Jury |
| 30 | Letter to EPA concerning a tolling agreement and settlement discussions, dated July 1, 2021 |
| 31 | Email from EPA transmitting draft Consent Agreement and Final Order, August 2, 2021 |

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| 32 | Email to EPA discussing Consent Agreement and Final Order, dated August 6, 2021 |
| 33 | Email from EPA discussing Consent Agreement and Final Order, dated August 11, 2021 |
| 34 | Email to EPA discussing Consent Agreement and Final Order, dated August 19, 2021 |
| 35 | Email from EPA discussing penalty amounts, dated September 14, 2021 |
| 36 | Email to EPA discussing penalty amounts, dated September 21, 2021 |

## III. COMPLAINANT'S RESPONSE TO RESPONDENT'S EXPLANATION OF THE ARGUMENTS IN SUPPORT OF ANY AFFIRMATIVE DEFENSES

Respondent indicates that Respondent's Exhibits Nos. 1 through 41 support all 29 of the affirmative defenses Respondent raised in its Answer, and states that its arguments are included in the 41 exhibits. In its Prehearing Exchange, Respondent has provided arguments for 13 of its 29 affirmative defenses, which Complainant addresses below. Complainant is not able to ascertain which of Respondent's exhibits or arguments support its affirmative defenses for the remaining 16 affirmative defenses without further explanation from Respondent. Complainant notes that Complainant's Initial Prehearing Exchange provides Complainant's position on all of Respondent's affirmative defenses, and does not agree with any unexpressed argument Respondent believes it has preserved with its general reference to its exhibits.

Complainant has responded to each of the 13 affirmative defenses identified by Respondent based on the information provided in Respondent's Prehearing Exchange.

### 1. Fourth Affirmative Defense: Statute of Limitations and/or Laches

Respondent's Fourth Affirmative Defense is that the Complaint is barred by the statute of limitations and/or laches. Respondent provides a timeline of events in this matter which seems to emphasize two periods during which Complainant and Respondent did not communicate: December 30, 2019 through September 4, 2020; and December of 2020 through June 11, 2021. Respondent provides no explanation as to why this delay relates to any alleged running of the statute of limitations. Complainant, however, notes that the earliest of the violations alleged in the Complaint occurred on October 22, 2016, and that the Complaint was filed on September 30, 2021, within the 5-year statute of limitations period applicable for assessing penalties under TSCA. *In re: Elementis Chromium, Inc*., 16 E.A.D. 649 (EAB 2015), in which the Environmental Appeals Board (EAB) confirmed applicability of a five-year federal statute of limitations for non-continuing violations in a TSCA enforcement action (*see* 28 U.S.C. Section 2462).

Estoppel by laches is the neglect or omission to assert a right for an unreasonable and unexplained length of time, under circumstances prejudicial to the adverse party. The doctrine of laches has two elements: "lack of due diligence by the party asserting the claim and prejudice to the opposing party" *West Bend Mut. Ins. Co. v. Procaccio Painting & Drywall Co., Inc.*, 794 F.3d 666 (7th Cir. 2015). However, the doctrine of laches does not apply here, where 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 and 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); *U.S. v. Arrow Transp. Co*., 658 F.2d 392, 394 (5th Cir. 1981). Even if the doctrine were applicable in this case, Respondent has made no claim regarding any kind of prejudice resulting from two brief periods of time when Complainant was evaluating the claims in this matter, nor were these periods of time unreasonable. Respondent also makes reference to two other investigations, specifically, an investigation regarding Windows Direct USA of Columbus, and what Respondent has indicated is an ongoing criminal investigation. Neither of these two investigations are relevant to Respondent's asserted defense, nor to any issue in this case, and should be disregarded.

**2. Thirteenth Affirmative Defense: Waiver and/or Estoppel**

Respondent's Thirteenth Affirmative Defense is that the Complaint is barred by waiver and/or estoppel. Respondent does not identify how or why Complainant has waived its claim and is estopped from pursuing it. Nevertheless, Complainant notes that "[G]enerally speaking[,] public officers have no power or authority to waive the enforcement of the law on behalf of the public." *United States v. Amoco Oil Co*., 580 F. Supp. 1042, 1050 (W.D. Mo. 1984). Likewise, in *United States v. Chevron U.S.A., Inc*., 757 F. Supp. 512 (E.D. Pa. 1990), the court held that "the fact that the EPA did nothing for four years to enforce the regulations against Chevron would not be considered an affirmative misrepresentation and does not satisfy the first requirement of the equitable estoppel defense." *Id*. at 515. "Simply put, the government may not be estopped from enforcing the law, even following an extended period of no enforcement or underenforcement." *Washington Tour Guides Ass'n v. National Park Service*, 808 F. Supp. 877, 882 (D.D.C. 1992).

When asserting equitable estoppel against the government, a party must not only prove the traditional elements of estoppel, but also that the government "engaged in some affirmative misconduct." *In re Envtl. Disposal Sys., Inc*., UIC Appeal No. 07-03, slip op. at 44 n.26 (EAB 2008), 14 E.A.D. 96, at 128, note 26; *In re Envtl. Prot. Servs., Inc.*, 13 E.A.D. 506, 541 (EAB 2008); *In re B.J. Carney Indus., Inc*., 7 E.A.D. 171, 196-200 (EAB 1997). Not only does Respondent not provide any reasoning as to how the basic elements of estoppel (that it reasonably relied upon Complainant's actions to its detriment) are satisfied; Respondent also provides no indication of what affirmative misconduct Complainant may have engaged in.

Though, at times, Complainant may have taken a reasonable amount of time to thoroughly conduct its investigation and analysis, respond to Respondent's requests, or follow up on further action in this matter, Complainant at no time indicated that it no longer intended to pursue the claims identified. Given that the EAB and various federal courts have denied equitable estoppel claims against the government where it took four or more years to open an enforcement action (s*ee*, e.g., *Washington Tour Guides Ass'n* , 808 F.Supp 877 at 882; *In re B.J. Carney Indus., Inc*., 7 E.A.D. 171 at *20), a perceived "delay" of a total of nine months clearly is an insufficient basis to argue that there was any kind of "affirmative misconduct" on the part of Complainant. On the contrary, Complainant takes seriously the government's obligation to

carefully examine all information pertaining to allegations of violations of federal environmental laws before alleging violations have occurred.

### 3. Sixteenth Affirmative Defense: Inspection not conducted at reasonable times within reasonable limits and in a reasonable manner

Respondent's Sixteenth Affirmative Defense is that the inspection was not conducted at reasonable times within reasonable limits, and in a reasonable manner. Respondent provides little to no detail as to why the inspection was conducted unreasonably, except that the owner of the Company, Chris Carey, was unavailable that day. Complainant notes, as a first matter, that an inspection was not actually conducted at Respondent's Blue Ash, Ohio location, as access was denied to Mr. Novak prior to presenting a written inspection notice. Respondent provides no explanation for why Mr. Carey was "unavailable" on October 7, 2019, yet on the same day, engaged in a conversation with Ms. Calvo in which Ms. Calvo reviewed EPA's access authority, and Mr. Carey stated he was "formally denying" EPA access to conduct an inspection.

As discussed in the Complaint and Complainant's Initial Prehearing Exchange, EPA has authority to conduct inspections and issue subpoenas under Section 11 of TSCA, 15 U.S.C. § 2610 and 40 C.F.R. § 745.87(e). TSCA Section 11 describes a number of limitations on EPA's inspection authority, including, but not limited to, completion "with reasonable promptness" and that inspections be "conducted at reasonable times, within reasonable limits, and in a reasonable manner." 14 U.S.C. § 2610(a). Generally, EPA inspectors are expected to conduct inspections during normal work hours, and, may coordinate with a facility to agree on a schedule. EPA does, however, also have the authority to conduct unannounced inspections, which do not require such coordination. EPA was attempting to conduct such an unannounced inspection on October 7, 2019 at Respondent's Blue Ash, Ohio facility. Inspector Novak documented his arrival at Respondent's business office at 2:25 pm Eastern on October 7, 2019, a Monday, well within normal work hours. Further, Mr. Novak will testify to the fact that his attempt at inspection lasted approximately seven minutes.

Section 11 of TSCA states that an inspection "may only be made upon the presentation of appropriate credentials and of a written notice to the owner, operator, or agent in charge of the premises or conveyance to be inspected." 15 U.S.C. § 2610(a). As described in Complainant's Initial Prehearing Exchange, Mr. Novak asked to speak with the person in charge of environmental matters. Moreover, as described in Complainant's Initial Prehearing Exchange, less than one hour later, at 2:07 pm Central/3:07 pm Eastern, Ms. Calvo was able to reach Mr. Carey, the owner, who also denied EPA access to conduct its lawful inspection.

Respondent argues that Inspector Novak failed to present his notice of inspection. As discussed in Complainant's Initial Prehearing Exchange, Mr. Novak will testify he was unable to reach the stage of presenting a written notice of inspection to Mr. Eger because Mr. Eger walked away from him.

**4. Eighteenth Affirmative Defense: Access not Denied**

Respondent's Eighteenth Affirmative Defense is that access was not denied. Complainant notes that affirmative defenses are intended to negate liability, even if it is proven that Respondent committed the alleged violations. As such, denying that the violation occurred is not an affirmative defense.

As discussed in Complainant's Initial Prehearing Exchange, Complainant addressed Respondent's denial that Respondent denied access. Complainant will establish, through the testimony of Mr. Novak, Ms. Calvo, and Mr. Carey, and through the introduction of Complainant's Exhibit 5, that Respondent denied EPA access to inspect records.

**5. Nineteenth Affirmative Defense: Respondent Cooperated and EPA Actions on September 7, 2019 were Unreasonable**

Respondent's Nineteenth Affirmative Defense is that Respondent cooperated and that EPA's actions on September 7, 2019 were unreasonable, and that therefore there is no legal or factual basis for Count 1. For reference, Count 1 of the Complaint alleges that Respondent failed or refused to permit the EPA representative entry or inspection, in violation of 40 C.F.R. § 745.87(c), and Sections 11 and 15 of TSCA, 15 U.S.C. §§ 2610 and 2689. Again, Complainant notes that denying that there is a legal or factual basis for an allegation is not an affirmative defense. Complainant also interprets Respondent's reference to "September 7, 2019" to be a reference to the events that occurred on October 7, 2019, as that is what is described in the details that follow in Respondent's Prehearing Exchange.

As described in response to Respondent's Sixteenth Affirmative Defense, above, EPA's actions on October 7, 2019, were reasonable and well within the bounds of EPA's authority under TSCA and the RRP Regulations.

**6. Thirteenth Affirmative Defense: No Risk of Harm, De Minimis Violations**

Respondent's Thirteenth Affirmative Defense is that the actions involve hyper-technical violations that create no risk of harm to a single person and are de minimis violations worthy of only a de minimis fine. Respondent provides no detail as to why it believes that the alleged violations involve hyper-technical violations that create no risk of harm to a single person and are de minimis violations worthy of only a de minimis fine. In any case, Complainant disagrees with this characterization of the violations alleged in the Complaint. Both Dr. Kristin Keteles and Mr. Martig will provide testimony relating to and underscoring the importance of the TSCA lead-based paint requirements addressed in the Complaint. Recordkeeping requirements, which comprise 5 of the alleged violations, "allow EPA or an authorized State to review a renovation firm's compliance with the substantive requirements of the regulation" and "remind a renovation firm what it must do to comply," among other things described below. Lead; Renovation, Repair, and Painting Program, 73 Fed. Reg. 21,745 (Apr. 22, 2008).

The EAB has considered the importance of record-keeping requirements in regulations pertaining to lead-based paint under 40 C.F.R. Part 745, Subpart F, in *In Re Harpoon Partnership*, 12 E.A.D. 182 (EAB, 2005):

> Moreover, we disagree with Harpoon's attempt to characterize § 745.113(b) as merely containing unimportant record-keeping requirements. As explained in the preamble to the Disclosure Rule, "the completion and retention of disclosure and acknowledgment language is a necessary component of any effective, enforceable disclosure requirement for leasing transactions." Final Lead Disclosure Rule, 61 Fed. Reg. at 9071. Without a requirement that parties certify that the appropriate lead-hazard information has been disclosed, the regulatory agencies would be forced to ascertain compliance by contacting individual tenants, relying on their record-keeping and memories. Therefore, we recognize the importance of the § 745.113(b)(6) requirements and are not persuaded by Harpoon's attempts to mischaracterize them as insignificant elements of the regulatory scheme. The purpose of the Disclosure Rule would be defeated without these documentation requirements. (*See* page 204)

a. *Count 1: failure to permit EPA entry for inspection*. Inspections are a critical tool with which EPA is able to determine whether a given entity is complying with the law, in this case TSCA and the RRP Regulations. EPA received a tip/complaint alleging that Respondent was not complying with the RRP Rule. To evaluate this allegation, and, to protect the health and safety of Respondent's customers, EPA needed to investigate the truth of that assertion. Refusing to allow EPA access to records that would provide clarity on the matter is not "hyper-technical" or "de minimis" and could very well result in harm to future customers if a Respondent were to continue to renovate without using lead-safe practices.

b. *Count 2: failure to obtain firm certification*. EPA requires firms that perform, offer, or claim to perform renovations for compensation to obtain firm certification prior to performing any renovation that may disturb lead-based paint. This argument demonstrates that Respondent minimizes the importance of the RRP Rule. The RRP Rule describes the requirements that firms must follow if they are paid to perform work that disturbs paint in housing and child-occupied facilities built before 1978. In particular, firms performing renovations must ensure, among other things:

- All individuals performing activities that disturb painted surfaces on behalf of the firm are either certified renovators or have been trained by a certified renovator;
- A certified renovator is assigned to each renovation and performs all of the certified renovator responsibilities;
- All renovations performed by the firm are performed in accordance with the work practice standards of the RRP Program;
- Pre-renovation education and lead pamphlet distribution requirements of the RRP Program are performed; and
- The program's recordkeeping requirements are met.

If Respondent believes that being an EPA-certified firm involves only registration and payment of a fee, Respondent currently may not be complying with the certified firm requirements in the RRP Rule.

Further, requiring firm certification is a necessary measure for EPA to be able to ensure the health and safety of any given firm's customers. If a firm were not to register with EPA, EPA could not be certain that the firm was aware of the requirements under the RRP rule, as the evidence will show was the case with Respondent. As such, this violation is not "hyper-technical" or "de minimis," and certainly creates a risk of harm to customers.

c. *Counts 3 and 4: failure to obtain written acknowledgement from adult occupants of multi-family dwellings*. Providing the lead-safe renovation pamphlet (Complainant's Exhibit No. 50) is important because it informs customers of the hazards of lead exposure and identifies the requirements that an RRP-certified firm and renovator must abide by. It is also a resource for properly identifying a renovation firm that is qualified, aware of the requirements, and will protect the health of the home's occupants. Providing the required pamphlet to the owner of a property typically occurs at the time the customer enters into a renovation contract. If the renovation work is performed in a rental property not occupied by the owner, the certified firm must document that either it or its certified renovator provided the required pamphlet to the occupant who otherwise has no information about what is required to ensure that the occupant's home is safe from lead hazards generated during a renovation project. If a certified firm fails to provide the pamphlet to an occupant, or fails to ensure that its certified renovator provide this required pamphlet, the firm and renovator have failed to provide the occupant with the required educational information to allow the occupant to ensure steps are taken to minimize lead exposure, and to see if the work is being performed by a certified firm. Such a firm has denied its customers' occupants the opportunity to make a critical choice for their health and safety. Without evidence that the pamphlet was provided, *i.e.*, a written acknowledgment or a certificate of mailing, EPA cannot be sure that occupants were properly informed of required information. Failing to obtain a signed form indicating the required pamphlet was provided to an occupant appears unimportant to Respondent, but Complainant does not agree that such violations of regulations designed to keep families safe from lead hazards are "hyper-technical" or "de minimis," and Complainant maintains that such violations should be taken seriously.

d. *Counts 5-7: failure to ensure that all individuals working on behalf of the firm are either certified renovators or trained by a certified renovator*. Certified renovators are required to take an 8-hour training course and pass a test to show their knowledge of lead-safe work practices prior to performing any kind of renovation work. Without this certification, neither EPA nor the customer receiving the renovation services can be certain that the renovator is aware of the correct procedures to protect those in the home from lead exposure. Again, this violation is neither "hyper-technical" nor "de minimis," and certainly risks harm to individuals.

e. *Counts 8-13: failure to retain all records necessary to demonstrate compliance with 40 C.F.R. Part 745, Subpart E*. Specifically, the Complaint alleges that Respondent failed to retain documentation of post-renovation cleaning verifications and certified renovators' training certificates. Maintenance of these records is required by law and is EPA's primary method of determining compliance. Because EPA inspectors cannot be present to observe the

conduct at every renovation job site in the country, EPA relies on certified renovators to document the steps taken to demonstrate compliance, and relies on certified firms to require its certified renovators to contemporaneously document their compliance with all elements of the RRP Rule while the work is being performed, and obtain the customer's signature documenting the customer's receipt of the checklist. Without these records, EPA cannot determine with certainty whether lead-safe practices were used during each renovation without having an EPA inspector present at every renovation project performed in the United States. Recordkeeping on the part of regulated entities is central to EPA's ability to carry out its mission, and is not "hyper-technical," "de minimis," or harmless.

**7. Twenty-First Affirmative Defense: Customers Received and Reviewed Pamphlet, Pamphlet Would Not Have Changed Actions, No Risk of Harm, De Minimis Violation**

Respondent's Twenty-First Affirmative Defense is that "customers of the EPA" received and reviewed the pamphlet; and that what he/she saw therein would not have changed any action subsequently taken, and that this is another hyper-technical violation that caused no risk or harm to anyone and is also de minimis. First, Complainant interprets "customers of the EPA" to mean Respondent's customers. Second, Complainant has seen no evidence to indicate that these customers did, in fact, receive the pamphlet. As discussed in the Complaint, the requirement under 40 C.F.R. § 745.84(a)(2)(i) is that the firm obtain a written acknowledgment from each adult occupant of target housing, acknowledging that they received the pamphlet, or to obtain a certificate of mailing at least seven days prior to each renovation.

Please refer to the discussion of the importance of Counts 3 and 4 in response to Respondent's Thirteenth Affirmative Defense, above, for an explanation of why these violations do involve a risk of harm and are not de minimis.

**8. Twenty-Second Affirmative Defense: EPA Admits these are Only Record-Keeping Violations and Present No Harm to Anyone**

Respondent's Twenty-Second Affirmative Defense is that, by EPA's own admission, these are only record-keeping violations and present no harm to anyone. Respondent provides only a list of documents intended to reflect its compliance with EPA's requirements as detail for this statement. Complainant has reviewed these documents and finds no indication that EPA has ever admitted that the alleged violations are only record-keeping and "present no harm to anyone." EPA does not, and has never, taken that position with respect to these violations. Complainant has identified in its Initial Prehearing Exchange, and will establish, through the introduction of exhibits and testimony listed there and in this Rebuttal Prehearing Exchange, that none of the information provided by Respondent suffices to absolve Respondent of the identified violations.

**9. Thirty-Third Affirmative Defense: Only Time Will Tell If Respondent Can Pay the Penalty**

Respondent's Thirty-Third Affirmative Defense is that only time will tell if Respondent can withstand payment of $104,000 and that "what is certain is that the Respondent will not now be able to expend certain monies on increased wages, more efficient equipment, maybe even installation of better record-keeping procedures." Respondent has provided, and Complainant's financial expert has reviewed, all financial information provided by Respondent relevant to Respondent's ability to pay the penalty. As Complainant will establish through the testimony of Ms. Smirnova and the introduction of her expert report (Complainant's Exhibit No. 67), Respondent has the ability to pay the penalty.

Complainant notes that Respondent has also stated in Section V of Respondent's Prehearing Exchange that it has already implemented a three-way compliance department.

**10. Twenty-Fourth Affirmative Defense: Violations are Harmless, Technical, and Record-Keeping Only**

Respondent's Twenty-Fourth Affirmative Defense is that the nature of the violations are harmless and are technical and are record-keeping only. Please refer to the responses to the Thirteenth Affirmative Defense and the Twenty-Second Affirmative Defense, above.

**11. Twenty-Fifth Affirmative Defense: Respondent is a Small Business, Ability to Pay is Less than What a Larger Regulated Entity is Capable of Paying**

Respondent's Twenty-Fifth Affirmative Defense is that Respondent is a small business whose ability to pay is much less than what a larger regulated entity is capable of paying. This general statement is irrelevant. In this matter, EPA has sought to evaluate Respondent's ability to pay throughout this proceeding. As discussed in response to the Twenty-Third Affirmative Defense, above, Complainant's financial expert has determined that Respondent has an ability to pay the penalty and will testify as such.

**12. Twenty-Sixth Affirmative Defense: Risk of Harm in all Instances was Little or None**

Respondent's Twenty-Sixth Affirmative Defense is that "in every instance, the risk of harm was little to none." Again, Complainant will refer to the discussion of this defense in response to the Thirteenth Affirmative Defense, the Twenty-Second Affirmative Defense, and the Twenty-Fourth Affirmative Defense.

**13. Twenty-Seventh Affirmative Defense: Actions by US Government and EPA Have Caused Inflation**

Respondent's Twenty-Seventh Affirmative Defense is that the actions by the United States Government (including the EPA) have raised the cost of doing business for multiple entities, thus causing inflation. As support for this, Respondent merely states that it has provided EPA with financial information and that it cannot pay the penalties that EPA is requesting.

Respondent also mentions Windows Direct of Columbus, which, as previously stated in this Rebuttal Prehearing Exchange, is an entity not relevant to the case before this Tribunal.

As discussed above, in response to the Thirty-Third Affirmative Defense and the Twenty-Fifth Affirmative Defense, Complainant's financial expert has determined that Respondent has the ability to pay the penalty and will testify as such.

Further, the actions of the U.S. Government and EPA in enforcing laws intended to protect human health and the environment have not raised the cost of doing business for any entity subject to TSCA and the RRP Regulations. Rather, Respondent has avoided the true cost of doing business over the course of the last five years by failing to comply with the law. This has allowed Respondent to operate at a lower cost than other renovation businesses in the United States that comply with TSCA and the RRP Regulations. Assessment of a penalty is an important deterrent to ensure that Respondent, and all other companies involved in renovations, realize there are consequences for failing to comply with the RRP Rule.

## IV. COMPLAINANT'S RESPONSE TO RESPONDENT'S FACTUAL INFORMATION RELEVANT TO THE ASSESSMENT OF A PENALTY

Respondent raises a number of arguments as to why the penalty assessed by EPA should be reduced. First, Respondent argues that continued emphasis on the alleged failure/refusal to permit entry is particularly weak, both legally and factually. In making this argument, Respondent asserts that EPA should have arrived with a warrant, with prior notification, and at a time when the person with access for the sought-after information was on the premises. Complainant has addressed this matter in Section III, above. Neither TSCA nor the RRP Rule require a warrant for civil administrative inspections, nor is EPA required to provide notice prior to the inspection. Respondent also refers to Respondent's Exhibit No. 35, a letter from EPA identifying the penalties assessed for each count, dated September 14, 2021. Complainant notes that this letter was intended solely for settlement purposes, was specifically identified as such, and should not be introduced as an exhibit before this Tribunal. Respondent also refers to Respondent's Exhibit No. 36, its response to that letter, also discussing settlement confidential information.

Respondent also asserts that it has cooperated in various ways during the course of EPA's investigation. As it relates to the assessment of a penalty, EPA considers cooperation as a component of the "attitude adjustment." The attitude adjustment is appropriate where a settlement is negotiated prior to a hearing. The case team has evaluated and continues to evaluate Respondent's cooperation throughout the entire compliance monitoring, case development, and settlement process, in line with the *Interim Final Consolidated Enforcement Response and Penalty Policy for the Pre-Renovation Education Rule; Renovation, Repair and Painting Rule* (Complainant's Exhibit No. 51).

Second, Respondent states that the second through fifth penalty areas identified in the September 14, 2021 letter involved administrative record-keeping omissions and that it is "a stretch to say that any person was put at any serious health risk by reason of these alleged violations." The violations Respondent refers to are (1) the failure to obtain firm certification for 18 renovations, (2) the failure to obtain a signed acknowledgment from adult occupants of two

homes prior to doing any renovation work, (3) the failure to ensure that all individuals working on behalf of the firm are either certified renovators or trained by a certified renovator for three renovations, and (4) the failure to retain required records for six renovations. Complainant has addressed the risk to human health involved in each of these violations above, in Section III.

Third, Respondent states that the penalty for individuals working on behalf of the certified firm who allegedly were neither certified renovators nor had been trained by certified renovators is unfounded. Complainant has identified, in its Initial Prehearing Exchange, the testimony and exhibits which it will use to establish the basis of these violations and the basis of the penalty calculation. Further, Respondent states that it has provided EPA with the renovator certificate, both for individuals and for firms, for Christopher Brown, which were in effect during the entire time period in question. This statement is entirely false. Christopher Brown was not a certified renovator at the time the renovations at issue were done, as shown in Complainant's Initial Prehearing Exchange. Christopher Brown may have been registered as a certified firm at that time, but that is both insufficient and irrelevant for this violation.

Fourth, Respondent states that small businesses cannot financially absorb penalties like the one involved in this action. As discussed in Section III, above, Complainant's financial expert has reviewed the financial information provided by Respondent and has determined that Respondent has the ability to pay the penalty. Complainant will establish, through the testimony of Ms. Smirnova and the introduction of her expert report, that Respondent has the ability to pay the proposed penalty in this matter.

Fifth, Respondent notes that it has implemented a three-way compliance department during the course of this enforcement action. Complainant is pleased to hear that Respondent has finally taken steps to ensure its compliance with regulations that should have been observed at the time Respondent began conducting renovations on target housing. Respondent does not explain why it failed to implement a compliance program until after being contacted about the alleged violations.

## V. COMPLAINANT'S RESPONSE TO RESPONDENT'S NARRATIVE STATEMENT EXPLAINING THE BASIS FOR RESPONDENT'S POSITION THAT THE PENALTY SHOULD BE REDUCED OR ELIMINATED

Respondent asserts that the penalty should be reduced or eliminated because of "the inconsequential nature of the alleged violations" and due to a lack of ability to pay. Complainant has addressed both of these matters in responses to affirmative defenses in Section III, above. Again, none of the violations alleged in the Complaint are "inconsequential" and pose serious risk of harm to human health. Further, as Complainant will establish through the testimony of Ms. Smirnova and the introduction of her expert report, Respondent has the ability to pay the penalty.

Next, Respondent claims that EPA did not take into consideration the history of prior violations and the degree of culpability in its assessment of a penalty. EPA is required, per the *Interim Final Consolidated Enforcement Response and Penalty Policy for the Pre-Renovation Education Rule; Renovation, Repair and Painting Rule; and Lead-Based Paint Activities Rule*

and *Section 1018 Disclosure Rule Enforcement Response and Penalty Policy* (Complainant's Exhibits Nos. 51 and 52) to consider the history of violations and the degree of culpability, and did so here. As discussed in Complainant's Initial Prehearing Exchange, Ms. Saldivar considered that Respondent did not have any prior history of violations and the degree of culpability in her decision not to adjust the gravity-based penalty either upward or downward. *See* page 31 of Complainant's Prehearing Exchange.

Respondent also misleadingly states that EPA only identified 13 violations among the 2,500 renovations completed in a three-year period. As Ms. Calvo will explain in her testimony, upon receiving a list of approximately 2,020 renovation projects completed by Respondent during a three-year period, she randomly selected 35 for which EPA then required production of documents. Ms. Saldivar will testify that she then reviewed the documents provided relating to those 35 renovation projects and then identified 13 regulatory violations in 18 projects. Respondent's arguments create the false impression that violations occurred at only 0.52% of its renovation projects, when in reality only a small number of its renovation projects were selected for investigation and ultimately cited for violations. Of the 35 projects provided by Respondent, Complainant identified violations in 18 projects, excluding the other 17 projects because those projects were not clearly renovation projects performed in target housing. Using Respondent's argument, Complainant could just as easily state that EPA identified violations in more than half of the projects performed by Respondent, which could be extrapolated to at least 1,000 properties where Respondent failed to comply with the RRP Rule, which is a more accurate characterization of what occurred in this matter.

Respondent characterizes EPA's determination that Counts 5 through 13 of the Complaint are "significant" violations as "random" because EPA cannot prove that there were people at risk present in the target housing, and alleges that EPA should be required to prove that such individuals were present. Counts 5 through 13 of the Complaint were assessed using the *Interim Final Consolidated Enforcement Response and Penalty Policy for the Pre-Renovation Education Rule; Renovation, Repair and Painting Rule; and Lead-Based Paint Activities Rule* (Complainant's Exhibit No. 51), which states that, in target housing where there is "no information about age of the youngest occupant, or one or more occupants between ages of 6 and 17," the extent of violation is deemed to be "significant." EPA had no evidence about the age of the youngest occupant of each unit of target housing, and appropriately selected the "significant" extent of violation. Regardless of Respondent's opinion about how the law should be written, under the applicable law as it ***is*** written, EPA is not required to prove that children under the age of 6 and/or pregnant women are present in any unit of target housing prior to assessing a penalty. Only certain properties, such as retirement communities and nursing homes, are excluded from the definition of "target housing."

Respondent alleges that, because "there was no principal of Windows Direct USA of Cincinnati on the premises" and because no subpoena had been secured at the time Inspector Novak attempted to conduct a federal inspection, the penalty assessed is unreasonable. As discussed in Complainant's Initial Prehearing Exchange and in response to Respondent's Sixteenth Affirmative Defense, above, the EPA Inspector was not required to speak with a "principal" of the Company. Whether or not a subpoena had been issued at the time of the inspection is irrelevant to EPA's authority to conduct an inspection. Respondent's assertion that

it had to contact EPA to remind the case team of the ongoing matter under development within EPA is also entirely irrelevant and unfounded, as Respondent has no evidence that the case team in any way *forgot* about this matter at times when this matter was under case development.

Respondent asserts that it did not fail to obtain firm certification, but merely obtained firm certification in the wrong name. Respondent equates renovation firms to law firms, and notes that law firms are not required to be licensed; only the attorneys that work at the firm are subject to this requirement. Respondent's logic is flawed in that it fails to acknowledge the law and regulations that specifically require renovation firms to be certified. What a law firm does is entirely irrelevant to this matter. The importance of firm certification is discussed in response to Respondent's Thirteenth Affirmative Defense, and is quite significant, despite Respondent's implication to the contrary.

Respondent asserts that documentation was provided to support the claim that written acknowledgments were provided for 705 Carlisle Avenue and 113 Glenwood Avenue. Complainant is unaware of any such documentation. With respect to the 705 Carlisle Avenue property, which was single-family housing managed by Bro Properties at the time of Respondent's renovation, Respondent has provided documentation that it provided written acknowledgement to Bro Properties. However, Respondent has not provided documentation that it provided the required acknowledgement to the tenant(s) residing in the property at the time of the renovation. To the extent Respondent argues that there was no tenant at the time of the renovation, Mr. Price may be called to testify regarding his conversation with Greg Braden, the representative of Bro Properties identified as the property management company's point of contact for Respondent, in which Mr. Braden confirmed that the residence was occupied by adults who were likely elderly, disabled, or both.

Further, if Respondent argues that, because the residence was occupied by adults who were likely elderly, disabled, or both, such residence is not "target housing" subject to the RRP Rule, Complainant will establish, through the introduction of Complainant's Exhibit No. 55 (*EPA Lead-Based Paint Program Frequent Questions*), that even if Mr. Braden recalled with specificity that elderly or disabled persons actually lived in the residence at the time the renovation was performed, the fact that the occupants of a home are elderly or disabled is insufficient for the residence to qualify as "housing for the elderly." As defined at 40 C.F.R. § 745.103, "housing for the elderly," means retirement communities or similar types of housing reserved for households composed of one or more persons 62 years of age or more.

With respect to the 113 Glenwood Avenue property, which is multi-family housing owned by Khahlia Sanders, Respondent has failed to provide any documentation of written acknowledgement of receipt of the required pamphlet by the non-owner occupant of this property. To the extent Respondent argues that there was no tenant at the time of the renovation, Mr. Price may be called to testify regarding his conversation with Ms. Sanders, in which she stated that the property at 113 Glenwood Avenue was occupied by both her and a tenant/lessee at the time of the renovation activity.

Respondent asserts that Christopher Brown was certified, per his firm certification, "to conduct lead-based paint renovation, repair and paint activities" and that Mr. Brown will testify

that he was a certified renovator at the time he performed work for Respondent. While firm certification and renovator certification are each critical components of compliance with the RRP Rule, firm certification is not interchangeable with renovator certification. In addition to the different regulatory requirements, renovator certification requires completion of an EPA-approved eight-hour course and examination, and firm certification does not. If Mr. Brown testifies that he was a certified renovator at the time he performed work for Respondent, Mr. Brown will be providing false testimony, as his initial renovator certification was obtained on October 21, 2019, after all of the renovations identified in the Complaint had been completed (Complainant's Exhibit No. 47).

Respondent points out that it has provided EPA with an affidavit from Nick Sapp, the renovator who completed the renovations at 1753 Wickham Place and 535 Central Avenue, stating that he complied with the post-renovation cleaning requirements, despite failing to indicate this on the checklist. Respondent asserts that Christopher Brown and Tony Dituillo will testify to the same for the renovations they conducted at 850 Old Ludlow Avenue, 705 Carlisle Avenue, 4334 Floral Avenue, and 2607 Harrison Avenue. As such, Respondent asserts that it should not be subject to any penalty with respect to these violations. However, whether or not these three individuals completed the post-renovation cleaning is not at issue in these Counts. What is relevant is whether they completed the renovation checklist, which is not addressed in the affidavit, nor in the proposed testimony, and was not contemporaneously documented by these individuals. Further, Mr. Brown should never have signed any checklist representing himself as a "certified renovator" prior to October 2019. As addressed in Complainant's Initial Prehearing Exchange, Complainant will show the truth of these allegations through the introduction of Complainant's Exhibits Nos. 12, 14, 16, 24, 40, and 44.

Respondent asserts that EPA is attempting to "recover the same penalty twice . . . as it pertains to the certification of Mr. Brown when in fact he was certified." Complainant has addressed Mr. Brown's certification on multiple occasions, and refers to the discussions in this section above, in Section IV, and in response to the Thirteenth Affirmative Defense regarding this matter. Respondent's math implies that the assessment of penalties for Counts 5-7 (failure to ensure that all individuals working on behalf of the firm are either certified renovators or trained by a certified renovator) and Counts 11 through 13 (failure to retain and provide a copy of the assigned certified renovator's training certificate for contracted renovations) is double-counting because they both result from Mr. Brown's non-certification. However, as indicated by the separate regulatory violations alleged in the Complaint, EPA does not consider these violations to be identical. When Mr. Brown is examined at hearing, Complainant fully expects to hear that Mr. Brown performed hundreds, if not thousands, of renovation activities prior to taking the training and passing the test required to be an EPA Certified Renovator while working for Respondent.

Respondent asserts that EPA has agreed to penalties in the area of $200 to $1,000 for similar violations, and that the penalty assessed against Respondent is therefore especially egregious. Cases in which such a low penalty was assessed qualified for treatment under the Lead-Based Paint Expedited Settlement Agreement Policy (Complainant's Exhibit No. 64). Ms. Saldivar will testify to the reasons why this policy is inapplicable to the violations identified with regard to the Respondent.

Finally, Respondent again asserts an inability to pay. As addressed elsewhere in this Rebuttal Prehearing Exchange, Complainant will establish Respondent's ability to pay through the introduction of the testimony of Ms. Smirnova and her expert report.

## VI. RESERVATION OF RIGHTS

Complainant respectfully reserves the right to call all witnesses called by Respondent; to recall any of its witnesses in rebuttal; and to seek permission to modify or supplement the names of witnesses and exhibits prior to the Adjudicatory Hearing, pursuant to 40 C.F.R. Part 22, and upon adequate notice to Respondent and this Tribunal, or by order of this Tribunal.

Complainant's Rebuttal Prehearing Exchange In the Matter of TWDS, Inc., d/b/a Windows Direct USA of Cincinnati, is hereby respectfully submitted.

Respectfully submitted,

MARY MCAULIFFE Digitally signed by MARY MCAULIFFE Date: 2022.01.20 19:41:43 -06'00'

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