BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:	)	
	)	Docket No. TSCA-10-2021-0006
GREENBUILD DESIGN & CONSTRUCTION, LLC	)	
	)	**COMPLAINANT'S REPLY TO RESPONDENT'S RESPONSE TO MOTION FOR ACCELERATED DECISION AS TO LIABILITY**
Anchorage, Alaska	)	
	)	
Respondent.	)	
	)	

REPLY IN SUPPORT OF MOTION FOR ACCELERATED DECISION

COMES NOW, the U.S. Environmental Protection Agency, Region 10 ("Complainant"), pursuant to this Court's February 3, March 2, and May 25, 2021 prehearing orders and 40 C.F.R. §§ 22.20 and 22.16, to respectfully offer the following reply to Greenbuild Design & Construction, LLC's ("Respondent") response to Complainant's motion for accelerated decision as to liability and memorandum in support of that motion. This Court should grant Complainant's motion for accelerated decision because no genuine issue of material fact exists and Complainant is entitled to judgment as a matter of law. 40 C.F.R. § 22.20(a).

I. STANDARD OF REVIEW

40 C.F.R. § 22.20(a) allows this Court to "render an accelerated decision in favor of a party as to any or all parts of the proceeding . . . if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law." In considering Complainant's motion for accelerated decision, this Court is guided by Federal Rules of Civil Procedure ("FRCP") Rule 56 and its associated jurisprudence because "accelerated decision is comparable to a summary judgement under [FRCP] Rule 56, which by analogy provides guidance." *ICC Indus., Inc.*, 1991 EPA App. LEXIS 13, at *16 (CJO Dec. 2, 1991).

Summary judgment is warranted if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A reviewing court should grant

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a motion for summary judgment when the evidence, viewed in the light most favorable to the non-moving party, presents no genuine issue of material fact. *Commander Oil Corp. v. Advance Food Serv. Equip.*, 991 F.2d 49, 51 (2nd Cir. 1993). The governing substantive law determines which facts are material for summary judgment, and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505 (1986). A factual dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id*. at 248. When reasonable minds cannot differ as to the import of evidence before the court, then there is no material factual issue. *Commander Oil Corp.*, 991 F.2d at 51 (citing *Anderson*, 447 U.S. at 250-51).

The party moving for summary judgment bears the initial responsibility of informing the Court of the basis for its motion and identifying items in the record that demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548 (1986). In opposing a properly supported motion, the nonmoving party may not rest upon mere allegations or denials in its pleadings to demonstrate a genuine issue of material fact. *Anderson*, 447 U.S. at 248-49. The nonmovant must present more than "a scintilla of evidence in support of [its] position" and must set forth specific facts showing that there is a genuine issue for trial. *Id*. at 250, 252. Conclusory allegations or unsubstantiated speculation are insufficient to defeat a properly supported motion for summary judgment. *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 428 (2nd Cir. 2001), *cert. denied*, 534 U.S. 891. "When the moving party has carried its burden . . . its opponent must do more than simply show that there is some metaphysical doubt as to material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586, 106 S. Ct. 1348 (1986). "[T]he nonmoving party must come forward with specific facts showing that there is a genuine issue for trial." *Id*. at 587 (citing Fed. R. Civ. P. 56(e)).

II. ARGUMENT

This Court should grant Complainant's motion for accelerated decision because there is no genuine issue of material fact and Complainant is entitled to judgment as a matter of law. In its motion for accelerated decision ("Motion") and memorandum in support ("Memorandum"), filed on June 23, 2021, Complainant establishes that Respondent violated Section 409 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2689, and the Lead Renovation, Repair and Painting Rule ("RRP Rule"), codified at 40 C.F.R. Part 745, Subpart E.

In its response, Respondent fails to offer specific facts showing the presence of a genuine issue of material fact. Rather, Respondent makes unsubstantiated assertions, fails to counter Complainant's arguments, and addresses immaterial or unnecessary subjects. *See Phillips v. Calhoun*, 956 F.2d 949, 951 (10th Cir. 1992) ("Unsubstantiated allegations carry no probative weight in summary judgment proceedings."); *Celotex Corp*., 477 U.S. at 322 (Rule 56 mandates the entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case . . . ."). Therefore, there is no genuine issue of material fact here and Complainant is entitled to judgment as a matter of law.

A. The RRP Rule applies to Respondent's activities at the Turnagain Property

In its motion and memorandum in support, Complainant establishes that the RRP Rule applies to Respondent's activities at the Turnagain Property. Memorandum Section V.A, at 13-25. Respondent's activities at the Turnagain Property were a renovation for compensation in target housing and therefore the RRP Rule applies. 40 C.F.R. § 745.82(a).

Respondent attempts to avoid this conclusion by arguing that the Turnagain Property was unoccupied and already demolished, and that it performed a lead test which was negative. Response at 1. These arguments are factually inaccurate, unsupported by evidence, or immaterial to this dispute. Therefore, they cannot defeat Complainant's motion.

1. Whether the Turnagain Property was occupied is immaterial

Respondent asserts that the Turnagain Property was unoccupied. Response at 1. This argument is immaterial. The RRP Rule applies to "*all* renovations performed for compensation in target housing . . ." 40 C.F.R. § 745.82(a) (emphasis added), not just renovations performed for compensation in occupied target housing. Respondent's argument that the Turnagain Property was unoccupied is immaterial because the RRP Rule applies whether it was occupied or not.

2. Respondent's assertion that the Turnagain Property was already demolished is factually inaccurate and unsupported by evidence

Respondent asserts that the Turnagain Property was "already demoed." Response at 1. This assertion is factually inaccurate and unsupported by any evidence.

As Complainant establishes in its memorandum in support, Respondent performed a renovation on the Turnagain Property. *See* Memorandum at 14-15. In support of this conclusion, Complainant offered numerous pieces of evidence including CX 08—the contractor agreement that Respondent agreed to with the owners of the Turnagain Property; CX 09—the invoice that Respondent sent to the owners of the Turnagain Property; and CX 10—the building permit that Respondent obtained in order to do work on the Turnagain Property. This evidence shows that Respondent was responsible for all of the work performed on the Turnagain Property. *See, e.g.*, CX 08 at 10-18 (Contractor agreement describing the scope of work that Respondent agreed to perform on the Turnagain Property); CX 09 (Invoice charging the Turnagain Property owners $127,000 for a "complete house remodel" including "demo all interior and open walls removing wood panels, drywall, insulation, electrical & plumbing.").[1]

[1] *See also*, CX 07 at 3 (Inspection Report describing that when Ms. Farnham and Mr. Hamlet arrived at the Turnagain Property on July 25, 2018, Respondent was present and actively renovating the property); CX 14 to 55 (Inspection photographs taken by Mr. Hamlet during the July 25, 2018 inspection showing Respondent actively performing a renovation on the Turnagain Property).

To counter the voluminous evidence in the record establishing that Respondent renovated the Turnagain Property, including Respondent's own invoice providing that it had "demo[ed] all interior and open walls," CX 09, Respondent offers nothing. Respondent has not presented even a scintilla of evidence to support its argument, *Anderson*, 477 U.S. at 250, and therefore has failed to meet its burden to show that there is a genuine issue of material fact. *Cortes-Irizarry v. Corp. Insular De Seguros*, 111 F.3d 184, 187 (1st Cir. 1997) ("To defeat a motion for summary judgment, the nonmoving party must demonstrate the existence of a trialworthy issue as to some material fact."); *Matsushita*, 475 U.S. at 587 ("Where the record taken as a whole could not lead a rational trier of fact to find for the summary judgment nonmovant, there is no genuine issue for trial.").

3. Respondent's argument that a lead test was performed resulting in a negative result is unsupported by evidence and immaterial

Respondent asserts that "a lead test was performed resulting in [a] negative test result." Response at 1. Respondent fails to provide any evidence to support this assertion, but even if Respondent had provided additional evidence, its argument is immaterial here.

As Complainant discusses in detail in its memorandum in support, 40 C.F.R. § 745.82(a)(2) ("the (a)(2) exception") provides an exception from the RRP Rule if a "certified renovator, using an EPA recognized test kit . . . and following the kit manufacturer's instructions, has tested each component affected by the renovation and determined that the components are free of paint or other surface coatings that contain lead . . . ." Memorandum Section V.B, at 26-31.[2] The (a)(2) exception cannot apply here because (1) Respondent's co-owner, Mr. Rodrigo von Marees, was not a certified renovator when he allegedly tested the Turnagain Property for lead, Memorandum at 27-29;[3] (2) Respondent's sole exhibit,

[2] *See also* 40 C.F.R. § 745.87(e) ("Lead-based paint is assumed to be present at renovations covered by" the RRP Rule).

[3] As Complainant noted in its Memorandum, Mr. von Marees represented to Complainant that he was the individual who performed the purported lead test. Memorandum at 27, n. 8. Respondent has not rebutted this assertion.

RX 1, indicates that Respondent did not follow the test kit manufacturer's instructions, *id*. at 29-30; and (3) Respondent did not test each component affected by the renovation, *id*. at 30-31.

To counter Complainant's argument that the (a)(2) exception does not apply, Respondent offers nothing other than the bare statement that "a lead test was performed resulting in a negative test result." On issues where the summary judgment nonmovant has the burden of proof, such as whether the (a)(2) exception applies, "the movant need do no more than aver 'an absence of evidence to support the nonmoving party's case.'" *Mottolo v. Fireman's Fund Ins. Co.*, 43 F.3d 723, 725 (1st Cir. 1995) (quoting *Celotex Corp.*, 477 U.S. at 322). "The burden of production then shifts to the nonmovant, who, to avoid summary judgment, must establish the existence of at least one question of fact that is both 'genuine' and 'material.' The nonmovant, however, may not rest upon mere denial of the pleadings." *Id*. (citing *Anderson*, 477 U.S. at 248; Fed. R. Civ. P. 56).

Here, Respondent has not established the existence of at least one question of fact that is both genuine and material. Respondent's failure to address any of Complainant's arguments that the (a)(2) exception does not apply, its failure to proffer any evidence suggesting the exception may apply, and its bare assertion that a lead test was performed, do not create a genuine issue of material fact.

Moreover, even if Respondent had been able to establish that a lead test was performed, that test's results would still be immaterial. Even if this Court were to assume that Mr. von Marees tested the Turnagain Property for the presence of lead and that test came back negative, as Respondent asserts, the (a)(2) exception would still not apply because Mr. von Marees was not a certified renovator when he allegedly conducted that test. Memorandum at 27-9. Similarly, since Respondent did not follow the kit manufacturer's instructions and did not test each component of the Turnagain Property affected by the renovation, Memorandum at 29-31, a reasonable jury could not find that the (a)(2) exception applies. *Alcman Servs. Corp. v. Bullock*, 925 F. Supp. 252, 256 (D. N.J. 1996), *aff'd*, 124 F.3d 185 (3rd Cir. 1997) ("A genuine issue of material fact for trial does not exist unless the party opposing the motion can

adduce evidence which, when considered in light of that party's burden of proof at trial, could be the basis for a jury finding in that party's favor."); *Cortes-Irizarry*, 111 F.3d at 187 ("To defeat a motion for summary judgment, the nonmoving party must demonstrate the existence of a trialworthy issue as to some material fact."); *Matsushita*, 475 U.S. at 587 ("Where the record taken as a whole could not lead a rational trier of fact to find for the summary judgment nonmovant, there is no genuine issue for trial.").

B. Respondent's remaining arguments are not material to this motion

Respondent makes four additional arguments that cannot be a basis for denying Complainant's motion for accelerated decision. Respondent asserts that: (1) it is a small business that cannot afford to pay a penalty; (2) it was given a warning during the inspection, so no penalty should be assessed; (3) there were not "paint chips flying everywhere" during Respondent's renovation; and (4) one of Complainant's exhibits was intended to malign Respondent's reputation. Response at 1-3. Each of these arguments are immaterial to this motion and, as such, should not prevent this Court from granting accelerated decision in favor of Complainant.

1. Respondent's size of business and ability to pay a penalty are not relevant to whether Respondent is liable for violating TSCA and the RRP Rule

Respondent asserts that the case law "lacks any credence as to the case against the Respondent" because Respondent is a small business. Response at 1. Respondent also asserts that it "would be unable to pay [a penalty] especially during this time of Covid." *Id*. at 2. Both of these arguments are immaterial to this motion. Complainant has moved for accelerated decision as to liability only. *See* Motion at 1. While Respondent's size of business or ability to pay a penalty may be relevant to the calculation of a reasonable penalty, *see* CX 96, 99, it is immaterial to Respondent's liability.[4]

[4] Additionally, Complainant has offered Respondent numerous opportunities to provide Complainant with detailed financial information from which it would be able to determine Respondent's ability to pay a civil penalty. *See* CX 99. Respondent has not provided any such information. Respondent has also not put any information into the record to establish whether it would have difficulty paying the proposed penalty. *See* Respondent's Prehearing Exchange.

Further, Respondent's suggestion that the case law Complainant relies upon "lacks any credence as to the case against the Respondent" because it is a small business, Response at 1, is meritless. The majority of the case law that Complainant cites relates to the standard of review that this Court should utilize. That standard of review applies regardless of the size of the nonmovant. *See Anderson*, 477 U.S. 242 (suit brought against a small magazine, its publisher, and its Chief Executive Officer); *LHP, LLC*, 2016 WL 2759699 (suit brought against a small company that owns residential housing in Nebraska); *Celotex Corp*, 477 U.S. 317 (suit brought against a large chemical corporation).

2. Respondent was not given a warning during the July 25, 2018 inspection, and even if it was, such a warning would not impact Respondent's liability

Respondent asserts that Ms. Farnham gave Respondent a warning during the July 25, 2018 inspection. Response at 2. Respondent argues that "it was understood that no penalty would be imposed as long as Mr. von Marees completed the required class for an EPA certification of lead-based paint renovation," which Respondent asserts he did 16 days later. *Id*. This is factually inaccurate, as Ms. Farnham did not tell Respondent that it would only be given a warning. But even if Ms. Farnham had given Respondent a warning, that would not impact Respondent's liability under TSCA. Further, even if Ms. Farnham had given Respondent a warning, Respondent violated the terms of that warning by offering to perform a renovation on target housing before it became firm certified.

a. Ms. Farnham did not provide Respondent with a warning

Ms. Farnham did not tell Respondent that it would only be getting a warning, and Respondent has offered nothing in support of its assertion that she did. In her declaration, Ms. Farnham discusses her interaction with Mr. von Marees during the July 25, 2018 inspection. CX 04 at 7. When the inspection was concluding, Ms. Farnham "talked to Mr. von Marees about next steps [and] told him [she] would return to the office and refer the case to a case developer." CX 04 at 09. At no point during that conversation did Ms. Farnham provide Respondent with a warning or otherwise promise that

Complainant would not pursue a penalty. *Id*.[5] EPA had already provided Respondent with at least three warnings and had attempted to schedule numerous in-person inspections with Respondent so that Respondent could understand its responsibilities under the RRP Rule. *See* CX 85 at 2 (letter Complainant sent to Respondent explaining the RRP Rule requirement, and warning that "violating the provisions of TSCA can subject Green Build Design & Construction, LLC to civil penalties of up to $37,500 per violation."); CX 80, 81, 92, 93 (letters and emails Complainant sent to Respondent explaining the RRP Rule requirements and attempting to schedule in-person inspections).

Mr. Hamlet also confirmed that Ms. Farnham did not provide Respondent with a warning. After walking around the Turnagain Property and taking pictures, Mr. Hamlet returned to where Ms. Farnham and Mr. von Marees were talking. CX 05 at 8. He noted that "at the end of the inspection, [Ms. Farnham] explained the next steps to Mr. von Marees. She said she would put together the inspection report detailing what we observed and that it would be referred to management for review." *Id*.

Complainant recognizes that credibility determinations and weighing of evidence is not proper for summary judgment motions. *See Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133, 150, 120 S. Ct. 2097 (2000) ("Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge."). Here, this Court does not have to weigh one version of facts against another, as Respondent has not supported its assertion with any proof. Respondent has not submitted affidavits, a written warning from Ms. Farnham, or any other proof tending to suggest that Complainant promised it would not pursue a penalty here. *See Crockett v. District of Columbia Metropolitan Police Dept.*, 293 F. Supp. 2d 63, 66 (D. D.C. 2003) (quoting Fed. R. Civ. P. 56(e)) ("Once the [summary judgment] moving party has met its burden . . . the adverse party's

[5] *See also*, CX 04 at 6 (Ms. Farnham speaking about her approach to typical RRP Rule inspections and noting that at the end of an inspection "I do not make decisions in the field about whether TSCA violations have occurred, and further, I do not have the authority to do that . . . I return to the EPA office, review the information, and refer the case to a case developer.").

response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.").

Further, the terms of Respondent's warning suggest that it was fabricated. Respondent is a firm, as that term is defined in 40 C.F.R. § 745.83, and is required to be EPA firm certified before it can perform, offer, or claim to perform renovations in target housing. 40 C.F.R. § 745.81(a)(2)(ii). To become EPA firm certified, Respondent only needs to apply to EPA. 40 C.F.R. § 745.89(a). Firms are required to employ certified renovators. 40 C.F.R. § 745.85(a) ("renovations must be performed by certified firms using certified renovators"). For an individual to become a certified renovator, they must successfully complete a course accredited by EPA. 40 C.F.R. § 745.90(a).

So, Respondent's suggestion that it would not be penalized if Mr. von Marees completed "the required classes for an EPA certification," indicates that this warning was fabricated because whether Mr. von Marees, himself, became a certified renovator is immaterial to EPA. As long as Respondent becomes firm certified—which does not require a class to accomplish—and then employs certified renovators, it does not matter to EPA who those renovators are. Therefore, it would not make sense for Ms. Farnham to offer Respondent a warning that was contingent upon Mr. von Marees becoming a certified renovator, as Respondent has suggested was the case.

b. Even if Ms. Farnham had provided Respondent with a warning, that would not preclude Complainant from bringing this administrative action

Respondent also fails to establish what the significance of such a warning would be for the purposes of this motion. Respondent has offered no argument or support for the notion that if an inspector gives an entity a verbal warning, that would preclude EPA from pursuing an administrative remedy against that entity. That's because no such support exists: nothing prevents EPA from pursuing an administrative action in that circumstance. So, even if Ms. Farnham had told Respondent that it

would only receive a warning, that would not preclude Complainant from bringing this action. Warning or not, Respondent is still liable for its violations of TSCA and the RRP Rule.

Moreover, Respondent's own argument undercuts its position for the purposes of this motion. Respondent asserts that it understood the warning meant "no penalty would be imposed." Response at 2. But this motion only pertains to Respondent's liability; it does not ask this Court to assess a penalty. Therefore, even if this Court were to assume for the purposes of this motion that Ms. Farnham had told Respondent that EPA would not assess a penalty, that would still not prevent this Court from granting Complainant's motion as to Respondent's liability.

c. Respondent violated the terms of the purported warning, thereby forfeiting any protection afforded

Further, Respondent violated the terms of the warning it claims it received from EPA, thereby forfeiting any protections that such a warning could have provided. Respondent asserts that "it was understood that no penalty would be imposed as long as Mr. von Marees completed the required classes for an EPA certification," which Respondent states he did on August 10, 2018. Response at 2. But Respondent ignores the fact that by obtaining another building permit for target housing on July 30, 2018—11 days before Respondent obtained its EPA firm certification—it again violated the RRP Rule. CX 87 (Building permit issued to Respondent on July 30, 2018, for 4220 Tahoe Drive); CX 88 (Municipality of Anchorage public inquiry parcel details providing that 4220 Tahoe Drive was built in 1969, making it "target housing." TSCA § 401(17)); CX 11 (EPA firm certification issued to Respondent on August 10, 2018).

40 C.F.R. § 745.81(a)(2)(ii) provides that "no firm may perform, *offer*, or claim to perform renovations without certification from EPA under § 745.89 in target housing." (emphasis added). By obtaining the building permit on July 30, 2018, Respondent was offering or claiming to perform renovations in target housing. But Respondent was not EPA firm certified under 40 C.F.R. § 745.89

until August 10, 2018, 11 days after it obtained the building permit. Response at 2; CX 11. Therefore, even if this Court were to assume that Ms. Farnham provided Respondent a warning and that warning could preclude Complainant from bringing this action, by offering to perform renovations in target housing without being EPA firm certified, Respondent did not comply with the terms of that warning.

3. Respondent's argument that there were no paint chips is unsupported by evidence and immaterial

Respondent asserts that EPA Senior Environmental Employee and TSCA inspector Mr. Hamlet was mistaken when he noted that there were paint chips flying everywhere. Response at 2. *See also*, Memorandum at 12, 41; CX 05 at 7. Instead, Respondent suggests that Mr. Hamlet was more than likely observing "cottonwood floating around." Response at 2. This argument is factually incorrect, unsupported by any evidence, and immaterial.

Respondent has provided no support for the assertion that Mr. Hamlet—a certified lead renovator, EPA lead inspector, RRP Rule inspector, and lead-based paint inspector, CX 02—mistook cottonwood pollen for paint chips. In contrast, Complainant introduced numerous pieces of evidence establishing that Respondent allowed paint chips to be strewn about the Turnagain Property. The declarations of Mr. Hamlet and Ms. Farnham both note that there were paint chips on the ground. CX 04 at 8; CX 05 at 7. Specifically, Mr. Hamlet notes that "the work site was a general mess . . . paint chips were flying everywhere. There were paint chips all over the bare ground." CX 05 at 7. Complainant has also put into the record photographs that Mr. Hamlet took during the July 25, 2018 inspection, including CX 35, 36, 39 and 40, in which paint chips can be seen on the bare ground of the Turnagain Property.

Respondent's argument is also immaterial. Complainant referred to the fact that Respondent allowed paint chips to litter the ground of the Turnagain Property as support for the fact that Respondent failed to cover the ground with plastic sheeting or other disposable impermeable material, as required by 40 C.F.R. § 745.85(a)(2)(ii)(C). *See* Memorandum at 40-42, Count Four. So even if this Court were to

disregard Ms. Farnham and Mr. Hamlet's declarations and assume that the white spots depicted in CX 35 to 40 are not paint chips, Complainant has still established the key point: Respondent failed to cover the ground with plastic sheeting or other disposable impermeable material, and in doing so violated 40 C.F.R. § 745.85(a)(2)(ii)(C). *See* CX 35, 36, 39, 40 (Photographs taken by Mr. Hamlet during the July 25, 2018 inspection depicting the ground surrounding the Turnagain Property, showing the lack of plastic sheeting or other disposable impermeable material). Therefore, whether Mr. Hamlet saw cottonwood or paint chips is immaterial to this dispute.

Respondent also argues that there could not have been paint chips flying around because if there had been Ms. Farnham and Mr. Hamlet would have issued a stop work order. Response at 2. This argument is inapposite as TSCA and the RRP Rule do not authorize EPA inspectors to issue the sort of orders envisioned by Respondent. An EPA inspector's sole course of action in that circumstance would be to initiate an enforcement action—administrative or judicial. 40 C.F.R § 745.87(a), (d) ("Failure or refusal to comply with any provision of this subpart if a violation of TSCA section 409 . . . . (d) Violators may be subject to civil or criminal sanctions pursuant to TSCA section 16."). According to Section 17(a)(1)(A) and (B) of TSCA, 15 U.S.C. §§ 2616(a)(1)(A), (B), district courts—not TSCA inspectors—have jurisdiction over civil actions to restrain any violation of Section 409 of TSCA, 15 U.S.C. § 2689.[6]

4. Respondent's concerns about Complainant's exhibit are erroneous

Finally, Respondent takes issue with four of the pages Complainant included in CX 78 and asserts that they are "being used to draw a negative image and narrative against the Respondent."

[6] Even Section 7 of TSCA, 15 U.S.C. § 2606—which likely would not apply to Respondent's scenario—allows the Administrator to seize imminently hazardous chemical substances or mixtures but requires him to do so through a civil action in an appropriate district court of the United States. *See also* Section 18(b) of TSCA, 15 U.S.C. § 2617(b) (allowing for the seizure or condemnation of violative products through a libel action in a district court).

Response at 3. CX 78 is a report created by the online legal database, Westlaw, summarizing publicly available information that it believes is associated with Respondent. If a Westlaw user enters information into a search engine—such as a business name, address, and phone number, and the business owner's name, address, and phone number—Westlaw will search through public records to develop a report similar to CX 78.

Complainant has no knowledge of who "Rodriguez Alejandro Diaz" is, CX 78 at 3, except that public records suggest this individual reported their home address as the same as Mr. von Marees' home address.[7] But the assertion that Complainant is using this information to draw an unfairly negative image of Respondent is patently false. First, Complainant has not cited or otherwise referred to this information at all. The only time Complainant even referenced CX 78 is for the assertion that Mr. and Mrs. von Marees are co-owners of Respondent. Memorandum at 9. Second, Complainant fails to understand how information about an unrelated third party casts any light upon Respondent. Finally, all this information shows is that a person named Rodriguez Alejandro Diaz had a criminal traffic offense dismissed in Oregon. CX 78 at 7. So, even if that information was related to Respondent, because the case against Diaz was dismissed, it would be unreasonable to derive a negative inference from it anyway.

Similarly, Complainant has no knowledge of "Greenbuild Corporation," CX 78 at 3 but the fact that an unrelated company was the plaintiff in an unrelated civil suit does not impact this matter or cast Respondent in a negative light.

[7] Complainant also notes that Mr. Rodrigo von Marees previously used the name Rodrigo Diaz. Mr. von Marees changed his name sometime between 2016 and 2018. So, it is reasonable to understand why an online search engine would assume that a "Rodriguez Diaz" may be associated with a "Rodrigo Diaz," especially when both had the same home address. Complainant takes no position with respect to who Rodriquez Alejandro Diaz is or whether they may be associated with Mr. von Marees or Respondent.

III. CONCLUSION

This Court should grant Complainant's motion for accelerated decision because there is no genuine issue of material fact and Complainant is entitled to judgment as a matter of law. As elaborated upon in Complainant's Memorandum in Support, the RRP Rule applies to Respondent's renovation of the Turnagain Property because Respondent performed a renovation for compensation on target housing. Respondent's failures to comply with the RRP Rule were violations of TSCA. Respondent has not introduced any evidence that could lead a reasonable trier of fact to conclude otherwise. *Anderson*, 477 U.S. at 248 (a factual dispute is only genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."); *Matsushita*, 475 U.S. at 587 ("where the record taken as a whole cannot lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial."). Therefore, there are no genuine issues of material fact and Complainant is entitled to judgment as a matter of law.

Respectfully submitted,

ANDREW FUTERMAN
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Date: 2021.08.06 18:06:50 -05'00'

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Andrew Futerman,
Counsel for Complainant
EPA Region 10

In the Matter of *GreenBuild Design & Construction, LLC,* Respondent.
Docket No. TSCA-10-2021-0006

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Complainant's Reply in Support of Motion for Accelerated Decision**, dated August 6, 2021 was served on the following parties in manner indicated below:

Original by OALJ E-Filing System to:
Mary Angeles, Headquarters Hearing Clerk
U.S. Environmental Protection Agency
Office of Administrative Law Judges
Ronald Reagan Building, Room M1200
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Copy by Electronic Mail to:
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For Respondent

Dated: August 6, 2021
Seattle, Washington

Respectfully submitted,

ANDREW FUTERMAN
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Date: 2021.08.06 18:07:21 -05'00'

_____
Andrew Futerman,
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EPA Region 10