

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

In the matter of: : **Docket No. TSCA-05-2021-0013**

TWDS, Inc., d/b/a Windows Direct : **RESPONDENT’S PREHEARING**
USA of Cincinnati : **EXCHANGE**

:

Respondent

Pursuant to this Court’s Prehearing Order and the Rules of Practice, 46 C.F.R. §22.19(a), the Respondent provides the following Prehearing Exchange.

I. 1. (A) List of Witnesses intended to be called at the hearing.

- 1) Paul J. Novak, Jr.,
Olmstead Township, Ohio

Paul J. Novak, Jr. will testify as a witness concerning his contact with representatives of Windows Direct on October 7, 2019. Mr. Novak will testify he conducted a complete research concerning the ownership of Windows Direct USA of Cincinnati. He will testify that he determined that the owner of Windows Direct USA of Cincinnati was Chris Carey. He will testify he went to Blue Ash on October 7, 2019 and attempted to conduct an in-person, unannounced inspection at Windows Direct business office at 11258 Cornell Park Drive, Suite 612, Blue Ash, Ohio. He will testify that even though he knew the owner of Windows Direct was Chris Carey, that upon making contact with Windows Direct on October 7, 2019, he simply asked to speak with the person in charge of environmental matters. He never asked to speak to the owner, Chris Carey.

Mr. Novak will testify he came into contact with Ryan Eger. Mr. Eger was an operations manager. Mr. Eger advised Mr. Novak that he did not have the authority to permit any such inspections and that the owner, Chris Carey, was not at the premises. Instead of waiting for Chris Carey to arrive that day or the next day, Mr. Novak left the premises.

Further, the statement about Mr. Novak willing to come back the next day and stay the night is not true. When Mr. Carey was contacted by Attorney Mary McAuliffe and a representative from the EPA by phone on October 7, 2019, Mr. Carey offered for Mr. Novak to come back and Mr. Carey was basically told that Mr. Novak had other places to be and that the unannounced inspection would occur today or never. Mr. Carey also indicated that if the EPA had an attorney then he needed to have any attorney.

- 2) Chris Carey
c/o Windows Direct USA of Cincinnati
11258 Cornell Park Drive, Suite 612
Blue Ash, OH 45242

Chris Carey will testify as the owner of Windows Direct USA, he will identify all of the exhibits that have been produced by Windows Direct USA of Cincinnati to the EPA. He will identify all correspondence from his counsel which he reviewed and approved before the letters were sent. He will acknowledge that he has at all times completely cooperated in the EPA investigation. He previously worked for a renovating company and had previous certification as a certified renovator. He then started his own business. He has at all times utilized certified renovators to perform work for Windows Direct USA of Cincinnati. He was unaware that Windows Direct was required to be firm certified. When the EPA made its investigation in October 2019 and he was informed that the firm needed firm certification, he immediately went on line, paid a fee of approximately \$300.00 and received immediate firm certification. All it took was him to go on line and fill out an application which took several minutes. He has at all time utilized certified renovators in performing work for Windows Direct USA of Cincinnati.

- 3) Demetrious Harris
2421 Vera Avenue
Cincinnati, Ohio 45237

Mr. Harris is the owner of rental property located at 2421 Vera Avenue, Cincinnati, Ohio 45237. Pursuant to the contract with Windows Direct USA of Cincinnati, Mr. Harris received EPA's renovate right pamphlet for homes built prior to 1978. When he contracted with Windows Direct USA of Cincinnati and when the work was performed at the property at 2421 Vera Avenue, Cincinnati, Ohio, the property was not occupied. Accordingly, Mr. Harris signed

the contract at the bottom of the page as the customer and the owner of the property.

- 4) Tony Dituillo
c/o Windows Direct USA of Cincinnati
11258 Cornell Park Drive, Suite 612
Blue Ash, OH 45242

Tony Dituillo will testify that he is a certified EPA installer for Windows Direct USA of Cincinnati. He received his certification as an EMP certified installer from Beck Safety Consulting of Richmond, Kentucky. He will identify the contracts between Windows Direct USA of Cincinnati and Karen Colker and Chris Wenz. He will testify he signed each of the contracts as a certified renovator for Windows Direct USA of Cincinnati. He will also testify he performed a post-renovation cleaning verification for each job. Due to excusable neglect, he failed to check the box on each contract indicating that he performed the post-renovation cleaning verification. The post-renovation cleaning was performed, he simply failed to check the box on the contract.

- 5) Christopher Wilson
Special Agent
Environmental Protection Agency
7550 Lucerne Drive, Ste. 305
Middleburg Heights, OH 44130

Christopher Wilson is the representative of the EPA. He will testify about his investigation of Windows Direct USA of Cincinnati. He will further testify about his conference and meeting with Chris Carey at the office of Lindhorst & Dreidame in Cincinnati, Ohio concerning his investigation into this matter.

- 6) Karen Colker
450 Old Ludlow
Cincinnati, OH 45220

Karen Corker will testify as a customer of Windows Direct USA of Cincinnati. She will testify about the window installation on her property. She will testify that she received appropriate paperwork from Windows Direct USA of Cincinnati and she is satisfied with the installation.

- 7) Nick Sapp
c/o Windows Direct USA of Cincinnati
11258 Cornell Park Drive, Suite 612
Blue Ash, OH 45242

Nick Sapp is one of the certified installers for Windows Direct USA of Cincinnati. Mr. Sapp will testify he performed the post-renovation cleaning verification for the contracts between Windows Direct USA of Cincinnati and Jill Keith and Mary Wright. He will testify it was only due to excusable neglect that he failed to check the box on both contracts indicating that he performed the post-renovation cleaning verification. Again, he performed the post-renovation cleaning. He simply did not check the box in question. He will testify he received his certification as an EPA certified installer from Beck Safety Consulting in Richmond, Kentucky.

- 8) Ryan Eger
c/o Windows Direct USA of Cincinnati
11258 Cornell Park Drive, Suite 612
Blue Ash, OH 45242

Ryan Eger will testify he is operations manager for Windows Direct USA of Cincinnati. He will testify about his contact with Paul Novak on or about October 7, 2019. He will testify that he had no authority to provide any inspection by anybody at Windows Direct on October 7, 2019. He informed Paul Novak that he had no authority and that the person who did have authority was the owner of the company, Chris Carey, who was not present at the time of the unannounced visit by Paul Novak on October 7, 2019.

- 9) Christopher Brown
c/o Windows Direct USA of Cincinnati
11258 Cornell Park Drive, Suite 612
Blue Ash, OH 45242

Christopher Brown will testify that he is a certified installer for Windows Direct USA of Cincinnati. He will testify that he was firm certified on April 24, 2015 and certified as a renovator on October 21, 2019. He will testify that at all times he performed work for Windows Direct USA of Cincinnati that he was a certified renovator, whether it be firm or individual.

- 10) Kirt Doolin
4317 Ashland Avenue
Cincinnati, OH 45212

Kirt Doolin was a customer of Windows Direct USA of Cincinnati in 2017. He will identify the contract that he signed for Windows Direct at 4317 Ashland Avenue, Cincinnati, OH 45212 on October 27, 2016. He will confirm that he received the EPA's renovate right pamphlet for homes prior to 1978. He will testify that he received and signed the post-renovation cleaning verification for his window replacements on January 17, 2017. The certified renovator was Nick Sapp from Windows Direct. He acknowledged that Windows Direct USA of Cincinnati set up a containment area perimeter, posted warning signs, completed the interior extraction containment, and clean-up containment and that a certified renovator performed post-renovation cleaning verification. He will testify he was very satisfied with the installation of the windows performed by Windows Direct USA of Cincinnati.

- 11) Representative from Bro Properties
705 Carlisle
Hamilton, Ohio

The representative from Bro Properties will testify as a customer of Windows Direct USA of Cincinnati. They will testify about the window installation on their property. They will testify they received appropriate paperwork from Windows Direct USA of Cincinnati and they are satisfied with the installation. The representative of Bro Properties will testify whether or not they are in target housing under the EPA.

- 12) Kahalia Sanders
113 Glenwood Avenue
Cincinnati, Ohio

Kahalia Sanders will testify as a customer of Windows Direct USA of Cincinnati. She will testify about the window installation on her property. She will testify she received appropriate paperwork from Windows Direct USA of Cincinnati and she is satisfied with the installation. She will testify whether or not her property is target housing under the EPA.

- 13) Kim Phillips
4334 Floral Avenue
Cincinnati, Ohio

Kim Phillips will testify as a customer of Windows Direct USA of Cincinnati. She will testify about the window installation on her property. She will testify she received appropriate paperwork from Windows Direct USA of Cincinnati and she is satisfied with the installation. She will testify whether or not her property is target housing under the EPA.

- 14) Abdul Square
2607 Harrison Avenue
Cincinnati, Ohio

Abdul Square will testify as a customer of Windows Direct USA of Cincinnati. He will testify about the window installation on his property. He will testify he received the appropriate paperwork from Windows Direct USA of Cincinnati and he is satisfied with the installation. He will testify concerning whether or not his property is target housing under the EPA.

II. 1. (B) List of all Exhibits.

Respondent intends to utilize the following Exhibits at the Trial of this Matter.

Exhibit	Title of Document	Date of Document
RX 1	EPA Inspector Paul Novak attempts to conduct a record review Inspection at Windows Direct;	10/7/2019
RX 2	Subpoena to Windows Directed dated October 10, 2019 to provide file materials;	10/10/2019
RX 3	Mary McAuliffe of the EPA requests that Windows Direct provide a customer list;	11/4/2019
RX 4	Pursuant to Mary McAuliffe's letter request of November 6, 2019, Windows Direct USA of Columbus and Windows Direct of Cincinnati provides a customer list;	11/6/2019
RX 5	Email from Mary McAuliffe requesting certain documents to be produced;	11/29/2019
RX 6	Pursuant to Mary McAuliffe's correspondence of November 29, 2019, Windows Direct of Columbus	12/30/2019

	and Windows Direct of Cincinnati produces the file materials requested;	
RX 7	EPA sends Windows Direct notice of potential violations and opportunity to Confer and intent to file administrative complaint against Windows Direct of Cincinnati and Windows Direct of Columbus;	9/4/2020
RX 8	Email to Mary McAuliffe requesting to amicably resolve the matter and indicating that Windows Direct of Columbus is no longer in operation and has dissolved;	9/10/2020
RX 9	Telephone conference with Mary McAuliffe and Christina Saldivar of the EPA concerning claims;	9/14/2020 No Exhibit
RX 10	Email to Mary McAuliffe concerning lists of claims concerning Columbus and Cincinnati;	9/21/2020
RX 11	Email from Mary McAuliffe concerning issues raised in 09/23/2020 email and reducing penalty as to Columbus from \$50,089.00 to \$41,260.00 and reducing penalty for Cincinnati from \$125,496.00 to \$111,893.00;	10/5/2020
RX 12	Email from Mary McAuliffe concerning settlement as to Cincinnati and Columbus and requesting tax information for Columbus;	10/8/2020
RX 13	Email to Mary McAuliffe providing Windows Direct of Columbus 1120S USA Income Tax Return;	10/16/2020
RX 14	Email from Mary McAuliffe concerning further information as to Cincinnati and Columbus;	11/9/2020
RX 15	Email from Jay Langenbahn to Mary McAuliffe providing the Affidavit of Demetrious Harris and information concerning Beck Safety Consulting in Richmond Kentucky	11/11/2020
RX 16	Email from Mary McAuliffe with copy to Christina Saldivar concerning tax information concerning Windows Direct USA of Columbus;	11/17/2020
RX 17	Email from Mary McAuliffe to Jay Langenbahn thanking him for the 2019 financial information of Windows Direct USA of Columbus;	12/2/2020
RX 18	Email to Mary McAuliffe forwarding the Affidavit of Tony Dituillo concerning work he performed for Karen Colker and Chris Wenz;	12/3/2020
RX 19	Email from Jay Langenbahn to Mary McAuliffe forwarding year to date balance sheet and profit and loss statements for Windows Direct of Columbus;	12/5/2020

RX 20	Email from Chris Carey to Jay Langenbahn dated December 7, 2020 indicating that Christopher Wilson from the Environmental Protection Agency went to Karen Colker's home;	12/7/2020
RX 21	Letter to Mary McAuliffe with the Affidavit of Tony Dituillo concerning work he performed for Karen Colker and Chris Wenz;	12/16/2020
RX 22	Email to Mary McAuliffe enclosing the contract for Chris Wenz which reflects the installation on that job was vinyl and stucco;	12/21/2020
RX 23	Email to Mary McAuliffe with Affidavit of Nick Sapp;	1/15/2021
RX 24	EPA per Christopher Wilson contacted Cassandra with Windows Direct call center about whether Windows Direct changed any documents;	6/9/2021 No Exhibit
RX 25	Chris Carey received a call from former operations manager, Ryan Eger indicating that he was contacted by Christopher Wilson of the EPA	6/9/2021 No Exhibit
RX 26	Email to Mary McAuliffe requesting status;	6/11/2021
RX 27	Email from Mary McAuliffe concerning status;	6/13/2021
RX 28	Subpoena to Testify before a Grand Jury;	6/7/2021
RX 29	Response to Subpoena to Testify before a Grand Jury;	6/16/2021
RX 30	Letter from Jay Langenbahn to Mary McAuliffe concerning tolling agreement;	7/1/2021
RX 31	Email from Mary McAuliffe to Jay Langenbahn with consent agreement and final order	8/2/2021
RX 32	Email from Jay Langenbahn to Mary McAuliffe with exhibits concerning consent agreement;	8/6/2021
RX 33	Email from Mary McAuliffe to Jay Langenbahn responding to August 6, 2021 email;	8/11/2021
RX 34	Email to Mary McAuliffe with additional documentation concerning consent agreement;	8/19/2021
RX 35	Email from Mary McAuliffe to Jay Langenbahn setting forth penalty amounts;	9/14/2021
RX 36	Email from Jay Langenbahn to Mary McAuliffe concerning penalty amounts;	9/21/2021
RX 37	Email from Mary McAuliffe concerning administration complaint filed by the EPA;	9/30/2021
RX 38	Email to Mary McAuliffe with accounting information for Windows Direct USA of Cincinnati;	12/15/2021
RX 39	Firm Certification for Christopher Brown from April 24, 2015 to May 8, 2020;	04/24/2015
RX 40	Individual Certification for Christopher Brown from October 21, 2019 to October 21, 2024;	10/21/2019

RX 41 Firm Certification for Windows Direct from December 23, 2019 to January 6, 2025; 12/23/2019

III. 1 (C) Statement Specifying Amount of Time Needed to Present Respondent's Case

The Respondent will need three days in which to present its case. Respondent's counsel will be out of the country from February 7, 2022 to February 24, 2022.

IV. 3 (A) Copy of Any Documents in Support of the Denials Made in its Answer.

All the documents identified as RX 1 through RX 41 are documents in support of the denials made by Respondent in its Answer.

3 (B) Copy of Any Documents in Support of Any Asserted Affirmative Defenses and An Explanation of the Arguments in Support of Any Such Affirmative Defenses.

All of the documents RX 1 through RX 41 are documents in support of any asserted affirmative defenses. The arguments in support of any such affirmative defenses are included in the exhibit.

The Fourth Affirmative Defense that the Complaint is barred by statute of limitations and/or laches.

The Thirteenth Affirmative Defense that the Complaint is barred by waiver and/or estoppel.

The EPA conducted its investigation in this matter pursuant to a tip and then an unannounced visit by Paul Novak on October 7, 2019. (RX 1). The EPA then issued a subpoena to Windows Direct dated October 10, 2019 to review file materials. (RX 2). The EPA then agreed to the production of a customer list which was produced on or about November 6, 2019. (RX 4). The EPA then requested certain documents to be produced on November 29, 2019. (RX 5). Pursuant to the request for production of documents, Windows Direct produced the file materials requested on December 30, 2019. (RX 6). Nothing occurred and there was total silence until September 4, 2020 when the EPA filed its notice for potential violations. (RX 7). Windows Direct immediately responded to the EPA on September 10, 2020 requesting that the matter be amicably resolved and indicated that Windows Direct of Columbus was no longer in operation and had dissolved. (RX 8). Windows Direct followed up with a phone call to the EPA on September 14, 2020 in an effort to amicably resolve the matter. (RX 9). Windows Direct then followed up with an email to Mary McAuliffe concerning the list of claims on September 21, 2020. (RX 10). The EPA responded concerning the issues raised

in the September 23, 2020 email and in fact reduced the proposed penalty. This email was sent on October 5, 2020. (RX 11).

The EPA and Windows Direct then exchanged information, tax returns and various emails between October and December of 2020. (RX 12 through RX 22).

Nothing happened for approximately six months and then Windows Direct became aware that Christopher Wilson, from the EPA, was contacting customers and former Employees of Windows Direct. (RX 24-RX 25). At that time, Windows Direct contacted the EPA by email on June 11, 2021 requesting the status. (RX 26). Thereafter, pursuant to the request for a status, Windows Direct received a subpoena to testify before a Grand Jury (RX 29) on June 7, 2021, and eventually an administrative complaint was filed on September 30, 2021 (RX 37).

Based upon the chronology above, it is clear that the EPA is guilty of laches and this case should be dismissed.

Besides laches, the EPA has waived its claim and is estopped from pursuing its claim.

Sixteenth Affirmative Defense that the inspection shall be conducted at reasonable times within reasonable limits, and in a reasonable manner.

Eighteenth Affirmative Defense that the Respondent denies that access was refused.

Nineteenth Affirmative Defense that the Respondent did cooperate, that the actions of the EPA on September 7, 2019 were not reasonable, and therefore there was no legal or factual basis for Count 1.

RX1 reflects that Paul Novak of the EPA conducted an unannounced record review inspection at Windows Direct on October 7, 2019. He knew that the owner of the Company was Chris Carey but never requested to meet with Chris Carey. Chris Carey was not at Windows Direct on October 7, 2019. Chris Carey was subsequently contacted by phone and indicated that he could be available the next day, October 8, 2019, but Mr. Novak indicated that he was not available. The information that Mr. Novak has provided indicates that he was available and simply refused any further contact with Windows Direct. Respondent did not deny Mr. Novak access. Respondent did cooperate with the EPA and provided materials pursuant to a subpoena on October 10, 2019. (RX 2 and RX 6). The EPA did not conduct their inspection within reasonable limits and in a reasonable manner.

Thirteenth Affirmative Defense that the actions involve hyper technical violations that create no risk of harm to a single person and are *de minimus* violations worthy of only a *de minimus* fine.

Twenty-First Affirmative Defense that the customers of the EPA received and reviewed the pamphlet; and that what he/she saw therein would not have changed any action subsequently taken. This is another hyper technical violation that caused no risk or harm to anyone and is also *de minimus*.

Twenty-Second Affirmative Defense that by the EPA's own admission, these are only record-keeping violations and present no harm to anyone.

Windows Direct has provided documents to the EPA reflecting its compliance with the EPA's requirements. These documents include RX 8, RX 10, RX 13, RX 14, RX 15, RX 16, RX 18, RX 21, RX 22, RX 23, RX 29, RX 32, RX 34, and RX 36.

Thirty-Third Affirmative Defense that only time will tell if Respondent can withstand payment of \$104,000. 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.

Twenty-Fourth Affirmative Defense that the nature of the violations are harmless and are technical and are record-keeping only.

Twenty-Fifth Affirmative Defense that the Respondent is a small business whose ability to pay is much less than what a larger regulated entity is capable of paying.

Twenty-Sixth Affirmative Defense in every instance, the risk of harm was little or none.

Twenty-Seventh Affirmative Defense, the actions by the United States Government (including the EPA) have raised the cost of doing business for multiple entities, thus causing inflation.

Windows Direct has provided the EPA with tax information and dissolution of Windows Direct of Columbus. Windows Direct has also provided tax information and other accounting information requested by the EPA for Windows Direct USA of Cincinnati. (RX 12, RX 13, RX 14, RX 19, RX 36, and RX 38).

Windows Direct cannot pay the penalties that the EPA is requesting.

V. 3 (C) All Factual Information Respondent Considers Relevant to the Assessment of A Penalty and Any Supporting Documentation.

The Complainant submitted a settlement demand letter dated September 14, 2021 (RX35). Respondent replied on September 21, 2021 (RX36). First, continued emphasis on the alleged failure/refusal to permit entry is particularly weak, both legally and factually. The EPA personnel showed up, without a warrant, without any prior notification, at a time when the person with access for the sought-after documents/information was not on the premises. The personnel then on-site probably could not locate that information on their own. As soon as the person with access was informed, Windows Direct did not drag its feet or put up any unreasonable barriers to compliance. In fact, Windows Direct has cooperated completely throughout this investigation. Accordingly, Windows Direct opposes the penalty of \$6,000.

The second through fifth penalty areas in the September 14, 2021 letter involved administrative record keeping omissions. It would be a stretch to say that any person was put at any serious health risk by reason of these alleged violations.

Next, we believe the penalty of \$45,900 for individuals working on behalf of the certified firm who allegedly were neither certified renovators nor had been trained by certified renovators to be unfounded. We have provided the EPA with the certified renovator certificates for all of the jobs requested. Further, we have provided the EPA with the renovator certificate both individual and firm for Christopher Brown, which were in effect during the entire time period in question.

From the President on down, statements have repeatedly been made that federal agencies are dedicated to keeping small businesses flourishing. Large corporations can afford to maintain a large staff of administrative personnel to keep abreast of all recordkeeping requirements. Small businesses cannot. Further large corporations can financially absorb penalties such as \$104,372. Small businesses cannot.

Through the EPA investigation, Windows Direct USA of Cincinnati has implemented a three-way compliance department. The compliance department consists of in-house compliance, out-house compliance and installation compliance. In-house, an individual reviews all paperwork for compliance. Out of house, an individual accesses and reviews all work with the customer for EPA compliance. Finally, a representative of Windows Direct USA of Cincinnati works directly with the installation people, who are generally independent contractors, to make sure that the renovator follows EPA lead-based paint protocol.

VI. 3 (D) Detailed Narrative Statement Explaining the Precise Factual and Legal Basis for Respondent's Position That The Penalty Should be Reduced or Eliminated, Including Any Inability to Pay, Including All Documents Upon Which It Intends to Rely In Support of Such Position.

The penalty should be reduced or eliminated because of the inconsequential nature of the alleged violations. Further, Respondent has provided significant documentation as to its inability to pay.

In determining the methodology utilized in calculating a proposed penalty, the EPA selected all of the extreme measures to arrive at the highest dollar penalty. The EPA acknowledges that in determining the penalty, the following steps must be followed: (1) identify the number of independently assessable violations; (2) determine respondent's economic benefit amount from non-compliance; (3) determine the gravity-based penalty on each violation's level of nature, circumstance, and extent of harm; (4) select the appropriate penalty amounts in the ERP's gravity-based penalty matrices; and (5) adjust the gravity-based penalty upward or downward based on respondent's ability to pay, history of prior violations, degree of culpability, and other matters as justice may require.

In arriving at the penalty, the EPA did not take into consideration that there is no history of prior violations and that the degree of culpability is minimal if at all. There was no intent on the part of Respondent to commit violations of the EPA. The Respondent engaged in work with approximately 2,500 customers over a three-year period and produced such a customer list to the EPA pursuant to its subpoena. The EPA in its investigation has identified only 13 violations. Further, the EPA randomly decided that relative to the violations, they would assess a significant level as to Counts 5-13 because there is no knowledge of the age of the individuals or the presence of pregnant women residing in the target housing at the time of each renovation. Since the EPA cannot prove that there were people at risk present in the target housing, then the alleged violation should be minor if at all. The EPA should be required to prove that there were individuals at risk present in the target housing. They cannot do so.

Respondent does not believe that the \$104,372 penalty is a fair and appropriate penalty to assess against Respondent based on only 13 violations of the TSCA and RRP rule over a three year period involving approximately 2,500 customers. The EPA has not taken into consideration all relevant facts and circumstances surrounding this case, including the nature, circumstances and extent of harm and gravity of the 13 violations. The penalties are as follows:

- (1) Failure or refusal to permit EPA representative entry for inspection.

The first penalty relates to failure to or refusal to permit EPA representative entry for inspection. Again, there was no principal of Windows Direct USA of Cincinnati on premises on October 7, 2019. No subpoena had been secured at that time. Therefore, there was no one physically present with authority to cooperate. Thereafter, the EPA issued a subpoena to Windows Direct USA of Cincinnati on October 10, 2019. Windows Direct USA of Cincinnati completely cooperated with the EPA pursuant to the timeline included in the list of exhibits documented RX1 through RX37. In fact, there were times that Windows Direct USA of Cincinnati was required to contact the EPA to remind the EPA that there was an ongoing matter that needed resolution.

- (2) Failure to obtain firm certification.

The second alleged penalty is for failure to obtain firm certification. Again, the information provided to the EPA indicated that Chris Carey, the principal of Windows Direct USA of Cincinnati has previously been EPA certified. He did not know that the Company, Windows Direct USA of Cincinnati, could and was able to obtain certification. No different than the attorneys at Lindhorst & Dreidame are licensed to practice law in the State of Ohio. The firm itself is not licensed. The claimed violation, therefore, is not a failure to obtain certification; it is a failure to have it in the right name. Windows Direct USA of Cincinnati was certified as of December 2019 pursuant to certification which was produced to the EPA. Again, Chris Carey went on-line and paid \$300.00 and received firm certification in a matter of minutes.

- (3) Failure to obtain written acknowledgment from adult occupants of two multi-family units involving Bro Properties and Sanders.

Documentation has been provided to support that Bro Properties and Sanders did provide written acknowledgment. Apparently, there is no actual violation.

- (4) Failure to insure that all individuals working on behalf of the firm are either certified renovators or trained by a certified renovator.

In this regard, EPA specifically identifies No. 3 Bro Properties, No. 7 Phillips, and No. 15 Square. The renovator for each of these jobs was Chris Brown. Chris Brown had a firm certification which he received on April 24, 2015 and he was certified as a renovator on October 21, 2019. His firm certification states that Christopher Brown is certified to conduct lead-based paint renovation, repair, and paint activities. He will testify that all times he

performed work for Windows Direct USA of Cincinnati that he was a certified renovator, whether it be firm or individual. Copies of his certifications are included in RX32 and RX39 and RX40.

- (5) Finally, the EPA maintains that civil penalties should be assessed for failure to obtain all records necessary to demonstrate compliance with 40 CFR Part 745, subpart E. This claim relates to files of (1) Colker, (2) Keith, (3) Bro Properties, (7) Philips, (15) Souare, and (17) Wright.

The EPA was provided with an Affidavit from Nick Sapp establishing his compliance with the post-renovation cleaning. Chris Brown and Tony Dituillo will testify that they performed the post-renovation cleaning. Documents have been provided which show post-renovation cleaning verification was performed for each job. Unfortunately, due to excusable neglect, some of the renovators failed to check the box on each contract indicating that they performed the post-renovation cleaning. However, this post-cleaning renovation will be verified by all of the renovators. Accordingly, there was substantial compliance with 40 CFR, Part 745, subpart E. Finally, none of the claimed violations involved any action or inaction which put any person at risk with respect to any hazard which the EPA was created to address.

Finally, the EPA is attempting to recover the same penalty twice for a total of \$56,286.00 (\$2,207 plus \$2,207 plus \$2,207 plus \$16,555.00 plus \$16,555.00 plus \$16,555.00) as it pertains to the certification of Christopher Brown when in fact he was certified.

Research has been completed concerning the penalties assessed by the EPA concerning failure to comply with Section 402(c) of U.S. Toxic Substance Control Act and 40 CFR Section 745.324(d) for failure to administer and enforce requirements for renovation, repair and painting program (RRP). In these cases, the EPA (pursuant to settlement agreement and final order) agreed to penalties in the area of \$200 and \$1,000. Accordingly, Respondent is unable to understand how the EPA arrives at such significant penalties. The penalty amount is especially egregious based upon all the efforts of compliance made by Windows Direct USA of Cincinnati.

Further, Windows Direct USA of Cincinnati has established an inability to pay. The documents which Respondent intends to rely in support of such position include Respondent's letter to Mary McAuliffe dated December 15, 2021 and supporting balance sheet, income statement, and distribution transaction reports which are identified as EX38.

Accordingly, based on no history of prior violations, no degree of culpability, and other matters as justice may require, no penalty should be assessed against Windows Direct USA of Cincinnati.

VII. Reservation of Rights.

Respondent respectfully reserves the right to call all witnesses called by the complainant; to recall any of its witnesses in rebuttal; and to seek permission to modify or supplement the names of witnesses or exhibits prior to the adjudicatory hearing, pursuant to 40 CFR, Part 22, and upon adequate notice to Complainant and this Tribunal, or by Order of this Tribunal.

Respondent's Prehearing Exchange in the matter of TWDS, Inc., d/b/a Windows Direct USA of Cincinnati is hereby respectfully submitted.

Respectfully submitted,

/s/ JAY R. LANGENBAHN
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing document was served by electronic delivery and via ordinary U.S. Mail, postage prepaid, on this the 6th day of January, 2022, upon the following:

Original by OALJ E-Filing System to:
Mary Angeles, Headquarters Hearing Clerk
U.S. Environmental Protection Agency
Office of Administrative Judges

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And

Christine Donelian Coughlin
Administrative Law Judge

/s/ Jay R. Langenbahn
Jay R. Langenbahn