

BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:)
)
GREENBUILD DESIGN &) Docket No. TSCA-10-2021-0006
CONSTRUCTION, LLC)
) **COMPLAINANT’S MOTION TO**
) **ACCEPT AN AFFIDAVIT IN LIEU**
Anchorage, Alaska) **OF ORAL TESTIMONY**
)
)
Respondent.)
_____)

COMES NOW, the U.S. Environmental Protection Agency, Region 10 (“Complainant”), by and through its undersigned counsel and pursuant to 40 C.F.R. § 22.22(d), to respectfully request that this Court accept the affidavit of Complainant’s witness, Mr. Rob Hamlet, *see* CX 05, in lieu of his testimony at the forthcoming hearing. Complainant recognizes that this motion is filed after the March 4, 2022 deadline for non-dispositive motion. *See* January 10, 2022 Hearing Order. Complainant apologizes for this delay and respectfully requests that this Court allow this untimely motion because Complainant only recently learned of the facts underlying this motion.

40 C.F.R. § 22.22(d) provides that this Court “may admit into evidence affidavits of witnesses who are unavailable.” A declarant is considered to be unavailable as a witness if the declarant “cannot be present or testify at the trial or hearing because of death or then-existing infirmity, physical illness, or mental illness.” Fed. R. of Evidence (FRE) 804(a)(4).

Unfortunately, Mr. Rob Hamlet will be unavailable to testify at the forthcoming hearing in this matter. Since the start of 2022, Mr. Hamlet has had to undergo four surgeries including an emergency surgery on March 28, 2022. Due to the physical toll that these procedures have taken on Mr. Hamlet and the time it will require him to recover, Mr. Hamlet will be unavailable to testify.

As part of its initial prehearing exchange, Complainant placed Mr. Hamlet’s affidavit into the record where Mr. Hamlet declared under penalty of perjury the bulk of his expected testimony. CX 05.

Therefore, pursuant to 40 C.F.R. § 22.22(d), Complainant respectfully requests that this Court accept CX 05 in lieu of Mr. Hamlet’s testimony. *See, In re Strong Steel Products, LLC*, 2005 WL 528484, at *4 (EPA ALJ February 18, 2005) (Order on Respondent’s Motion in Limine to Exclude Certain of Complainant’s Proposed Exhibits) (Applying federal circuit court case law to analyze whether a witness was unavailable under FRE 804(a) for the purposes of 40 C.F.R. § 22.22(d)); *United States v. Campbell*, 845 F.2d 1374, 1378 (6th Cir. 1988) (Upholding the trial court’s determination that the government’s witness was unavailable within the meaning of FRE 804(a) in part because it was “highly unlikely that an elderly invalid would undergo a miraculous rejuvenation during the two-week interval” between the witness’s deposition testimony and the date of the trial).¹

Respectfully submitted,

Andrew Futerman
Counsel for Complainant
EPA Region 10

¹ Counsel for Complainant does not intend to suggest that Mr. Hamlet is an “elderly invalid” by citing to *U.S. v. Campbell*, 845 F.2d at 1378, but rather that it is “highly unlikely” that an individual who has undergone four surgeries in the past three months, including one emergency surgery, would “undergo a miraculous rejuvenation” in the three weeks remaining before the hearing. *Id.*

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

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Motion to Accept an Affidavit in lieu of Testimony**, dated April 8, 2022 was served on the following parties in the 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
1200 Pennsylvania Avenue, NW
Washington DC 20004

Copy by Electronic Mail to:
Mr. and Mrs. Rodrigo and Kari von Marees
GreenBuild Design & Construction, LLC
rad@greenbuild.us.com
kad@greenbuild.us.com
For Respondent

Dated: April 8, 2022
Chicago, Illinois

Respectfully submitted,

Andrew Futerman
Counsel for Complainant
EPA Region 10