

IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 v. ) Case No.05-C-0486  
 )  
 WILL J. SHERARD and )  
 W.J. SHERARD REALTY )  
 COMPANY, )  
 )  
 Defendants. )  
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**MEMORANDUM OF LAW IN SUPPORT OF THE  
UNITED STATES' MOTION TO HOLD THE DEFENDANTS  
IN CIVIL CONTEMPT**

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**INTRODUCTION**

The defendants, Will J. Sherard and W.J. Sherard Realty (collectively, "Sherard"), have resisted complying with the Consent Decree in this matter for more than two years. In the latest round, Sherard has refused to select and enter into an agreement with an appropriate lead hazard abatement contractor to begin the lead abatement work that is required under the 2005 Consent Decree and the Court's May 2, 2007 Order to Enforce the Consent Decree ("the May Order"). The May Order specifically required Sherard to (1) name a contractor who would perform both lead hazard abatement and window replacement work pursuant to the Consent Decree, (2) enter into an agreement for the work with that contractor, and (3) produce a time line for the work, all within six months of the Order, or by November 2, 2007. Despite extensive prompting by the

United States, Sherard has failed to comply with these provisions of the May Order. As a result, the United States hereby moves the Court for an order to hold Sherard in civil contempt for failing to comply with the previous Order of this Court and to impose a \$500 fine for each day after an order for contempt is entered that Sherard continues to fail to comply with the May Order.

### **FACTUAL BACKGROUND**

A Consent Decree was entered between the United States and Will J. Sherard and W.J. Sherard Realty Company (collectively “Sherard”) on August 3, 2005. The parties entered into the Consent Decree based on the United States’ allegations that Sherard, who owns a large number of rental properties in Milwaukee, violated Section 1018 the Residential Lead-Based Paint Hazard Reduction Act of 1992. 42 U.S.C. § 4852d, *et. seq.* Among other things, the Consent Decree required Sherard to perform lead-based paint risk assessments on his properties and to abate the lead-based paint hazards identified on those properties. In addition, the Consent Decree required Sherard to replace the windows on the subject properties as windows are the most common source of lead poisoning in children. Generally, the window replacement work was to be completed by July 2008 and the hazard abatement work by July 2010.

On March 8, 2007, the United States filed a motion to enforce the terms of the Consent Decree. At that time, Sherard had failed to meet the deadline for completing the risk assessments on his properties. Pursuant to that motion, the Court entered an Order on May 2, 2007 (“the May Order”) to enforce the Consent Decree. A copy of that Order is attached as Exhibit A to the Ward Declaration. In addition to setting a new deadline for Sherard to complete the risk

assessments, the May Order required the following:

4. Sherard shall submit a hazard abatement and window replacement plan no later than six months after the date of this Order. The contents of this plan shall follow the requirements of paragraph 16 of the Consent Decree.
5. Sherard shall complete the window replacement work as specified in the Consent Decree by July 2008, except that replacement of all windows shall be completed within six months of approval of the Hazard Abatement Plan for those Subject Properties with children six years of age or under.
6. Sherard shall complete the hazard abatement work as specified in the Consent Decree by the time provided under the Consent Decree, and in the manner provided in the Consent Decree, by July 2010, except hazard abatement work shall be completed within one year of approval of the Hazard Abatement Plan for those Subject Properties with children six years of age or under.
7. Until the completion of the work set forth in the Consent Decree, Sherard shall not conduct any painting or lead hazard control work, including but not limited to window replacement, or direct that any such activity be conducted, on any of the Subject Properties unless Sherard obtains prior approval from HUD. Further, Sherard shall not perform the lead abatement work himself, even if he has obtained certification from the State of Wisconsin.
8. Sherard shall make the following reports:
  - c. Within six months of this order, Sherard shall submit to HUD and the Court:
    1. The name(s) of the person(s) or company(ies) that will perform the window replacement and hazard abatement work and a copy of their valid state certification;
    2. The agreements or letters of understanding between Sherard and the contractor(s) to perform the window replacement and hazard abatement work; and
    3. A time line which specifies which properties will be subject to hazard abatement and window replacement in each of the years until the work has been completed.

Although Sherard is in the process of completing the risk assessments on the Subject

Properties, he has failed to comply with Paragraph 8(c) of the Order.

The parties have had extensive discussions about Sherard's compliance with Paragraph 8(c) of the Order. Starting on August 23, 2007, counsel for the United States wrote to Sherard's lawyer to remind him that Sherard was required to name a hazard abatement/window replacement contractor and submit a hazard abatement plan by November 1, 2007. Ward Declaration, Paragraph 7, Exh. B. Because the hazard abatement contractor needed to complete the work plan by November 1, counsel for the United States suggested that Sherard name the contractor in advance of the November 1 deadline so that the United States would have a chance to review and approve the contractor's credentials and allow the contractor sufficient time to complete the work plan by November 1. *Id.*

Following a second letter on this topic on October 1, 2007 (Ward Declaration, ¶ 8, Exhibit C), Sherard advised that he was considering using MCM Enterprises, Inc., as the hazard abatement and window replacement contractor. The United States met with the owner of MCM Enterprises and Mr. Lind on October 25, 2007, to discuss the scope of the work pursuant to the Consent Decree. Ward Declaration, ¶ 10. On November 8, 2007, MCM provided a quote for the hazard abatement and window replacement work on one of Sherard's properties. Ward Declaration, ¶ 11. As a result of having received the quote, the United States requested a schedule for the hazard abatement and window replacement work on November 9, 2007. Ward Declaration, ¶ 12, Exh. D.

During these discussions, the possibility was raised that completing the work in the required time frame may be financially difficult for Sherard. Ward Declaration, ¶ 10. Based on limited financial information provided by Sherard, the United States proposed that Sherard

complete hazard abatement and window replacement work on two properties per month in a December 3 letter to Mr. Lind. Ward Declaration, ¶ 14. Because the United States still did not have either an agreement between Sherard and a contractor or a work plan as required by the May Order, counsel for the United States urged Mr. Lind to provide those materials to the government by December 7. *Id.*

Following a meeting with Sherard and his counsel on December 10, the United States proposed a stipulation between the parties, to be submitted to the Court for its signature, as the proposal significantly impacted the provisions of the Consent Decree. Ward Declaration, ¶ 15. A draft of that stipulation was sent to counsel for Sherard on December 20, 2007. The key components of the stipulation required Sherard to identify a hazard abatement contractor by January 8, 2008 to the United States and to submit an agreement between Sherard and the contractor to complete the hazard abatement and window replacement work within five days of the United State's approval of the contractor. Further, the proposed stipulation indicated that the form of the hazard abatement plans would be modified and that, because it was more economical to do the hazard abatement and window replacement work on each property at the same time, the separate deadlines for these components would be merged into one deadline - July 2009. In addition, the stipulation included a monthly schedule of which properties were to be abated. *Id.*

Because the United States had not received a response from Sherard, it sent a letter to Sherard's counsel on January 9, 2008, requesting that Sherard sign the proposed stipulation. Ward Declaration, ¶ 16, Exh. E. To date, the United States has received no response from Sherard or his counsel and have received no indication that he has selected or entered into an agreement with a hazard abatement contractor. Ward Declaration, ¶ 17. The original deadline

for the replacement of all windows on Sherard's properties - July 2008 - remains intact.

## DISCUSSION

### A. THE STANDARD FOR IMPOSING SANCTIONS FOR CIVIL CONTEMPT.

The Supreme Court has ruled that courts unquestionably have “inherent power to enforce compliance with their lawful orders through civil contempt.” *United States v. Shillitani*, 384 U.S. 364, 370 (1966) (citing *United States v. United Mine Workers of America*, 330 U.S. 258, 330-332 (1947)). “Civil contempt sanctions are properly imposed for two reasons: to compel compliance with the court order and to compensate the complainant for losses caused by contemptuous actions.” *Tranzact Technologies v. ISource Worldsite*, 406 Fed. 3d 851, 855 (7<sup>th</sup> Cir. 2005) (citing *United States v. Dowell*, 257 F.3d 694, 699 (7<sup>th</sup> Cir. 2001)).

Compelling compliance with a previous order can be accomplished through imposing a fine for future failure to comply with the order. In determining the appropriate sanction to ensure the defendant's future compliance, “. . .the court must consider the ‘character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired.’” *South Suburban Housing Center v. Berry*, 186 F.3d 851, 854 (7<sup>th</sup> Cir. 1999) (citing *United Mine Workers*, 330 U.S. at 304).

To establish civil contempt, the complaining party must demonstrate by clear and convincing evidence that “the respondent has violated the express and unequivocal command of a court order.” *Autotech Technologies LP v. Integral Research and Development Corp.*, 499 F.3d 737, 751 (7<sup>th</sup> Cir. 2007) (citing *D. Patrick, Inc. v. Ford Motor Company*, 8 F.3d 455, 460 (7<sup>th</sup> Cir. 1993) (emphasis in original)).

**B. SHERARD HAS VIOLATED AN ORDER OF THE COURT AND SANCTIONS ARE APPROPRIATE.**

The Court entered an Order to enforce the Consent Decree in this matter on May 2, 2007. That Order specifically set forth that, by November 1, 2007, Sherard was to: (1) submit the name of the entity that would perform the window replacement and hazard abatement work; (2) provide the agreement or letter of understanding between Sherard and the contractor to perform the window replacement and hazard abatement work; and (3) produce a time line specifying which properties will be subject to hazard abatement and window replacement in each of the years until work has been completed. Ward Declaration, Exh. A. The Ward Declaration demonstrates that Sherard has failed to complete any of these requirements and has, therefore, violated an order of this Court.

Sherard's violation of the May Order demonstrates a repeated pattern of willfully failing to comply with his obligations imposed both by court order and by the Consent Decree. In March 2007, the United States was forced to bring a motion to enforce the Consent Decree. At that time, Sherard had failed to timely complete the risk assessments, he had failed to timely submit a plan for the hazard abatement work, and he had failed to submit a completed risk assessment for one property which showed elevated levels of lead in the property. As a result of that motion, the Court entered the May Order. Now Sherard has again failed take the steps necessary to create a hazard abatement and window replacement work plan and, therefore, failed to comply with terms of the May Order.

Prior to filing this motion, the United States devoted significant time and attention to encouraging Sherard to comply with his obligations. As is demonstrated by the attached

declaration, the United States has written to counsel for Sherard about his compliance with these provisions on several occasions, including reminders about the Court's deadline for complying with these obligations. The United States has met with Sherard, Sherard's counsel, and a contractor Sherard seemed to intend to use for the abatement work. The United States has proposed certain modifications of the requirements of the Consent Decree in order to facilitate Sherard's timely completion of these obligations. Despite all these efforts, Sherard has chosen to ignore his obligations.

This is a serious violation. The Consent Decree was entered by the Court on May 3, 2005. The components of the Court's Order which are currently at issue were included in the Order to ensure Sherard's compliance with the ultimate objective of the Consent Decree - to abate the lead hazards that exist on Sherard's properties and to protect the tenants, especially the children, that reside in these properties. Because of Sherard's past failures to comply with his obligations, the May Order included specific provisions to facilitate steady progress towards timely completion of the hazard abatement work. By failing to comply with these provisions of the May Order, Sherard has less than six months to comply with the Order's provision that the windows in all 39 subject properties be replaced by July 2008.

The United States seeks a sanction of \$500 for each day after the Court enters an order for contempt that Sherard continues to fail to comply with the May Order. The Consent Decree provides for stipulated penalties of \$200 per day for failure to comply with its provisions. Consent Decree, ¶¶ 24 -26. Sherard's repeated failure to comply with the provisions of the Consent Decree and the May Order of this Court demonstrates that a more significant penalty is warranted.

**CONCLUSION**

For the reasons stated above, the United States respectfully requests that the Court hold Sherard civilly in contempt by his failure to comply with the Court's May Order. Further, the United States requests that the Court impose a \$500 fine for each day after the Court enters an order for contempt that Sherard continues to fail to comply with the Court's May Order.

Dated: March 26, 2008.

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